

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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In the Matter of the Petition of:

PAUL MULLER AND MARCIA MULLER AND
FRIENDLY TRANSPORTATION, INC.,

Petitioners,

DOCKET NO. PR 08-084

To Review Under Section 101 of the Labor Law:
An Order to Comply with Article 6 and 19 of the
Labor Law, dated April 25, 2008,

RESOLUTION OF DECISION

- against -

THE COMMISSIONER OF LABOR,

Respondent.
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APPEARANCES

Michael Kaszbuski, Esq., for petitioners.

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

WITNESSES

Marcia Muller and Paul Muller for petitioners; Labor Standards Investigator Erin Gibbons
and Usman Hanif for respondent.

WHEREAS:

The petition in this matter was filed with the Industrial Board of Appeals (Board) on
June 20, 2008 and seeks review of an order issued by the Commissioner of Labor
(Commissioner or respondent) against petitioners Paul Muller, Marcia Muller, and Friendly
Transportation, Inc. on April 25, 2008. Upon notice to the parties a hearing was held on
November 4, 2009 and February 18, 2011, in Westbury and Garden City, New York, before
Jean Grumet, Esq., member of the Board, 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, make statements relevant to the issues, and file post-

hearing briefs. Petitioners filed a Post Hearing Brief on April 18, 2011, and the Commissioner filed a Reply on June 17, 2011.

The order is an order to comply with Articles 6 and 19 of the Labor Law, which finds that the petitioners failed to pay wages in the amount of \$47,538.75 to claimants Ali Raza and Usman Hanif from July 21, 2004 to May 9, 2007. The order further finds interest at the rate of 16% calculated to the date of the order, in the amount of \$7,764.20, and assesses a civil penalty in the amount of \$11,884.00, for a total amount due of \$67,186.95.

SUMMARY OF EVIDENCE

On November 7, 2006, Ali Raza filed a claim with the New York State Department of Labor (DOL) alleging that he worked as a driver for petitioners Paul Muller, Marcia Muller and Friendly Transportation, Inc.¹ from March 23, 2006 to October 31, 2006 at an agreed wage rate of \$10.00 an hour. Raza's claim further alleges that he was terminated on October 31, 2006 because he had an "emergency," and that he worked seven days a week, 16 hours a day during his last weeks of employment and was only paid a total of \$200.00 during that time period. Accordingly, he claimed that the petitioners owed him \$5,400.00.

On May 11, 2007, Usman Hanif also filed a claim with DOL. Hanif's claim alleges that he worked as a dispatcher for the petitioners from July 21, 2004 to May 9, 2007, and was discharged because the petitioners "found someone else." Hanif's claim alleges that his rate of pay was \$15.00 an hour and that he was not paid any wages from January 2, 2007 to May 7, 2007, and that he worked an alternating weekly schedule of 79 and 81 hours during that time period. An additional claim for minimum wage/overtime filed by Hanif alleges that he worked from July 21, 2004 to May 11, 2007 for 89 hours a week. His wage rate was \$13.00 an hour from July 21, 2004 to February 9, 2006; and \$15.00 an hour from February 9, 2006 to May 9, 2007. The claim alleges that no overtime premium was paid for hours worked over 40 in a week. Hanif's claim indicates he did not work "Ramadan."

DOL Labor Standards Investigator Erin Gibbons testified that her investigation of the petitioners began on July 25, 2007. She reviewed the claims filed by Raza and Hanif, and then went to the petitioners' office where she met with Marcia Muller but was unable to review any records. Gibbons stated that Marcia Muller was supposed to call Paul Muller to advise him of the investigation and gather records to submit to DOL. Gibbons testified that the petitioners never provided any documents and that they made promises to her but never actually cooperated with the investigation. Gibbons explained that eventually she had no choice but to issue the order based on the claim forms filed with DOL, because the petitioners never provided any records. She calculated the overtime wages owed to Hanif based on an alternating work weeks of five and six days (52 ½ and 63 hours respectively), and assumed that the petitioners paid the promised wages at straight-time.

