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INDUSTRIAL BOARD OF APPEALS

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Empire State Plaza
Agency Building 2, 20th Floor
Albany, New York 12223
Phone: (518) 474-4785 Fax: (518) 473-7533

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Application of:	:	
DAVID SCHLOCKMAN, AND/OR MITCHELL ZIMMERMAN, AND/OR D.A.M. CLOTHING, INC.	:	
Petitioner,	:	DOCKET NO. PR 07-047
To Review Under Section 101 of the Labor Law: Two Orders to Comply with Article 6 of the Labor Law, dated June 29, 2007.	:	RESOLUTION OF DECISION
- against -	:	
THE COMMISSIONER OF LABOR,	:	
Respondent.	:	

WHEREAS:

The Petition for review in the above-captioned case was filed with the Industrial Board of Appeals (Board) on August 28, 2007 pursuant to Labor Law § 101 and Part 66 of the Board's Rules of Procedure and Practice (12 NYCRR Part 66). Petitioner filed an Amended Petition on December 19, 2007.

Petitioners David Schlockman, Mitchell Zimmerman and/or D.A.M. Clothing (collectively Petitioner) ask the Board to review two Orders to Comply with Article 6 of the Labor Law (Orders) issued by the Respondent Commissioner of Labor (Commissioner) on June 29, 2007.

The first Order (Wage Order) directs payment to the Commissioner of wages due to five employees (Complainants) in the total amount of $32,738.88, with interest continuing thereon at the rate of 16% calculated to the date of the Order in the amount of $11,139.40, and assesses a civil penalty in the amount of $8,185, for a total amount due of $52,063.28.

The second Order (Benefits Order) directs payment to the Commissioner of wage supplements in the nature of unreimbursed expenses due Complainant Harriet Weitman in the amount of $2,259.69, with interest continuing thereon at the rate of 16% calculated to the date of the Order in the amount of $685.45, and assesses a civil penalty in the amount of $565.00, for a total amount due of $3,510.74.

At a pre-hearing conference held on behalf of the Board, a motion to dismiss the Petition brought by the Commissioner was dismissed and the Petitioner was granted leave to file an Amended Petition. The Amended Petition alleges that both Orders must be reversed because the amounts alleged to be due to the Complainants were incorrectly calculated and are therefore inaccurate. Petitioner also claims that no payments are due to Complainant Weitman because she was paid on a commission basis, and there were no earned commissions that were not paid.

The Commissioner filed an Answer to the Amended Petition on February 4, 2008 denying its material allegations. The Answer asserted that the Orders are valid and reasonable in all respects because Petitioner failed to produce sufficient records showing the hours worked or the wages paid to the Complainants during the time periods claimed.

Upon notice to the parties, the Board held a hearing on April 9, 2008 before J. Christopher Meagher, Member of the Board and the designated Hearing Officer in this case. Petitioners were represented by Gilbert A. Lazarus, Esq. Respondent Commissioner was represented by Maria Colavito, Counsel to the Department of Labor (DOL), Jeffrey G. Shapiro, of Counsel. Each party was offered a full opportunity to present evidence, to examine and cross-examine witnesses, and to make statements relevant to the issues. Petitioner Mitchell Zimmerman testified for the Petitioner. Complainants Harriet Weitman and Senior Labor Standards Investigator Joyce Chan-Wong testified for the Respondent.

At the end of Petitioner's case, Respondent made a motion to dismiss the Petition for failure to produce any evidence in support of the allegations made in the Petition. The Motion to Dismiss was denied. However, the issues on review were limited to whether work was performed after September 26, 2005 and the reasonableness and validity of Complainant Weitman's claim.

SUMMARY OF EVIDENCE

At all relevant times, Mitchell Zimmerman and David Schlockman were the exclusive shareholders of Petitioner D.A.M. Clothing, Inc., a wholesale manufacturer of men's and women's clothing located in New York City. For all relevant purposes, Petitioner is an employer governed by Article 6 of the Labor Law.

Petitioner ceased operations and discharged its employees after its financing factor, Century Wells Fargo Bank, seized Petitioner's assets. On October 18, 2005 and November 6, 2005, the Complainants filed claims with DOL alleging that they had been employed by

Petitioner but had not been paid their salaries for several weeks prior to the termination of their employment.

