

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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In the Matter of the Petition of:

NASIR ALI MUSAID OMAR A/K/A
NASIR M. BAQASH A/K/A
NASIR M. BAQUSH A/K/A
NASIR MUZAID OMAR BUQASH A/K/A
NASIR ALI MUZAID-OMAR AND
UNIVERSAL FOOD MART, INC.,

Petitioners,

To Review Under Section 101 of the Labor Law:
An Order to Comply with Article 6 of the Labor Law :
and an Order Under Article 19 of the Labor Law, both :
dated June 8, 2012,

- against -

THE COMMISSIONER OF LABOR,

Respondent.
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DOCKET NO. PR 12-120

RESOLUTION OF DECISION

APPEARANCES

Borins, Halpern & Paskowitz, Buffalo (*Michael Paskowitz* of counsel), for petitioners.

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

WITNESSES

Nasir Musaid Omar, Hamad Mezel, Jeffrey Rosado-Rojas, and Manea Alhajaji, for petitioners.

Ibrahim Alsawadi, Supervising Labor Standards Investigator Amy Clark, and Labor Standards Investigator Ruth Gonzalez-Cruz, for respondent.

WHEREAS:

On July 2, 2012, petitioners Nasir Ali Musaid Omar a/k/a Nasir M. Baqash a/k/a Nasir M. Baqush a/k/a Nasir Muzaid Omar Buqash a/k/a Nasir Ali Muzaid-Omar and Universal Food Mart, Inc. filed a petition for review of two orders issued against them by respondent Commissioner of Labor on June 8, 2012. Respondent filed her answer on July 24, 2012.

Upon notice to the parties, a hearing was held on July 23, 2014, March 5, 2015, May 26, 2015, September 8, 2015, and February 3, 2016 in Buffalo, New York, before then Board member LaMarr J. Jackson, the designated hearing officer in this proceeding. Each party was afforded a full opportunity to present documentary evidence, to examine and cross-examine witnesses, to make statements relevant to the issues, and to file post-hearing briefs.

The order to comply with Article 6 of the Labor Law (wage order) directs payment of \$16,714.12 for wages due and owing to claimant Ibrahim Alsawadi for the period August 23, 2009 to June 27, 2010, together with \$5,216.64 in interest at 16% per annum calculated to the date of the order, 25% liquidated damages in the amount of \$4,178.53, and a 100% civil penalty of \$16,714.12, for a total amount due of \$42,823.41.

The order under Article 19 of the Labor Law (penalty order) imposes a \$1,000.00 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 for the period August 1, 2009 through February 6, 2012.

The petition alleges that the orders are invalid and unreasonable because: (1) claimant was not employed by petitioners; (2) petitioners never received notice of a conciliation conference; and (3) petitioners maintained accurate payroll records.

SUMMARY OF EVIDENCE

Petitioner Nasir Musaid Omar owns Universal Food Mart, Inc., a 2,150 square foot convenience store in Buffalo, New York, that sells groceries, cigarettes, lotto tickets, candy, pizza, hot and cold sandwiches, fried chicken, and beer. The store is located on the ground floor and petitioner maintains a four-bedroom apartment on the second floor above the store.

Testimony of Claimant Ibrahim Alsawadi

Claimant Ibrahim Alsawadi testified that on August 20, 2009, his friend, Ahmed Aliafi, brought him to the store to meet petitioner. Aliafi and petitioner had previously arranged for claimant to take Aliafi's place working in the store and living in the upstairs apartment. At this meeting, petitioner told claimant that he was going to be trained to work in the store, and once his kitchen training was completed, he would do everything in the store, including working at the cash register and filling the refrigerators. Petitioner instructed claimant to watch how an employee named Brook was cleaning splattered oil from the kitchen ceiling. Claimant understood that during the unpaid training period, he would receive free room and board, and that once Aliafi left the store, he would take over Aliafi's job and receive a salary.

Claimant received three days of on-the-job training from Aliafi learning how to clean the kitchen (which included cleaning the fryers, draining the oil, scrubbing oil from the ceiling and walls) and prepare food sold by the convenience store (including chicken wings, pizzas, fried chicken breasts, Philly steak sub sandwiches, and cold sandwiches). Claimant was shown how to cut meat and cold cuts using a meat cutter and how to use the oven. Petitioner was present at the store while claimant was being trained in the kitchen and directed claimant to fill up the

refrigerators in the back of the store. After he was trained in the kitchen, he also was shown how to use the Lotto machine to sell Lotto tickets to customers.