After the first day of hearing, Gibbons recalculated the wages due to Hanif to account for payments made according to paystubs produced at the hearing. The

¹ Friendly Transportation is a livery car service with offices in Great Neck, New York.

recalculation credits the petitioners with payments in the amount of \$1,543.50 made to Hanif on March 3, March 20, and April 10, 2007, and reduces the wages due and owing to \$39,776.25. Additionally, Gibbons admitted that although Hanif's claim alleges he was paid \$13.00 an hour for part of the claim period, the order is based on a \$15.00 an hour wage rate for the entire claim period. Furthermore, Gibbons did not take days off for Ramadan into account when calculating the amount owed to Hanif.

Gibbons testified that the 25% civil penalty was determined by a Senior Labor Standards Investigator.

Marcia Muller stated that between 2004 and 2007 she worked as a dispatcher for Friendly Transportation, but that during that time period she did not work for 2 ½ of the years, although she does not recall when it was that she did not work. She also testified that she was "retired" and that during the relevant time period she was an owner of Friendly Transportation, Inc. Marcia Muller further testified that Paul Muller was frequently in the hospital and not involved with the company during his hospitalizations. She does not remember when Paul Muller was in the hospital.

Marcia Muller testified that Hanif was a part-time dispatcher, and that he sometimes worked full-time. She does not know how many hours Hanif worked, but testified all employees, including herself, punched a time clock upon arriving to work and upon leaving. She explained that the time cards were filed in boxes and that payroll sheets, which were based on the time cards and sent to the payroll company each week, were filed in binders. Marcia Muller does not know where the time cards or payroll sheets are currently located. Marcia Muller doubts that she ever paid Hanif's wages in cash.

Paul Muller testified that he was the owner and president of Friendly Transportation, Inc. during the relevant time period. He testified that Hanif was employed by Friendly Transportation from 2004 to 2007, although he could not recall the exact dates. Muller testified that Hanif was always a driver in some capacity while working for Friendly Transportation and that he only worked part-time in the office. According to Muller, Hanif was originally hired as a driver, but since he was under 25 years old at the time and therefore not supposed to drive due to insurance issues, he came into the office part-time to "fill in." Starting in January 2007, Hanif started working more hours in the office than driving because the "main dispatcher" was on vacation. Friendly Transportation paid Hanif 35% commissions plus tips when he worked as a driver, and his rate as a dispatcher was \$10.00 to \$15.00 an hour. Muller further explained that Hanif was a driver "for most of the time when he first started," so he could not have been working in the office the amount of hours claimed.

Paul Muller testified that the business was open 24 hours, seven days a week, and that three or four dispatchers split the 148 hours covered. Muller stated that during the relevant time period he did not remember Hanif working overtime, although other dispatchers did. Muller specifically mentioned that another dispatcher, who worked the overnight shift, worked overtime and was paid time and one-half for the overtime hours he worked. Muller did not know how many hours a week Hanif worked, and testified that

Hanif did not work any specific schedule. According to Muller, there were time periods when Hanif did not work, but he was not sure when those periods were.

Muller testified that Hanif was paid by check, and was never paid part of his wages in cash. However, Muller also testified that Hanif did take cash advances, "because when I would collect the receipts in the morning there would be cash missing if he were to book out a driver . . . and he would leave a note in the thing, 'Usman took \$100.'" Muller explained that there were misunderstandings concerning these cash advances and that they "never got the paperwork caught up." Muller further explained that Hanif

“. . . would take an advance. Say he worked for \$100. He took the \$100 cash and then he would – then, you know, the money would be taken out of his paycheck, but he already cashed – in other words, he cashed his check, and he would owe me the money.”

Muller testified that records, or IOUs, were maintained of the cash advances and stapled to Hanif's timecards, which have been misplaced. Indeed, Muller testified that the building where Friendly Transportation's records were kept was condemned, leaving him without access to the company's wage and hour records.

Muller stated that the petitioners fired Hanif in April or May 2007 because they caught him drinking alcohol in a company car. Hanif never brought any concerns about the way he was being paid to the petitioners, and did not file a claim with DOL until after he had been fired.

