

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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In the Matter of the Petition of: :
 :
JBCSTYLE NY LLC (T/A JBC STYLES), :
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Petitioner, :
 :
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To Review Under Section 101 of the Labor Law: :
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An Order to Comply with Article 6 of the Labor Law, : RESOLUTION OF DECISION
and an Order Under Article 19 of the Labor Law, both :
dated February 29, 2016, :
 :
 :
- against - :
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 :
THE COMMISSIONER OF LABOR, :
 :
 :
Respondent. :
-----X

DOCKET NO. PR 16-030

RESOLUTION OF DECISION

APPEARANCES

Alexis Gulemmo, Human Resource Manager, New York, for petitioner.

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

WITNESSES

Alexis Gulemmo, for petitioner.

Senior Labor Standards Investigator Joseph Ryan and claimant Jorge A. Washington, for respondent.

WHEREAS:

Petitioner JBCStyle NY LLC (T/A JBC Styles) filed a petition in this matter on July 28, 2016 pursuant to Labor Law § 101, seeking review of two orders issued against it by respondent Commissioner of Labor on February 29, 2016. Respondent filed her answer to the petition on August 24, 2016.

Upon notice to the parties a hearing was held in this matter on January 11, 2017, in New York, New York, before J. Christopher Meagher, Board Member, and the designated hearing officer in this proceeding. Each party was afforded a full opportunity to present documentary evidence, to examine and cross-examine witnesses, and to make statements relevant to the issues.

The order to comply with Article 6 (unpaid wages order) under review directs compliance with Article 6 and payment to respondent for unpaid wages owing to claimant employee Jorge A. Washington in the amount of \$1,087.50 for the time period from August 31, 2014, to April 23, 2015, with interest continuing thereon at the rate of 16% calculated to the date of the order in the amount of \$144.44, liquidated damages in the amount of \$1,087.50, and assesses a civil penalty in the amount of \$815.63, for a total amount due of \$3,135.07.

The order under Article 19 (penalty order) assesses a \$500.00 civil penalty for violating Labor Law § 661 and 12 NYCRR 146-2.6 by failing to keep and/or furnish true and accurate payroll records for each employee from on or about August 31, 2014 to April 19, 2015.

Petitioner alleges that the orders are invalid and unreasonable because claimant was paid for all the hours worked, and challenges the penalties and damages assessed in the orders as unreasonable.

SUMMARY OF EVIDENCE

Wage Claim

On May 4, 2015, claimant filed an unpaid wage claim against petitioner alleging that he was owed a total of \$1,087.50 in unpaid wages. Claimant asserted that his agreed rate was \$11.00 per hour and that he worked 33 hours from August 25, 2014, through August 31, 2014; that his agreed rate was \$11.50 per hour and he worked 36.5 hours from March 30, 2015 through April 5, 2015, and 26.5 hours from April 13, 2015, through April 19, 2015. Claimant alleged that he was not paid for any of those hours of work.

Claimant testified that he worked as a temporary employee for two of petitioner's clients during the three payroll weeks listed in his claim and that the rates of pay were different for each assignment. He was paid for one of the assignments but not the other. Claimant authenticated his claim form and testified that the information concerning his wages and hours is true and accurate. He requested payment from petitioner for his unpaid work, but his supervisor indicated all wages had been paid.

Petitioner's Evidence

Petitioner's representative at the hearing, Alexis Gulemmo, is the Human Resources Manager for petitioner and was the only witness called on its behalf. Gulemmo testified that claimant was actually employed by JBCPlatform NY LLC, but that four entities, including JBCStyle NY LLC and JBCPlatform NY LLC, are all interrelated and fall under the umbrella entity JBC Holdings. JBCStyle provides permanent employee staffing and JBCPlatform temporary staffing services to clients throughout the New York City area.

Gulemmo testified that direct deposit transmission records admitted into evidence reflected that claimant was paid for all hours worked. The records were created by National Payment Corp. the payroll company petitioner uses to transmit direct deposit payments to employees. A chain of email communications between Gulemmo and an employee of National Payment Corporation regarding the reports were also accepted into evidence, as well as a 2015 W-2 form for claimant. Gulemmo testified that she reviewed the direct deposit transmission records and the 2015 W-2

form and determined that petitioner had paid all wages to claimant; any money purportedly not received was due to an error by claimant's bank and not by petitioner.

Respondent's Investigation

Senior Labor Standards Investigator Joseph Ryan testified that he received claimant's unpaid wages claim form and relied on that as a basis for respondent's determination. He testified that he sent petitioner a letter regarding the claim and petitioner's only response was that claimant never worked for JBCStyles. Ryan testified that he never received any documents from petitioner showing the actual hours that claimant worked or any cancelled pay checks showing he was paid for those hours.