When claimant's three-day training period concluded, he started working full time, seven days per week, opening the store "on average" at 9:00 a.m. and working until 9:00 p.m. At some point in the morning, petitioner arrived at the store and remained until closing at midnight or 1:00 a.m. Claimant worked a seven day/ 12 hour per day workweek at all times when he lived in the apartment above the store during the period of the claim, but he worked six days per week during the period from September 25, 2009 until December 25, 2009, when claimant was married and living elsewhere with his wife. Claimant also testified that he did not work for petitioners or lived in the apartment above the store in January 2010. Claimant's salary was \$300.00 per week, but the cost of food was deducted, and claimant was paid the remainder, which was usually \$250.00, in cash. He was never given a pay stub. Claimant identified the two claims he filed with respondent.

Petitioner gave claimant the keys to the store and provided specific instructions regarding how to open the store, which included deactivating the alarm system, unlocking the back door and a second door, removing barriers at the back door including boxes and a wood stick, turning on the refrigerators, store lights and oven. Claimant testified that petitioner stopped paying him, and fired him shortly after claimant's requests to be paid were refused. Claimant left the premises shortly afterwards.

Six additional workers were employed at the store at various times when claimant worked at the store, including Aliafi, Manea Alhajaji, Jeffrey Rosado-Rojas, Jamal, Hamad Mezel, and Brook. Brook cleaned the outside of the store, did roofing, tree cutting, shoveled snow, and filled the refrigerators. Jamal worked longer hours than the others, mostly in the kitchen or at the cash register, and stocked the refrigerators and unloaded petitioner's truck when petitioner shopped for the store. Claimant was the only employee who worked seven days per week. All employees were paid in cash and never received a pay stub. Workers kept a list of any food that they ate, and petitioner would deduct the cost of the food from the workers' pay. Claimant identified a photograph of himself and Manea Alhajaji working together behind the counter in the store taken in May 2010. Claimant denied ever working at a Halal restaurant on Broadway, which he described as a restaurant that petitioner liked and sometimes ordered food from.

Testimony of Petitioner Nasir Musaid Omar

Petitioner Nasir Musaid Omar¹ testified that he has owned Universal Food Mart since 2006. In October 2009, a mutual friend, Ahmed Aliafi (who was living rent-free in the second floor apartment), introduced petitioner to claimant. Petitioner allowed claimant to move into the apartment temporarily and did not charge him rent. Hamad Mezel lived rent-free in the apartment during the relevant period, but did not work at the store. Moaath Aleryani also lived rent-free in the upstairs apartment with his children during this period, and "sometimes came and helped me out." Petitioner's explanation of why people lived above the store without paying rent was: "it's our way that you help somebody."

Claimant lived in the apartment for two weeks and moved out when he got married. Thereafter, claimant visited the store once a week to socialize with petitioner. In December 2009,

¹ Petitioner testified that the names listed in the petition and orders are "associated" with him.

when claimant and his wife broke up, claimant moved back into the upstairs apartment, vacated it on January 20, 2010, and resumed living there from February 10, 2010 until the beginning of June 2010. Petitioners never employed claimant and claimant never worked in the store; instead, claimant “used to come downstairs to eat with us like friends.” From February to May 2010, claimant worked at a Halal restaurant on Broadway.

Petitioner worked at the store every day from the time it opened, which was between 9:00 a.m. and 11:00 a.m., and the time it closed at 12:00 a.m. or 1:00 a.m. Petitioner prepared all the food sold at the store, including fried chicken, pizza, and sub sandwiches. Petitioner had one employee, Manea Alhajaji, who started work at 1:00 p.m. or 2:00 p.m. and worked for a total of 40 hours each week as a cashier and stocked the refrigerators. Although he is not sure how long Alhajaji worked for him, he believes that Alhajaji began working in November 2009 and worked at the store until sometime in 2010, and stated, “I have Paychex and I have the information.” Petitioner’s wife also helped out at the store. An employee named Jeffrey currently works for petitioners on weekends, and for at least a year prior to this, Jeffrey worked full time at the store. Petitioners began using Paychex as their payroll service in 2009 or 2010, but petitioner “didn’t provide [respondent] any information” during the investigation and likewise did not provide payroll records during the five-day hearing.