Muller explained that he was in and out of the hospital in 2007, including several short periods of one to two weeks between January and April. Muller could not recall the exact dates of his hospitalizations.

The claimant, Usman Hanif, testified that he started working for the petitioners in 2004. He was originally hired as a phone operator by a dispatcher named Ian, and a week later spoke to Paul Muller. Hanif worked as a phone operator for two years "here and there" with some time off. His starting pay was \$10.00 an hour, which was raised by Paul Muller to \$13.00 an hour after one week of work. Hanif worked an alternating schedule of five to six days a week. The shift normally started at 7:00 a.m. and ended at 6:00 or 7:00 p.m. Hanif became a dispatcher in 2005 or the beginning of 2006, at which point he was working both jobs – 30% of the time as an operator and 70% as a dispatcher.

Hanif testified that the petitioners paid his wages in a combination of check and cash, and that he was never paid correctly. His wages were "always off here and there." The petitioners paid Hanif for 40 hours by check, and for the rest of his hours in cash. In 2004 and 2005, Hanif attended college for three months, and did not work overtime. During that time period, he received all his wages by check. The petitioners kept track of Hanif's hours by using time cards, which enabled him to track how much money he was owed.

Hanif testified that he was not correctly paid from January to May 2007. During that time, the petitioners paid him sporadically, only every five weeks "or so." Paul Muller was in the hospital at the time, Marcia Muller was not running the business, and Hanif was not sure whether Vicky Muller was in charge. In April, Glenn Muller "came around."

Hanif explained that since he was not being paid and needed money, he was able to take an advance one time in February 2007 with Marcia Muller's approval. He testified that he "would call Marcia and say 'nobody is paying me and I have bills to pay,' and she would say 'you can write a slip and drop it in the safe box that you are taking \$1,000, and we will adjust it according to what we owe you.'" Hanif stated that he complained on a weekly basis that he had not been paid, and was always told that Vicky Muller was "in charge of that."

In March 2007, Hanif told the petitioners he would quit if he wasn't paid. He did not work for two days, and then was given two checks. He was also given \$700.00 or \$800.00 in cash at the same time and \$1,200.00 the following week. He was not paid any more wages by the petitioners after that.

Hanif testified that on his last day of work, he telephoned Marcia Muller to ask for his wages. She did not answer the phone and he left a message. Glenn Muller then showed up at the office and told Hanif that he was being replaced. Hanif demanded his wages from Glenn Muller at that time who told him, "we don't owe you any money. Whatever you are owed, you are owed by Paul." Later, Hanif spoke to Paul, who said he no longer had control of the business, but would do his best to pay him. The petitioners never paid Hanif any wages after he was fired.

Hanif explained that his claim was based on an average of the hours he worked, and that he credited the petitioners with any cash advances that they had paid him. He further explained that he worked less than 40 hours a week from September 2004 to September 2006, and was paid "accurately" prior to January 2007. After January 2007, the petitioners paid him every five weeks, but not all that was owed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Board makes the following findings of fact and law pursuant to the provision of Board Rules of Procedure and Practice (Rules) 65.39 (12 NYCRR 65.39).

The 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 (Labor Law § 101, 103; 12 NYCRR 65.30).

While the petitioners testified that they maintained the required records of the hours worked by and wages paid to the claimants, it is undisputed that such records were never provided to DOL, nor were they produced at hearing. The petitioners' failure to produce records does not bar their employees from filing wage claims. Where the claims demonstrate a violation of the Labor Law, DOL must credit the information contained in the

claims and the claimants' statements and calculate wages due based on such information. The petitioners then bear the burden of proving that the disputed wages were paid (Labor Law § 196-a; *Angello v Nail. fin. Corp.*, 1 AD3d 818, 821 [3d Dept 1989]. As the Appellate Division stated in *Matter of Mid Hudson Pam Corp v Hartnett*, 156 AD2d 818, 821 [3d 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 calculation to the employer."