Complainants Theresa Morton, Kwan Yu Chin, Charlotte Chin, and Harriet Weitman alleged that Petitioner failed to pay them two weeks salary for the period September 19 to September 30, 2005. Complainant John Tiburzi claimed five weeks of unpaid salary. Mr. Tiburzi claimed that his salary payment for the period August 22, 2005 to September 2, 2005, which was deposited directly into his checking account, was reversed and recouped by Petitioner's payroll agent, and that he received no salary payment at all for the period September 16, 2005 to October 7, 2005. The five unpaid salary claims filed by Complainants totaled $15,330.00.

On October 18, 2005, Complainant Weitman filed a second claim with DOL for unpaid wage supplements. She alleged that she had been employed as a sales representative by Petitioner under an agreement whereby Petitioner agreed to reimburse her for expenses incurred during the course of her employment. She claimed that Petitioner failed to pay her $2,259.69 in such expenses for the period July 31, 2005 to September 2, 2005. She substantiated the claim by attaching a detailed statement of expenses and copies of receipts upon which they were based.

On January 5, 2007, Complainant Weitman filed a third claim with DOL for unpaid salary commissions. She alleged that Petitioner agreed to pay her commissions for the year 2005, in addition to her regular salary, equal to 1 ½ % of all sales after the first $1 million in orders were shipped. She claimed that Petitioner failed to pay her $17,408.12 in such commissions for the period January, 2005 to August, 2005. She substantiated the claim by attaching copies of the commission agreement and sales records upon which the commissions were based.

In its investigation, DOL requested that Petitioner provide copies of payroll records it is required to keep pursuant to 12 NYCRR § 137-2.1(a) documenting the hours worked and wages paid to the Complainants for the period of their claims.

Petitioner responded by generally disputing the accuracy of the Complainants' unpaid salary claims. It asserted that because its assets had been seized on or around the last week of September, 2005, the last payroll paid while the Petitioner still had control of its funds was paid on September 16, 2005. In response to DOL's records request, Petitioner submitted payroll records for only the period August 5, 2005 to September 2, 2005. There is no evidence in the record that Petitioner ever specifically responded to Complainant Weitman's second or third claims for unpaid wage supplements and commissions.

Because Petitioner's records did not show proof of payment to any of the five Complainants for the specific amounts and periods claimed, DOL repeatedly requested such records from Petitioner and its attorney. None were ever submitted.

As a result of Petitioner's failure to provide the requested records, or other proof that the Complainants were paid the wages and benefits claimed, the Commissioner determined that Petitioner failed to meet its burden under Labor Law § 196-a to establish that the Complainants

were paid the wages, benefits and wage supplements due to them. Accordingly, on June 29, 2007, the Commissioner issued the Orders to Comply under review in this proceeding.

At the hearing, Petitioner presented its case first and Mr. Zimmerman testified that Petitioner's factor seized all Petitioner's books and records at the end of September, 2005. Petitioner argues that it was thus unable to prove that the Complainants were fully paid the wages and benefits claimed and that the Commissioner's Orders are inaccurate. However, Petitioner did not avail itself of the opportunity to subpoena records for the hearing pursuant to Board Rule 65.20.

Mr. Zimmerman also testified that Petitioner actually ceased business operations on September 26, 2005 and, to his knowledge, no employees reported to work after that time. Petitioner thus challenges the accuracy of the Wage Order for any salaries owed after September 26, 2005.

Finally, referring to the period "1/8/05" to "1/8/05" listed in the Wage Order for Complainant Weitman's unpaid commissions, Mr. Zimmerman testified that it would have been impossible for her to have earned over $17,000 in commissions on one day because the company's total sales for 2005 were $11 million and it never completed $1 million in sales on a single day.

Complainant Weitman credibly testified that her last day of employment was September 30, 2005. Petitioner never gave her written or verbal notice of termination but instead simply handed Complainant a COBRA application on her last day of employment.

We credit Ms. Weitman's testimony that she was employed until September 30, 2005 and find it corroborates the claims of all Complainants that they were permitted or suffered to work through the dates of employment alleged in their claims.[1] In the absence of contemporaneous time records required by the Labor Law particularizing the actual hours worked by the Complainants, Petitioner's bare testimony that no employees reported to work after September 26, 2005 is insufficient to overcome DOL's determination of the salaries owed based on the Complainants' claims.