Ryan testified that he calculated the 75% civil penalty amount assessed in the order based on the amount of the claim and, primarily, based on the history of DOL cases against petitioner or one of its related companies as documented in the investigative file.

ANALYSIS

The Board makes the following findings of fact and conclusions of law pursuant to the provisions of the Board Rules of Procedure and Practice [Board Rules] [12 NYCRR] § 65.39.

Standard of Review and Burden of Proof

Petitioner's burden of proof in this matter was 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; Board Rules [12 NYCRR] § 65.30). A petition must state "in what respects [the order on review] is claimed to be invalid or unreasonable," and any objections not raised shall be deemed waived (*id.* § 101 [2]). The Labor Law provides that an order of the Commissioner shall be presumed valid (*id.* § 103 [1]). The hearing before the Board is *de novo* (Board Rules [12 NYCRR] § 66.1 [c]). Petitioner has the burden to prove by a preponderance of the evidence that the orders are not valid or reasonable (Board Rules [12 NYCRR] § 65.30; State Administrative Procedure Act § 306; *Matter of Angello v Natl. Fin. Corp.*, 1 AD3d 850, 854 [3d Dep't 2003]).

Petitioner's Failure to Maintain Payroll Records

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." Article 6 and Article 19 of the Labor Law also require employers to maintain, for six years, contemporaneous and accurate records of the hours their employees worked and the wages they paid them (*id.* §§ 195 [4], 661; 12 NYCRR 142-2.6). The records must show for each employee, among other things, the daily and weekly hours worked, rate of pay, gross wages, any allowances claimed as part of the minimum wage, deductions, and net wages (*id.*). Employers must keep such records open for inspection by the Commissioner or a designated representative or face issuance of a penalty (Labor Law §§ 661, 662 [2]).

Employers are further required to furnish each employee a statement with every payment of wages listing the dates of work covered by the wage payment, hours worked, rate of pay, gross

wages, any allowances claimed as part of the minimum wage, deductions, and net wages (*id.* § 195 [3]; 12 NYCRR 142-2.7). The required recordkeeping provides proof to the employer, the employee, and the Commissioner that the employee has been properly paid.

Petitioner neglected to offer adequate and complete records of the hours that claimant worked and wages he was paid in compliance with the Labor Law, either at the investigative phase of this matter or at the hearing before the Board. As such, the Commissioner correctly determined that petitioner failed to maintain legally required payroll records.

The Unpaid Wages Order is Affirmed

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 if results may be merely approximate (*Ramirez v Commissioner of Labor*, 110 AD3d 901, 901-02 [2d Dep’t 2013]; *Matter of Mid-Hudson Pam Corp. v Hartnett*, 156 AD2d 818, 820-21 [3d Dep’t 1989]).

In a proceeding challenging the Commissioner’s unpaid wages order, the employer must then 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 15-16 [April 10, 2014]).

Here, the unpaid wages order finds that petitioner failed to pay claimant for three weeks of work in 2014 and 2015. Investigator Ryan testified that he used the complaint form to calculate the unpaid wages for claimant since he did not receive any payroll records from petitioner. Based on the record before us, we conclude that petitioner failed to meet its burden to prove that it paid claimant for all of the hours that he worked or that the Commissioner’s calculation of wages was otherwise unreasonable.

Petitioner’s evidence presented at hearing was inadequate to substantiate the allegation that it does not owe claimant any wages. Petitioner did not introduce daily or weekly time records and wage statements showing the dates of work covered by the payments, the hours that claimant worked during those weeks, his rate of pay, gross wages, deductions, and net wages. The direct deposit transmission records merely show preparation, at an unknown date and time, of various sums of money petitioner allegedly paid to claimant and do not include an entry on or around September 5, 2014, despite that being a date of pay for the August 25, 2014, through August 31, 2014, work week included in the unpaid wages order. Thus, the direct deposit records cannot be credited (*Matter of Dimitros Potaminanos Sr. and Saveta Lakeram*, PR 14-080 at 5 [May 25, 2016]). While petitioner argued that its reports and claimant’s own bank statement show a payment on the Friday following each of the weeks in the claim period, only one payment is shown for those weeks and it is not correlated by rate of pay, weekly hours, or gross and net wages to the hours for which claimant testified he was not paid. Petitioner asserted in general fashion that there

was no proof that claimant worked on more than one job assignment during these time frames, but we credit his specific and credible testimony over petitioner's general denial. We find the absence of required information, incompleteness, and lack of correlation to the hours worked by claimant renders the records unreliable and insufficient to meet petitioner's burden of proof (*Id.*).