Therefore, the petitioners have the burden of showing that the Commissioner's order is invalid or unreasonable by a preponderance of the evidence of the specific hours that the claimant worked and that he was paid for the those hours, or other evidence that shows the Commissioner's findings to be invalid or unreasonable (*In the Matter of Ram Hotels, Inc.* Board Docket No. PR 08-078, October 11, 2011). Where no wage and hour records are available, DOL is "entitled[d] to make just and reasonable inferences and use other evidence to establish the amount of underpayments, even though the results may be approximate" (*Hy-Tech Coatings v New York State Dept. of Labor*, 226 AD2d 378, [(1st Dept 1996)], citing *Mid-Hudson Pam Corp.*).

Claim of Usman Hanif

DOL determined based on Hanif's claim form and subsequent statements, that he was owed a total of \$42,138.75, which represented unpaid overtime for the period July 27, 2004 to December 31, 2006, and unpaid wages from January 1, 2007 to May 8, 2007. As shown at hearing, DOL's determination was defective in many respects, including using the wrong wage rate for part of the claim period (\$15.00 an hour instead of \$13.00 an hour), finding any overtime due and owing from September 2004 to 2006 when the Hanif testified he worked less than 40 hours a week, not taking into account days Hanif did not work in observance of Ramadan, and not crediting the petitioners with \$1,543.50 they paid Hanif by check and \$1,900.00 they paid him in cash in 2007.

We find based on the testimony and evidence at hearing that Hanif is owed \$21,354.50 in unpaid wages, calculated as follows, and modify the order accordingly²:

<u>Week of</u>	<u>Hours</u>	<u>Overtime Hours</u>	<u>Regular Rate</u>	<u>Overtime rate³</u>	<u>Wages Paid</u>	<u>Wages Owed</u>
7/25/2004	57.5	17.5	\$10.00	\$15.00	\$575.00	\$87.50

² Because of the unusual circumstances of this case, the record was left open for the Petitioners to provide additional documents in support of their case. On March 4, 2011, Petitioners' attorney submitted 2006 and 2007 W-2 forms for Claimant Usman Hanif, as well as a payroll journal for weeks ending January 3, January 17, January 24, January 31, February 7, February 14, March 28, and May 2, 2006, and March 6, March 20, March 27, April 3, April 10, April 17, April 24, and May 8, 2007. Neither daily time records, nor cancelled checks or check stubs were furnished by the Petitioners to demonstrate the daily hours worked by the Claimants or to demonstrate that the Claimants were actually paid. Nor was any supporting affidavit filed to authenticate these documents. We have therefore given no weight to the documents filed post-hearing.

³ 12 NYCRR 142-2.2 requires the petitioners to pay time and one-half of the claimant's regular rate for all hours worked over 40 in a workweek.

