

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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In the Matter of the Petition of: :
 :
ARTHUR JOHNSON AND UNITY HOME CARE :
AGENCY INC., :
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Petitioners, : DOCKET NO. PR 16-064
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To Review Under Section 101 of the Labor Law: : RESOLUTION OF DECISION
An Order to Comply with Article 6 of the Labor Law, :
and an Order Under Article 19 of the Labor Law, both :
dated October 24, 2014, :
 :
 :
- against - :
 :
THE COMMISSIONER OF LABOR, :
 :
Respondent. :
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APPEARANCES

Arthur Johnson, Administrator, Bronx, petitioner pro se and for Unity Home Care Agency Inc.

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

WITNESSES

Arthur Johnson, for petitioners.

Senior Labor Standards Investigator Cuiyuan Zhu, and claimant Norica Barnett, for respondent.

WHEREAS:

Petitioners Arthur Johnson and Unity Home Care Agency Inc. filed a petition with the Board on May 31, 2016, and amended on July 13, 2016 pursuant to Labor Law § 101, seeking review of two orders issued against them by respondent Commissioner of Labor on October 24, 2014.¹ Respondent filed her answer to the petition on August 24, 2016.

¹ While ordinarily, a petition filed more than sixty days after the date of the issuance of an order to comply would be dismissed as untimely under Labor Law § 101 (1), here, respondent consented to the petition being filed after the statute of limitations in a court-ordered stipulation dated July 6, 2016. The stipulation provides that petitioners must file a petition on or before September 4, 2016, which petitioners did.

Upon notice to the parties a hearing was held in this matter on March 13, 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 to claimant Norica Barnett in the amount of \$2,420.00 for the time period from December 1, 2013 to December 26, 2013, with interest continuing thereon at the rate of 16% calculated to the date of the order in the amount of \$320.37, liquidated damages in the amount of \$605.00, and assesses a civil penalty in the amount of \$2,420.00, for a total amount due of \$5,765.37.

The order under Article 19 (penalty order) assesses a \$250.00 civil penalty 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 from on or about December 1, 2013 to December 26, 2013.

Petitioners allege that the orders are invalid and unreasonable because claimant did not work for petitioners during the relevant time period because the patient that claimant cared for while employed by petitioners was in the hospital during that time. Petitioners also allege that even if it is determined that claimant worked for petitioners from December 1, 2013 to December 26, 2013, petitioners paid her for such work by two money orders.

SUMMARY OF EVIDENCE

Wage Claim

On March 17, 2014, claimant filed a claim against petitioners alleging that she was owed a total of \$2,420.00 in unpaid wages from December 1, 2013 to December 26, 2013. Claimant was a home health care worker and was employed by petitioners to care for a woman five to seven days per week, 24 hours per day. She was paid a daily wage of \$110.00. Claimant alleged that she was not paid for the 22 days that she worked between December 1 and December 26, 2013. Claimant's December 2013 time records, included with her wage claim, reflect that she worked for seven days from December 1 through December 7, 2013; five days from December 8 through December 12, 2013; five days from December 15 through December 19, 2013; and five days from December 22 through December 26, 2013.

Claimant testified that the information in the claim form is correct and that she requested payment from petitioners, but was never actually paid. Instead, petitioners gave her checks with instructions not to cash them because they had insufficient funds. Claimant testified that petitioners also gave her two money orders on or about December 10, 2013, but those money orders were for wages owed from November 2013.

Petitioners' Evidence

Petitioners' representative at the hearing, Arthur Johnson, an administrator for co-petitioner Unity Home Care Agency and a named petitioner, was the only witness called by petitioners. Johnson testified that petitioners did not owe any unpaid wages to claimant because

she did not work for petitioners during the entire claim period and she was paid for the days that she did work in December 2013.