Complainant Weitman also credibly testified that Petitioner employed her under an agreement in 2005 whereby she would be reimbursed for all expenses incurred during her employment and receive commissions in addition to salary equal to 1 ½ % of all sales over $1 million shipped. She substantiated the expenses and the calculation of commissions filed with the documents attached to her claim. She also testified that the accrual date listed on the Commissioner's Wage Order for these commissions, i.e. January 8, 2005, was simply a typographical error by DOL. Her commission recapitulation sheet lists "1 – 8/05" as the date of sale. "1 – 8/05" referred to January through August 2005 and not January 8, 2005.

[1] *See,* Labor Law § 2 (7) ("'Employed' includes permitted or suffered to work").

Again, in the absence of pay records required by the Labor Law, or any evidence from Petitioner rebutting or contradicting Complainant Weitman's testimony, we credit DOL's calculation of the expenses and commissions owed Complainant under both Orders.

GOVERNING LAW

Standard of Review and Burden of Proof in Proceedings Before the Board

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 an order of the Commissioner "shall be presumed valid" (Labor Law § 103 [1]).

A petition filed with the Board that challenges the validity or reasonableness of an Order issued by the Commissioner must state "in what respects [the order on review] is claimed to be invalid or unreasonable" (Labor Law § 101[2]). It is a petitioner's burden at hearing to prove the allegations that are the basis for the claim that the order under review is invalid or unreasonable (*See*, Rules § 65.30 [12 NYCRR § 65.30] ["The burden of proof of every allegation in a proceeding shall be upon the person asserting it"]; *Angello v Natl. Fin. Corp.*, 1 AD3d 850, 854 [3d Dept 2003]).

It is therefore Petitioner's burden in this case to prove the allegations in its Petition that the Commissioner's calculation of the salaries and benefits owed to the Complainants is inaccurate and that Complainant Weitman is not owed the commissions claimed.

An Employer's Obligation to Maintain Records and DOL's Calculation of Wages in the Absence of Adequate Employer Records.

The law requires employers to maintain payroll records that include, among other things, its employees' daily and weekly hours worked, wage rate, and gross and net wages paid (Labor Law §§ 195 and 661, and 12 NYCRR §§ 137-2.1 and 142-2.6). Employers are required to keep such records open to inspection by the Commissioner or her designated representative (*Id*).

An employer's failure to keep adequate records does not bar employees from filing wage complaints. Where employee complaints demonstrate a violation of the Labor Law, DOL must credit the complainant's assertions and relevant employee statements and calculate wages due based on the information the employee has provided. The employer then bears the burden of proving that the disputed wages were paid. (*See,* Labor Law § 196-a; *Angello v. National Finance Corp.*, 1 AD3d 850 [3d Dept. 2003].) As the Appellate Division stated in *Matter of Mid-Hudson Pam Corp. v Hartnett*, 156 AD2d 818, 821 (3rd Dept. 1989), "[w]hen an employer fails to keep accurate records as required by statute, the Commissioner is permitted to calculate back wages due to employees by using the best available evidence and to shift the burden of negating the reasonableness of the Commissioner's calculations to the employer."

In *Anderson v Mt. Clements Pottery Co.*, 328 U.S. 680, 687-88 (1949), superseded on other grounds by statute, the U.S. Supreme Court long ago discussed the fairness of relying on employee statements where the employer failed to keep adequate records:

> "[W]here the employer's records are inaccurate or inadequate . . . . [t]he solution. . . is not to penalize the employee by denying him any recovery on the ground that he is unable to prove the precise extent of uncompensated work. Such a result would place a premium on an employer's failure to keep proper records in conformity with his statutory duty; it would allow the employer to keep the benefits of an employee's labors without paying due compensation as contemplated by the Fair Labor Standards Act."

Citing to *Anderson v Mt. Clemens,* the Appellate Division in *Mid-Hudson Pam Corp.,* 156 AD2d at 821, agreed: "The public policy of providing protection to workers is embodied in the statute which is remedial and militates against creating an impossible hurdle for the employee. . . . Were we to hold otherwise, we would in effect award petitioners a premium for their failure to keep proper records and comply with the statute. That result should not pertain here."

FINDINGS

At the outset, we affirm the ruling dismissing the Commissioner's Motion to Dismiss the Petition and granting Petitioner the right to file an Amended Petition.