8/1/2004	69	29	\$13.00	\$19.50	\$897.00	\$188.50
8/8/2004	57.5	17.5	\$13.00	\$19.50	\$747.50	\$113.75
8/15/2004	69	29	\$13.00	\$19.50	\$897.00	\$188.50
8/22/2004	57.5	17.5	\$13.00	\$19.50	\$747.50	\$113.75
8/29/2004	69	29	\$13.00	\$19.50	\$897.00	\$188.50
10/1/2006	57.5	17.5	\$15.00	\$22.50	\$862.50	\$131.25
10/8/2006	69	29	\$15.00	\$22.50	\$1,035.00	\$217.50
10/15/2006	57.5	17.5	\$15.00	\$22.50	\$862.50	\$131.25
10/22/2006	69	29	\$15.00	\$22.50	\$1,035.00	\$217.50
10/29/2006	57.5	17.5	\$15.00	\$22.50	\$862.50	\$131.25
11/5/2006	69	29	\$15.00	\$22.50	\$1,035.00	\$217.50
11/12/2006	57.5	17.5	\$15.00	\$22.50	\$862.50	\$131.25
11/19/2006	69	29	\$15.00	\$22.50	\$1,035.00	\$217.50
11/26/2006	57.5	17.5	\$15.00	\$22.50	\$862.50	\$131.25
12/3/2006	69	29	\$15.00	\$22.50	\$1,035.00	\$217.50
12/10/2006	57.5	17.5	\$15.00	\$22.50	\$862.50	\$131.25
12/17/2006	69	29	\$15.00	\$22.50	\$1,035.00	\$217.50
12/24/2006	57.5	17.5	\$15.00	\$22.50	\$862.50	\$131.25
12/31/2006	69	29	\$15.00	\$22.50	\$0.00	\$1,252.50
1/7/2007	57.5	17.5	\$15.00	\$22.50	\$0.00	\$993.75
1/14/2007	69	29	\$15.00	\$22.50	\$0.00	\$1,252.50
1/21/2007	67.5	27.5	\$15.00	\$22.50	\$0.00	\$1,218.75
1/28/2007	69	29	\$15.00	\$22.50	\$0.00	\$1,252.50
2/4/2007	57.5	17.5	\$15.00	\$22.50	\$0.00	\$993.75
2/11/2007	69	29	\$15.00	\$22.50	\$0.00	\$1,252.50
2/18/2007	57.5	17.5	\$15.00	\$22.50	\$0.00	\$993.75
2/25/2007	69	29	\$15.00	\$22.50	\$0.00	\$1,252.50
3/4/2007	57.5	17.5	\$15.00	\$22.50	\$0.00	\$993.75
3/11/2007	69	29	\$15.00	\$22.50	\$0.00	\$1,252.50
3/18/2007	57.5	17.5	\$15.00	\$22.50	\$0.00	\$993.75
3/25/2007	69	29	\$15.00	\$22.50	\$0.00	\$1,252.50
4/1/2007	57.5	17.5	\$15.00	\$22.50	\$0.00	\$993.75
4/8/2007	69	29	\$15.00	\$22.50	\$0.00	\$1,252.50
4/15/2007	57.5	17.5	\$15.00	\$22.50	\$0.00	\$993.75
4/22/2007	69	29	\$15.00	\$22.50	\$0.00	\$1,252.50
4/29/2007	57.5	17.5	\$15.00	\$22.50	\$0.00	\$993.75
5/6/2007	69	29	\$15.00	\$22.50	\$0.00	\$1,252.50
					Total	\$24,798.00
Less \$1,543.50 checks paid in 2007						\$23,254.50
Less \$1,900.00 cash paid in 2007						\$21,354.50

Claim of Ali Raza

Ali Raza's claim against the petitioners is for \$5,400.00. The petitioners presented no evidence at hearing concerning Raza's claim. Therefore, that portion of the order is affirmed.

Civil Penalty

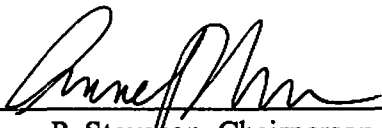
The order imposes a 25% civil penalty against the petitioners. The Petition did not contest the civil penalties, and pursuant to Labor Law § 101[2], any objection not raised in the Petition is deemed waived.

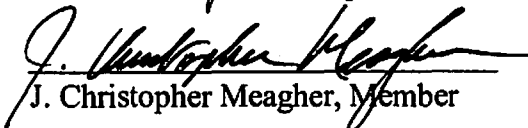
Interest

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 section 14-A sets the "maximum rate of interest" at "sixteen percent per centum per annum." Therefore, the interest imposed by the wage order is affirmed.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

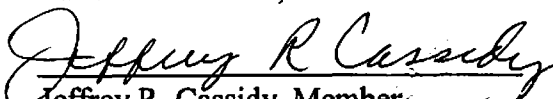
1. The order to comply with Articles 6 and 19 of the Labor Law dated April 25, 2008 is modified to reduce the total wages due and owing to \$26,754.50 with interest and penalty recalculated based on the new principal; and
2. The petition for review be, and the same hereby is, denied.


 Anne P. Stevason, Chairperson


 J. Christopher Meagher, Member


 Jean Grumet, Member

 LaMarr J. Jackson, Member


 Jeffrey R. Cassidy, Member

Dated and signed in the Office
 of the Industrial Board of Appeals
 at New York, New York, on
 March 29, 2012.