STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of: HAULL 4 PFS, INC., Petitioner, To Review Under Section 101 of the Labor Law: An Order to Comply with Article 6 and an Order Under rticle 19 of the Labor Law, both dated September 7, 2010, - against - THE COMMISSIONER OF LABOR, Respondent.	DOCKET NO. PR 10-329 RESOLUTION OF DECISION

APPEARANCES

Kamal Bitar, for Haull 4 PFS, Inc.

Pico Ben-Amotz, General Counsel, NYS Department of Labor (Larissa C. Bates of counsel), for respondent.

WITNESSES

Kamal Bitar, for petitioner.

Raymond E. Renouf, Jr., and Mary Coleman, Supervising Labor Standards Investigator, for respondent.

WHEREAS:

On October 25, 2010, Amani H. Bitar filed a petition on behalf of petitioner Haull 4 PFS, Inc. with the Industrial Board of Appeals (Board) seeking review of two orders issued by the Commissioner of Labor (Commissioner) against petitioner on September 7, 2010. The Commissioner filed an answer on January 5, 2011.

Upon notice to the parties, a hearing was held on April 4, 2013 in Buffalo, New York before Board member and designated hearing officer La Marr J. Jackson, Esq. 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 (wage order) demands compliance with Article 6 of the Labor Law and payment to the Commissioner of $3,240.00 in wages due and owing to claimant for the period October 12, 2009 through October 19, 2009, interest continuing thereon at the rate of 16% in the amount of $458.75, and a civil penalty in the amount of $3,240.00, for a total amount due of $6,938.75.

The second order (penalty order) under Article 19 of the Labor Law assesses petitioner a civil penalty of $500.00 for failure to keep and/or furnish true and accurate payroll records during the period from October 12, 2009 through October 29, 2009.

The petitioner alleges that: (1) claimant was never hired and (2) petitioner was established at the end of November or beginning of December 2009.

SUMMARY OF EVIDENCE

Kamal Bitar's Testimony

Kamal Bitar testified that he operates a business called Haull 4 PFS, Inc. (Haull 4) which is a trucking company located in Erie County, New York.

Bitar testified that claimant Raymond Renouf was not an employee of Haull 4 and never worked for his company. He stated he has no record of the claimant, but testified that Renouf did apply for a job but he was not hired because he failed a drug test and was a diabetic. Bitar did not have the job application or results of the drug test at the hearing, stating that these documents were destroyed.

Bitar testified that he did not operate a trucking company prior to December 2009. He presented a permit from the U.S. Department of Transportation dated October 15, 2009, under the name Haull 4 PFS, Inc. to engage in transportation as a contract carrier of property (except household goods) by motor vehicle in interstate or foreign commerce (Petitioner's Exhibit 2). He also introduced into evidence other licenses for trucks from November 2009, a fuel tax license issued December 16, 2009, a highway use tax certificate issued December 23, 2009, and an inspection receipt of April 17, 2009; all to indicate the business was not operational during the claim period.

Under cross-examination Bitar testified that he did not operate a business named Payless Freight, Inc., but both Haull 4, and Payless Freight use the same address according to New York State Department of State records.

Claimant Raymond Renouf, Jr.'s Testimony

Claimant Raymond Renouf filed a claim against petitioner with the Department of Labor (DOL) on November 9, 2009, stating that he was employed as a driver and was owed $3,240.00 in unpaid wages for the period October 12, 2009 through October 19, 2009. Renouf's claim form describes the trips taken and the commission rate based upon a percentage of the total load fee.

Renouf testified that he met Bitar through a friend named Jim who knew Bitar as "Paul." In April 2009, he started working for Bitar under his company Payless Freight as a company driver. He was then made an offer to lease a Volvo truck for which he paid the lease payment through deductions from his pay. The truck broke down during the lease period and Renouf also testified he paid for fuel and repairs on the truck.

Renouf testified that Bitar and his wife Amani Bitar, went on vacation to Bitar's homeland in the Middle East and was gone a month and a half during which time claimant did not work. Upon Bitar's return, Renouf was told that Bitar had a new company named Haull 4 PFS, Inc. Claimant stated on his claim form that he drove a Ryder truck that was leased by petitioner on routes from October 12, 2009 through October 19, 2009, covering the following locations:

1. Buffalo, NY to Dunkirk, NY
   to Lakeland, FL then to Augusta, GA;

2. Augusta, GA to Auburn, MA
   then to Westfield, MA; and

3. Westfield, MA to Keary, NY to Dunkirk, NY
   then return truck to Buffalo, NY.

Renouf testified he was to be paid a 28% commission based on the value of each load he delivered.

DOL's Investigation

Senior Labor Standards Investigator Mary Coleman testified concerning the DOL's investigation that resulted in the orders under review. Various documents and reports from the investigative file were submitted into evidence, including a claim form filed by the claimant.

On January 20, 2010, DOL issued Haull 4 a collection letter advising it of the claim and requesting that petitioner remit payment or submit a statement why the amount was not due, including "a copy of any payroll record, policy, contract, etc. to substantiate your position." Petitioner responded in a letter to Coleman, stating that claimant was never employed by Haull 4. Petitioner stated that the business was not established until November 2009 and that claimant's application was denied because he did not meet Federal Motor Carrier rules.

In the notice dated April 8, 2010, Coleman advised Amani Bitar that the DOL was pursuing the claim and that petitioner should remit payment or the case would be referred for an order to comply, adding additional interest and penalties to the wage claim.

On April 23, 2010, Coleman received a letter signed by Amani Bitar stating that the claimant had filed a false claim and that he was disqualified by not passing a drug test and he is diabetic and this condition does not meet Federal Motor Carrier rules.