The 2015 W-2 form presented by petitioner is also insufficient proof of payment. The unpaid wages order covers time periods in 2014 and 2015, and a 2015 W-2 form does not reflect wages paid for the year 2014. As the W-2 also does not contain necessary information to reflect the wage payments for the particular weeks at issue, the rate of pay, and the actual hours worked, we find that it is of no probative value in this matter (*See e.g. Rivera v Ndola Pharm.*, 497 F Supp 2d 381, 389 [EDNY 2007]).

Petitioner failed to meet its burden to prove the precise hours worked and wages paid to claimant or otherwise show that the Commissioner's determination was unreasonable (*see Mt. Clemens Pottery*, 328 US at 687-88; *Mid-Hudson Pam Corp.* 156 AD2d at 821; *Doo Nam Yang*, 427 F Supp 2d at 332; *Matter of Kong Ming Lee*, PR 10-293 at 15-16). We therefore affirm the Commissioner's wage calculation in the unpaid wages order.

Interest

Labor Law § 219 (1) provides that when the Commissioner determines that wages are due, then the order directing payment of those wages 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 sets the "maximum rate of interest" at "sixteen per centum per annum." Here, respondent correctly determined that claimant was not paid all wages owed. Petitioner did not offer any evidence to challenge the imposition of interest and the issue is thereby waived pursuant to Labor Law § 101 [2]. We affirm the interest imposed in the wage order.

Liquidated Damages

Where respondent determines an employee has not been paid all wages owed, Labor Law § 218 (1) requires her to assess 100% liquidated damages of the amount of unpaid wages unless the employer proves a good faith basis to believe that its underpayment was in compliance with the law. Here, respondent correctly determined that claimant was not paid all wages. Petitioner failed to offer any evidence challenging the imposition of liquidated damages and the issue is thereby waived pursuant to Labor Law § 101 [2]. Accordingly, we affirm the imposition of liquidated damages in the unpaid wages order.

The Civil Penalty is Affirmed

The unpaid wages order includes a 75% civil penalty. Labor Law § 218 (1) provides that when determining an amount of civil penalty to assess against an employer who has violated a provision of Article 6 of the Labor Law, respondent shall give:

"due consideration to the size of the employer's business, the good faith basis of the employer to believe that its conduct was in compliance with the law, the gravity of the violation, the history of

previous violations and, in the case of wages, benefits or supplements violations, the failure to comply with record-keeping or other non-wage requirements.”

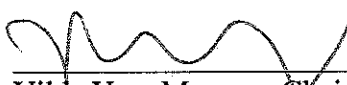
Petitioner asserted that it opposed the civil penalty but offered no evidence in support of its opposition at hearing. Investigator Ryan testified that the history of previous violations was a significant factor in his recommendation of a 75% civil penalty. Petitioner offered nothing other than vague, unsupported testimony that other wage claims should not be relevant to support its opposition to the civil penalty. Without more specific testimony or documentary evidence to show why the 75% civil penalty should be revoked, petitioner failed to meet its burden to prove the civil penalty was inappropriate. We affirm the civil penalty assessed in the unpaid wages order.

The Penalty Order is Affirmed

Labor Law § 218 (1) provides that where a violation is for a reason other than an employer’s failure to pay wages, the order shall direct payment to respondent of a civil penalty in an amount not to exceed \$1,000.00 for a first violation. In determining this penalty, respondent is required to “give due consideration to the size of the employer’s business, the good faith basis of the employer to believe that its conduct was in compliance with the law, the gravity of the violation, and the history of previous violations.” (*Id.*). Petitioner failed to introduce any evidence at hearing that it kept required records and the issue is thereby waived pursuant to Labor Law § 101 [2]. The penalty order is affirmed.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The unpaid wages order is affirmed; and
2. The penalty order is affirmed; and
3. The petition for review be, and it hereby is, denied.



Vilda Vera Mayuga, Chairperson

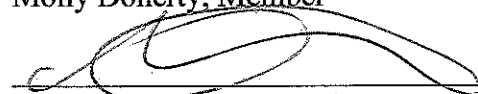


J. Christopher Meagher, Member

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 June 14, 2017.

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NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The unpaid wages order is affirmed; and
2. The penalty order is affirmed; and
3. The petition for review be, and it hereby is, denied.

Vilda Vera Mayuga, Chairperson

J. Christopher Mcagher, Member


Michael A. Arcuri, Member

Dated and signed by a Member
of the Industrial Board of Appeals
in Utica, New York,
on June 14, 2017.

Molly Doherty, Member

Gloribelle J. Perez, Member