We reject Petitioner's contention that the Commissioner's reliance on the Complainant's claims was unreasonable because the seizure of its books and records made it unable to prove they were paid some or all of the wages claimed. The Third Department held in *Angello v. National Finance Corp.*, 1 AD3d at 854, that if the employer does not provide the records required under the Labor Law, "regardless of the reason therefor", the presumption favoring the Commissioner's determination based on the employees' complaints applies (*Id.* at 854). Petitioner could have subpoenaed its records from its factor under the Board's rules, but it failed to do so.

We affirm the Commissioner's two Orders directing payment to the five Complainants of wages under the Wage Order totaling $32,738.88, and to Complainant Weitman of wage supplements under the Benefits Order totaling $2,259.69.

Having failed to produce accurate time and payroll records required by the Labor Law, DOL's calculation of the wages and wage supplements must be credited unless the Petitioner met its burden to prove that the employees were paid the disputed amounts (*See, e.g. Angello v. National Finance Corp.,* 1 AD3d 850). This burden is not an impossible one. However, in this case, Petitioners' evidence on the sole issue it addressed at the hearing, i.e. the accuracy of DOL's salary calculations for the Complainants after September 26, 2005, was too general and conclusory to shift such burden. Petitioner submitted no other evidence in support of the claims in its Petition. The Commissioner's determinations are therefore affirmed.

Complainant Weitman also established that the period covered by her complaint for unpaid commissions covered January, 2005 to August, 2005 and that the date listed in the Wage Order was simply a typographical error. We therefore conform the Order to the proof and modify the Wage Order accordingly.

CIVIL PENALTIES FOR FAILURE TO PAY WAGES

If the Commissioner determines that an employer has violated Article 6 of the Labor Law, she is required to issue a compliance order to the employer that includes a demand that the employer pay the total amount found to be due and owing (Labor Law § 218 [1]). Along with the issuance of an order directing compliance, the Commissioner is authorized to assess a civil penalty based on the amount owing. Labor Law § 218 (1) continues:

> "In addition to directing payment of wages, benefits or wage supplements found to be due, such order, if issued to an employer who previously has been found in violation of these provisions, rules, or regulations, or to an employer whose violation has been found to be willful or egregious, shall direct payment to the Commissioner of an additional sum as civil penalty in an amount equal to double the total amount found to be due. In no case shall the order direct payment of an amount less than the total wages...found by the Commissioner to be due, plus the appropriate civil penalty... In assessing the amount of the penalty, the Commissioner shall give due consideration to the size of the employer's business, the good faith of the employer, the gravity of the violation, the history of previous violations and, in the case of wages...the failure to comply with recordkeeping or other non-wage requirements."

In this case, the Commissioner assessed a penalty of 25% in the amount of $8,185.00 in the Wage Order, and a penalty of 25% in the amount of $565.00 in the Benefits Order. Petitioner did not challenge these penalty determinations. The Board finds that the considerations and computations required to be made by the Commissioner in connection with the penalties set forth in the Orders are valid and reasonable in all respects.

INTEREST

Labor Law § 219 (1) provides that when the Commissioner determines that wages are due, then 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 payment." Banking Law § 14-A sets the "maximum rate of interest" at "sixteen percent per centum per annum." The Board finds that the considerations and computations required to be made by the Commissioner in connection with the interest set forth in the Orders are valid and reasonable in all respects.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT

1. The Order to Comply with Article 6 of the Labor Law, dated June 29, 2007, is affirmed insofar as it directs payment to the five named employees of wages totaling $32,738.88, with interest at 16% calculated to the date of the Order in the amount of $11,139.40, and assesses a civil penalty in the amount of $8,185.00, for a total amount due of $52,063.28;

2. The Order is modified to state that the period covered by commissions totaling $17,408.12 to be paid employee Harriet Weitman is January, 2005 to August, 2005, and is remanded to the Commissioner to issue an Amended Order consistent therewith;

3. The Order to Comply with Article 6 of the Labor Law, dated June 29, 2007, directing payment to employee Harriet Weitman of wage supplements totaling $2,259.69, with interest at 16% calculated to the date of the Order in the amount of $685.45, and assessing a civil penalty in the amount of $565.00, for a total amount due of $3,510.74, is affirmed; and

4. The Petition be, and the same hereby is, dismissed in all other respects.

Anne P. Stevason, Chairman

Susan Sullivan-Bisceglia, Member

J. Christopher Meagher, Member

Mark G. Pearce, Member

Jean Grumet, Member

Dated and signed in the Office
of the Industrial Board of Appeals
at New York, New York, on
June 25, 2008