Testimony of Hamad Mezel

Hamad Mezel testified that he currently resides in the apartment above the store. He began living there in April or May 2008, briefly left the apartment at the end of August 2009, returned in September 2009, moved later that month to an apartment located two blocks from the store, and resumed living in the apartment at the end of 2009. Mezel has been friends with petitioner since 1997. According to Mezel, he was unemployed in the fall of 2009, and lived rent-free in petitioner’s apartment because “when somebody’s unemployed we like to help each other.” Mezel initially testified that he was the only person living in the apartment in August and September 2009, but later testified that Moaath Aleryani and his children also resided there during this period. Mezel occasionally saw Brook at the store, but does not remember what he was doing there.

Mezel met claimant at the end of September or early October 2009, and claimant moved into the upstairs apartment after Mezel moved out. Mezel returned to the store frequently for “an hour, hour and a half” and Mezel and claimant cooked food and ate together at the store. Mezel did not see claimant working at the store nor did he see him taking money from customers. The only people he saw working at the store were petitioner, petitioner’s wife, and Manea Alhajaji.

Testimony of Jeffrey Rosado-Rojas

Jeffrey Rosado-Rojas testified that he has known petitioner since 2006 and that petitioner was in Yemen from August to October 2009. When petitioner was in Yemen, petitioner’s wife and Moaath Aleryani, operated the store. Aleryani lived in the upstairs apartment with his children. Rosado-Rojas met claimant at the store in October 2009, after petitioner returned from Yemen.

During the relevant period, Rosado-Rojas frequented the store and had meals there multiple times. Rosado-Rojas became friendly with Mezel, who worked at a shop about a block away from the store, and the two men visited the store sometimes daily, mostly at dinnertime. Rosado-Rojas never saw claimant working at the store, taking money from customers, or waiting on customers.

Rosado-Rojas saw Brook sweeping the sidewalk outside the store but did not see him working inside the store. Rosado-Rojas identified a photograph of claimant and Alhajaji taken behind the counter and bulletproof plexiglass barrier at petitioner's store. According to Rosado Rojas, this is "where we sit to eat around dinnertime." When asked if only workers had their meals at the store, Rosado-Rojas testified, "I'm not a worker and I used to eat there."

Testimony of Manea Alhajaji

Manea Alhajaji testified that he began working at petitioner's store in January 2010, and left when he got another job. During his employment, only he, petitioner, and petitioner's wife worked in the store; claimant did not work there. Petitioner opened the store in the morning and Alhajaji worked at least 40 hours per week six days per week, starting at 12:00 p.m. and working until 6:00 p.m., 8:00 p.m. or 10:00 p.m. Alhajaji worked as a cashier and also did stocking, cleaning, and worked in the kitchen. When Alhajaji began working at petitioner's store, claimant was not living in the upstairs apartment but claimant subsequently moved back in. On one occasion, when Alhajaji no longer worked for petitioners, he saw claimant working at a Halal market on Broadway. Alhajaji identified a photograph of himself and the claimant behind the counter in petitioners' store.

Testimony of Labor Standards Investigator Ruth Gonzalez-Cruz

Labor Standards Investigator Ruth Gonzalez-Cruz testified that she investigated the claim in this matter. LSI Gonzalez-Cruz visited the store on February 6, 2012, accompanied by another investigator, James Donohue, and met with petitioner, who said he was the owner. Petitioner was standing behind the counter and plexiglass barrier close to the cash register, and LSI Gonzalez-Cruz saw five additional people behind the counter and in the kitchen area. She notified petitioner of the claim, and requested payroll and time records. Petitioner stated that claimant was never an employee, petitioner had only one employee, and he did not have payroll or time records. LSI Gonzalez-Cruz issued a Notice of Labor Law Violation for petitioners' failure to maintain payroll and time records and told petitioner that she would be following up with him shortly. According to her Narrative Report, petitioner told LSI Gonzalez-Cruz that his one employee had not yet arrived at work and that the other people present behind the counter were not employees.