Based on the petitioner's failure to submit sufficient evidence substantiating that claimant was not an employee, or payroll records establishing that he was paid the wages claimed, DOL issued the orders under review on September 7, 2010.

GOVERNING LAW

Standard of Review and Burden of Proof

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]). If the Board finds that the order, or any part thereof, is invalid or unreasonable it shall revoke, amend, or modify the same (*id.* § 101 [3]). An order issued by the Commissioner shall be presumed "valid" (*id.* § 103 [1]).

A petition that challenges such order shall "state . . . in what respects [the order] is claimed to be invalid or unreasonable" (Labor Law § 101 [2]). Any objection "not raised in such appeal shall be deemed waived" (*id.*).

The Board's Rules provide that "[t]he burden of proof of every allegation in a proceeding shall be upon the person asserting it" (12 NYCRR 65.30). The burden is by a preponderance of evidence (State Administrative Procedure Act § 306 [1]).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Board makes the following findings of fact and conclusions of law pursuant to the provisions of Board Rule 65.39 (12 NYCRR 65.39).

Claimant Was Petitioner's Employee Under the Labor Law

Labor Law § 190 [3] defines the term "employer" as including "any person, corporation, limited liability company, or association employing any individual in any occupation, industry, trade, business or service" (*see also* § 651 [6]). An "employee" is described as "any person employed for hire by an employer in any employment (*id.* § 190 [2]; *see also* § 651 [5]). "Employed" means that a person is permitted or suffered to work" (*id.* § 2 [7]).

We credit claimant's testimony and find that petitioner failed to meet its burden of proof to establish by credible evidence that Haull 4 did not employ claimant during the period of his claims. Claimant credibly testified that he was hired and employed by Bitar for Haull 4 between October 12, 2009 through October 19, 2009 to make deliveries in a truck provided by petitioner to a set of locations that was established by petitioner. He testified that he had first worked for Bitar at a related company named Payless Freight, Inc. starting around April 2009 and was asked to do the trip in October for Haull 4 that was a newly established company. Claimant testified that a driver's log with Haull 4's name and address on the form was provided to the DOL with his claim for unpaid wages and this document was admitted into evidence at the hearing.

Bitar testified that he did not start Haull 4 until December 2009, but admitted into evidence and contradicting this is a New York State Department of State document showing September 28, 2009, as the initial filing date for Haull 4. Bitar did not offer any evidence to counter the fact that the claimant was asked to make deliveries to places selected by petitioner as far away as Georgia and Florida, at a rate established by petitioner, in a truck that petitioner provided. Haull 4 and Payless Freight are related companies, controlled by Bitar or his wife and both companies have the same address on file with the New York Department of State.

Bitar argued at the hearing that Haull 4 could not be the claimant's employer because the company did not have certain truck permits and licenses in place during the time period of claimant's delivery trip but claimant testified that the deliveries were made using a leased truck from Ryder and not one of the Haull 4 trucks whose licenses were referenced at the hearing. Petitioner did not offer any credible evidence to dispute claimant's testimony regarding the truck used for the October trip. Bitar also argued that there was "no physical document evidence" proving that the claimant worked for Haull 4 but that there was such evidence with respect to Payless Freight but this is not correct because the claimant did introduce the trip log that had the name and address of Haull 4 written on the form. The claimant's testimony was credible that he was hired to do the October trip for Haull 4 and the petitioner did not counter this evidence or offer any proof that the work of the October trip was not done. Bitar also argued that the claimant could not have been hired because he failed a drug test but he offered no evidence to support this claim. The claimant offered evidence that these out of state deliveries were made and that he was not paid and the petitioner provided no evidence to counter this. The claimant's evidence established that the petitioner controlled the 28% commission based on the value of each load that the claimant was to receive, provided the truck, and determined where the claimant made deliveries and petitioner's evidence did not counter any of this.

We find the record evidence establishes that claimant was "hired" by petitioner and "permitted and suffered to work" as a driver during the period of his claims. An employment relationship thereby existed between petitioner and claimant and petitioner is responsible for any wages owed under the Labor Law (*see Matter of Rafael Martinez,* PR 13-055 [December 17, 2014]).

Wage Order is Affirmed

The Labor 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, 12 NYCRR 142-2.6). Employers are required to keep such records open to inspection by the Commissioner or a designated representative.

In the absence of accurate records required by the Labor Law, 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]).

Petitioner did not submit evidence challenging the Commissioner's calculation of wages of $3,240.00 and the issue is thereby waived pursuant to Labor Law § 101 (2). We therefore affirm the wage order as 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 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."

Petitioner did not challenge the interest assessed in the wage order and the issue is thereby waived pursuant to Labor Law § 101 (2). We find that the computations made by the Commissioner in assessing interest in the order are valid and reasonable in all respects.

Civil Penalties

The petitioner did not submit evidence challenging the civil penalties assessed in the wage and penalty orders and the issue is thereby waived pursuant to Labor Law § 101 (2). We find that the considerations and computations the Commissioner made in connection with the imposition of the penalties assessed in the orders are valid and reasonable in all respects.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The wage order is affirmed; and

2. The penalty order is affirmed; and

3. The petition for review be, and the same hereby is, otherwise dismissed.

Vilda Vera Mayuga, Chairperson
At Albany, New York

J. Christopher Meagher, Member
At Albany, New York

LaMarr J. Jackson, Member
At Rochester, New York

Dated and signed by the Members
of the Industrial Board of Appeals
on July 22, 2015.

Michael A. Arcuri, Member
At Syracuse, New York

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