Johnson first testified that claimant worked from December 1, 2013 to December 14, 2013. He later testified that she worked from December 1, 2013 to December 15, 2013 and yet another time testified that she worked from December 1, 2013 to December 19, 2013. Johnson testified that claimant could not have worked for petitioners for the entire month of December 2013 because the patient that she cared for was in the hospital from December 10, 2013 to December 25, 2013, although he later testified that he could not recall when the patient that claimant cared for was in the hospital but that he believed it was sometime in December 2013. Johnson testified that the time records claimant provided to respondent could not be accurate because he was certain claimant did not work each of the days reflected in such records.

Johnson stated that petitioners issued one check to claimant dated January 13, 2014 for \$910.28 to cover the pay period from December 14, 2013 to December 27, 2013; and one check dated January 15, 2014, also for \$910.28, to cover the pay period from December 28, 2013 to January 10, 2014. Johnson explained that after the checks were issued, petitioners determined there were insufficient funds in the bank account from which those checks were drawn, thus claimant was told not to cash those checks. Johnson personally delivered two money orders to claimant for her December 2013 hours to replace the checks that could not be cashed. Each money order was dated December 10, 2013, for \$748.88.

Johnson also testified that the last invoice submitted for services provided by claimant in December 2013 reflects she did not do any work for petitioners after December 7, 2013.

Respondent's Investigation

Labor Standards Investigator Cuiyuan Zhu testified that the Department of Labor received claimant's unpaid wages claim form and relied on that as a basis for respondent's determination. She testified that respondent only received two letters from Arthur Johnson regarding the claim for unpaid wages. The first letter is dated May 6, 2014 and states that petitioners paid claimant all her wages and that Mr. Johnson would provide documentary proof of that at a hearing. The second letter is dated June 11, 2014 and includes copies of the two December 10, 2013 money orders that Mr. Johnson stated in the letter were used to pay claimant for her December 2013 work. Zhu testified that respondent never received any records from petitioners reflecting days and weeks claimant worked.

Zhu testified that respondent assessed a 100% civil penalty based on the size of the firm, the good faith of the employer, the gravity of the monetary, non-wage and recordkeeping violations.

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 [12 NYCRR] § 65.39.

Standard of Review and Burden of Proof

Petitioners' 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; *Matter of Angello v. Natl. Fin. Corp.*, 1 AD3d 850, 854 [3d Dep't 2003]). 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 of Procedure and Practice [12 NYCRR] § 66.1 [c]).

Petitioners' 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, certain records of the hours their employees worked and the wages they paid them (Labor Law §§ 195 [4] and 661). The records must show for each employee, among other things, the number of hours worked daily and weekly, the amount of gross wages, deductions from gross wages, and allowances, if any (*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 and 662 [2]). In the absence of required payroll 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]).

Petitioners neglected to offer the legally required records of the days claimant worked and the wages they paid her either at the investigative phase of this matter or at the hearing before the Board. As such, the Commissioner correctly determined that petitioners failed to maintain and produce legally required payroll records.

The Unpaid Wages Order is Affirmed

In a proceeding challenging the Commissioner's unpaid wages order, the employer must come forward with evidence establishing 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 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 petitioners failed to pay claimant from December 1, 2013 to December 26, 2013. Investigator Zhu testified that respondent used the complaint form to calculate the unpaid wages for claimant since respondent did not receive any payroll records from petitioners. Based on the record before us, we conclude that petitioners failed to meet their

burden to prove that they paid claimant for all the days that she worked and the Commissioner used the best available evidence in determining the underpayment due.

Petitioners' evidence presented at hearing was inadequate to substantiate the allegation that they do not owe claimant any wages. Petitioners did not introduce any evidence showing the days and weeks that claimant worked during the time periods in question, her rate of pay for those days and proof of payment for each of those days. It was claimant who provided respondent with records of the time she worked in December 2013 and credibly testified about the hours she worked and the payments received from petitioner during her employment that supported respondent's finding of unpaid wages. Petitioners failed to adequately challenge those records.