LSI Gonzalez-Cruz computed the wage underpayment based on the hours listed in the claim, using the \$7.25 minimum wage in effect at the time of the claim for the first 40 hours in a week and time and a half at \$10.88 for weekly work hours over 40. She gave the employer credit for the wages claimant reported he was paid in cash. On April 19, 2012, notice of a compliance conference scheduled for May 25, 2012 was sent to petitioner. He did not attend the conference.

Testimony of Supervising Labor Standards Investigator Amy Clark

Supervising Labor Standards Investigator Amy Clark testified that she attended the compliance conference on May 25, 2012. The compliance conference officer recommended the 100 percent civil penalty in the wage order and the \$1,000.00 penalty order for petitioners' failure to cooperate with the investigation and failure to maintain records. After the compliance conference, SLSI Clark recommended the issuance of the orders to comply. She agreed with the compliance officer's recommendation of the 100 percent civil penalty in the wage order for the failure to cooperate with the investigation and the failure to provide payroll and time records. SLSI

Clark stated that a 100 percent penalty is a typical amount to be imposed on a small employer for such a large amount of unpaid wages. She testified that she would have increased the 100 percent civil penalty if the violation was highly egregious or the employer was highly uncooperative. The \$1,000.00 penalty order was based on petitioner's admission to LSI Gonzalez-Cruz that he did not keep payroll records.

STANDARD OF REVIEW AND BURDEN OF PROOF

When a petition is filed, the Board reviews whether an order issued by the Commissioner is "valid and reasonable" (Labor Law § 101 [1]). 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 [Board Rules] [12 NYCRR] § 66.1 [c]). Petitioners have 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 AD 3d 850, 854 [3d Dept 2003]).

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 Rules (12 NYCRR) § 65.39.

Petitioners Were Not Denied Due Process

At the outset, we reject petitioners' contention that they were denied due process because they did not receive the notice of the compliance conference sent to them by respondent on April 19, 2012. The Commissioner is not required to conduct conferences or hearings prior to the issuance of an order to comply. Due process is satisfied by the opportunity to contest the orders at the hearing before the Board, where a petitioner has the right to present evidence and cross-examine witnesses and where the Board views the order *de novo* and renders its decision based on the evidence presented at hearing (*Matter of Clifton J. Morello (T/A Iron Horse Beverage LLC)*, PR 14-283 [Sept. 14, 2016] at 6; *Matter of Angelo A. Gambino and Francesco A. Gambino (T/A Gambino Meat Market, Inc.)*, PR 10-150 [July 25, 2013] at p. 6).

Claimant was an Employee During the Relevant Period

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 id.* § 651 [6] [similar definition under Article 19]). An "employee" is described as "any person employed for hire by an employer in any employment." (*id.* § 190 [2]; *see also id.* § 651 [5] [similar definition under Article 19]). "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 his burden of proof to establish by credible evidence that he did not employ claimant during the period of his claim.

Claimant credibly testified that he met with petitioner on August 20, 2009. Petitioner approved him as an employee and described the work he would be doing after receiving three days of training. Petitioner assigned claimant's duties, scheduled his hours, set his rate of pay at \$300.00 per week, deducted from his pay the cost of the food he consumed, and paid him approximately \$250.00 in cash per week, provided him with a key to the store, and explained the detailed process of opening the store each morning. Claimant continued to be employed at the store until the end of June 2010 when petitioner, having stopped paying him, also fired him. In contrast to petitioners' witnesses, claimant was the only witness at the hearing to describe in detail the day-to-day operation of the convenience store. Claimant described not only his work, but the work performed during the relevant period by six other workers (Alhajaji, Brook, "Jamal," Mezel, Rosado-Rojas, and Aliafi, who introduced claimant to petitioner as his replacement). Petitioners did not provide a credible rebuttal to this testimony.

Instead, petitioner testified that during the relevant period from August 23, 2009, to June 27, 2010, his only employee was Alhajaji. Alhajaji testified that he did not begin working at the store until January 2010, at a time when it is undisputed that claimant was not working at the store or living in the upstairs apartment. Alhajaji failed to state when his employment with petitioners ended. To accept petitioners' version of the facts would require believing that for much of the relevant period they had no employees, other than petitioner's wife, in a 2,150-square-foot store which was open 112 hours a week. This inherently unlikely assertion is further undercut by petitioner's admission that Moaath Aleryani "sometimes came and helped me out," as well as Rosado-Rojas's testimony that he saw Aleryani operating the store, Brook sweeping up outside and claimant photographed together with Alhajaji behind the store's bullet-proof glass barrier, and LSI Gonzalez-Cruz's testimony that she observed five individuals behind the counter and plexiglass barrier during her visit to the store. Petitioner's testimony that free apartments were provided to claimant, Mezel, Aleryani, and Aliafi during the relevant period without requiring work in return from all but Mezel is simply not believable.

We also reject petitioners' assertion that claimant was never employed because petitioners failed to provide any contemporaneous payroll or time records for the period of the claim, which would be critical evidence of who was employed during the claim period and who was not. Petitioner testified that he used Paychex as his payroll service during the period of the claim, and even asserted that the purported payroll records would show the exact period of time that Alhajaji was employed by petitioners and who was employed during the period of the claim. Petitioners failed to provide payroll records either during the investigation or during the five-day hearing. Petitioner's lack of candor concerning his employees and his records undermines the credibility of his testimony that he never employed claimant or anyone other than Alhajaji. We credit claimant's specific and detailed testimony, which was corroborated in part by Rosado-Rojas and petitioner himself, over petitioner's general denials.

With the exception of petitioner's admission that Moaath Aleryani worked in the store and Rosado-Rojas's testimony that he saw Aleryani and Brook respectively working inside and outside the store, we do not find the petitioner or petitioners' witnesses testimony credible with regard to the employment status of claimant or to petitioners' assertion that only one employee worked for petitioners during the relevant period. Rosado-Rojas' testimony that he never worked at petitioners' store was contradicted by petitioner, who admitted that Rosado-Rojas is a current employee. Mezel testified that he currently resides in petitioner's upstairs apartment, and has resided there since 2008, rent-free at times including during the relevant period. In light of these

two witnesses' direct and substantial economic relationships with petitioner that may be affected by the litigation, they were not independent witnesses (*see Matter of Rafael Almonte and D'Almonte Enterprises Parking Garage, Inc.*, PR 12-040 [December 9, 2015]).

Alhajaji testified that he was hired by petitioner in January 2010, at a time when it is undisputed that claimant was not working at the store. Alhajaji did not testify when he left petitioners' employment. Petitioner, who testified that Paychex payroll records would conclusively show the dates of Alhajaji's employment, never provided the records. We find Alhajaji's vague and general testimony insufficient to shift petitioners' burden of proof (*see Matter of Young Hee Oh a/k/a Young H. Oh and Cheong Hae Corp.*, PR 11-017 [May 22, 2014]). In the absence of credible records or credible testimony concerning their operation of the convenience store, petitioners have failed to meet their burden to establish that they did not employ the claimant during the period of the claim.

We find the record evidence establishes that claimant was hired by petitioner Nasir Musaid Omar and was "permitted and suffered to work" and "employed" by petitioners during the period of his claim. Because an employment relationship thereby existed between petitioners and claimant, petitioners are responsible for any wages owed under the Labor Law

Liquidated Damages, Interest and Civil Penalty Assessed in the Wage Order Are Affirmed

Petitioners did not challenge the Commissioner's determination to assess liquidated damages, interest, and a civil penalty in the wage order and the issue is thereby waived pursuant to Labor Law § 101 (2).

The Penalty Order is Affirmed

The penalty order imposes a \$1,000.00 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 for the period August 1, 2009 through February 6, 2012. During the investigation, petitioner told LSI Gonzalez-Cruz that he did not have payroll and time records, and although at hearing petitioner asserted that he used Paychex as a payroll service since 2009, he did not provide any payroll or time records during the hearing. We find that petitioners failed to keep and/or furnish true and accurate payroll records as required and we affirm the penalty order.

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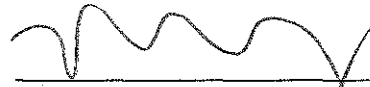
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NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The wage order is affirmed;
2. The penalty order is affirmed;
3. The petition for review be, and the same 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.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The wage order is affirmed;
2. The penalty order is affirmed;
3. The petition for review be, and the same is, denied.

Vilda Vera Mayuga, Chairperson

J. Christopher Mcagher, Member

Michael A. Arcuti, Member

Molly Doherty, Member

Glorabelle J. Petz, Member

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