Johnson's testimony was not credible as it was rife with inconsistencies and contradictory statements and was not supported by documentary evidence. Johnson's testimony about which dates claimant worked in December 2013 changed throughout his testimony. He also attempted to prove that claimant was paid for each of the dates that she worked in December 2013 by testifying that two December 2013 money orders were full pay for the December 2013 dates that claimant worked and that those money orders were to replace paychecks that had been tendered to claimant but could not be cashed because of insufficient funds. The dates and amounts of the money orders are wholly inconsistent with the dates and amounts of the paychecks that they were purportedly replacing. The money orders, each in the amount of \$748.88, were dated December 10, 2013, and Johnson testified that they were for claimant's work from December 1, 2013 through December 14, 2013. Subsequently, Johnson testified that the money orders were for claimant's work from December 1, 2013 through December 19, 2013. Yet, the paychecks that Johnson testified the money orders were replacing were for different periods of time than the money orders, as reflected in the check information attached to the paychecks and for totally different amounts. One of those paychecks states that it is for the pay period from December 14, 2013 to December 27, 2013 and the check is dated January 13, 2014. The other paycheck states that it is for the pay period from December 28, 2013 to January 10, 2014 and it is dated January 15, 2014. Each of those paychecks is in the amount of \$910.28. Johnson's testimony that the money orders were tendered to replace the paychecks is not credible since the money orders pre-date the paychecks and are for different amounts than the paychecks. Respondent also rebutted petitioners' incredible testimony with claimant's consistent and credible testimony. She testified that the money orders were not for work she performed in December 2013. She consistently testified that she did not get paid any money for her work in December 2013 and that she always received her pay four to six weeks after the work performed, thus money orders dated December 10, 2013 would have been for work done prior to December 2013. The money orders and testimony about the money orders are not evidence for petitioners to meet their burden that they paid claimant for the time that she worked in December 2013.

Petitioners' other theory about why petitioners do not owe claimant unpaid wages for December 2013 is that the patient claimant cared for was hospitalized during December 2013 and thus claimant did not need to work for petitioners while the patient was in the hospital. Johnson testified that he could not recall when in December 2013 the patient was hospitalized but he was certain it was December. Johnson offered no documentary evidence of when the patient was in the hospital. Without any evidence supporting this theory, as well as no evidence showing when claimant worked, the Board must discount it.

Not only did petitioners fail to offer any documentary evidence showing when claimant worked, but also the testimony of petitioners' only witness, Johnson, was entirely inconsistent and general and simply asserted his conclusion that he did not believe the claimant's records to be true. It is well established that such inconsistent, general and conclusory testimony regarding the amount of work performed by an employee is insufficient to meet the employer's burden of proof. (*Matter of Frank Lobosco and 1378 Coffee, Inc.*, PR 15-287 at 6 [May 3, 2017] citing *Matter of Young Hee Oh*, PR 11-017 at 12 [May 22, 2014]). Petitioners failed to meet their burden to produce evidence of the "precise" work performed and wages paid to claimant (see *Anderson v. Mt. Clemens Pottery*, 328 US 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; see also Labor Law § 195(4)). 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 and petitioners did not offer any evidence to challenge the imposition of interest. We affirm the interest imposed in the unpaid wages order.

Liquidated Damages

Labor Law § 218² provides that when wages are found to be due, respondent shall assess against the employer the full amount of the underpayment or unpaid wages and an additional amount as liquidated damages, unless the employer proves a good faith basis for believing that its underpayment or nonpayment of wages was in compliance with the law. Here, respondent correctly determined that claimant was not paid all wages and petitioners failed to offer any evidence challenging the imposition of liquidated damages. Accordingly, we affirm the imposition of 25% liquidated damages in the unpaid wages order.

The Civil Penalty is Affirmed

The unpaid wages order includes a 100% 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."

² 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.

Petitioners did not introduce any evidence to challenge the civil penalty. 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 this case, respondent assessed a \$250.00 penalty against petitioners for failure to keep and/or furnish true and accurate payroll records for each employee from on or about December 1, 2013 to December 26, 2013; a violation of Labor Law § 661 and 12 NYCRR 142-2.6. Petitioner failed to introduce any evidence at hearing that it kept required records. We affirm the penalty order.

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

Date and signed by the Members
of the Industrial Board of Appeals
in New York, New York, on
July 26, 2017.