

STATE OF NEW YORK  
INDUSTRIAL BOARD OF APPEALS

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 In the Matter of the Petition of: :  
 :  
 FRANK MARINO, RICK FIALLO AND FM :  
 CLEANING INC., :  
 :  
 Petitioners, :  
 :  
 To Review Under Section 101 of the Labor Law: :  
 An Order to Comply with Article 6, dated February :  
 19, 2010, :  
 :  
 - against - :  
 :  
 THE COMMISSIONER OF LABOR, :  
 :  
 Respondent. :  
 -----X

DOCKET NO. PR 10-064

RESOLUTION OF DECISION

**APPEARANCES**

Frank Marino, *pro se* petitioner and for petitioner FM Cleaning, Inc.  
Pico Ben-Amotz, Acting Counsel, NYS Department of Labor (Larissa C. Bates of counsel),  
for the respondent.

**WITNESSES**

Frank Marino for petitioners; Senior Labor Standards Investigator Jeremy Kuttruff and Lani  
Norwood for respondent.

**WHEREAS:**

The petition in this matter was filed with the Industrial Board of Appeals (Board) on  
March 5, 2010 and seeks review of an order issued by the Commissioner of Labor  
(Commissioner or respondent) against petitioners Rick Fiallo, Frank Marino and FM  
Cleaning, Inc. on February 19, 2010. Upon notice to the parties a hearing was held on  
December 21, 2011, in New York City before Anne Stevason, Esq., Chairperson of the  
Board, and the designated Hearing Officer in this proceeding. Counsel for respondent and  
witness Senior Labor Standards Investigator Jeremy Kuttruff appeared by video from the  
Board's Albany office. Frank Marino appeared at the hearing on behalf of himself and FM

Cleaning, Inc. Rick Fiallo failed to appear at hearing. Each party was afforded a full opportunity to present documentary evidence, to examine and cross-examine witnesses, make statements relevant to the issues.

The order is an order to comply with Article 6 of the Labor Law, which finds that the petitioners failed to pay wages in the amount of \$414.28 to claimant Lani Norwood for the period of 7/13/09 through 7/24/09. The order further finds interest at the rate of 16% calculated to the date of the order, in the amount of \$38.14, and assesses a civil penalty in the amount of \$414.28, for a total amount due of \$866.70. A civil penalty order for \$500.00 was also issued to petitioners on the same day for failure to keep and/or furnish accurate payroll records. The civil penalty order was not appealed.

### SUMMARY OF EVIDENCE

On August 10, 2009, Lani Norwood (Norwood or claimant) filed a claim with the Department of Labor (DOL) for unpaid wages for the period of July 13, 2009 through July 24, 2009. The claim provided that Norwood worked for FM Cleaning, Inc., a maid service, during that period and was not paid all wages due. She was hired on July 10, 2009 at a rate of \$8.50 per hour and was supervised by Rick Fiallo. Norwood followed up her claim with a letter attaching a copy of her wage statement for the pay period 7/2/09 to 7/16/09 issued on 7/31/09 which indicated that she was paid for 6.5 hours at the rate of \$7.50 and 8 hours at the rate of \$8.50 and an additional \$6.00 for travel for a total gross wage of \$122.75. The wage statement also indicated that Norwood had been paid \$116.75 at a prior time that year. Also attached to claimant's letter was a copy of her paycheck dated 7/31/09 for \$113.24.

On October 8, 2009, DOL sent a letter to petitioners notifying them of Norwood's claim. In response, DOL received a letter from Rick Fiallo stating that Norwood quit her job on July 8<sup>th</sup>. Attached to his letter was payroll information indicating that Norwood earned \$48.75 for training and then worked a total of 8 hours on July 1 and July 2, 2009 at the rate of \$7.50 per hour for total wages due of \$108.75.

DOL sent another letter to petitioners on December 7, 2009 detailing the information received from Norwood and attaching a copy of the wage statement and paycheck and indicating that since petitioners had not submitted contemporaneous payroll or time records but only inadequate computer generated records which contained a different period of employment, DOL would be relying on Norwood's claim and issuing an order to comply unless payment of the \$414.28 in wages was remitted by petitioners. On January 11, 2010, Fiallo faxed a letter to DOL in response and attached an earnings record which was similar to claimant's pay stub. Fiallo again maintained that Norwood worked only June 29 through July 2, 2009 but this time stated that she worked at a rate of \$7.50 per hour for training and \$8.50 per hour thereafter. During the next two days, Fiallo faxed 2 additional letters which contained the same payroll information he had originally produced in October.

At hearing, petitioner Frank Marino testified that he was the owner of FM Cleaning, Inc. which was doing business as Maid Pro. Rick Fiallo was office manager and ran the business on a day to day basis. Marino produced computer records which he stated indicated that Norwood worked June 29, 2009 to July 2, 2009 and which he introduced into

evidence as payroll history for June 1, 2009 through July 31, 2009. The payroll history was based on work orders received by FM and the information was entered into the computer by Fiallo. Marino spoke with Fiallo on a daily basis and relied on information given to him by Fiallo. He had not met Norwood before the hearing. There was no record of the actual number of hours spent training, cleaning or traveling between jobs. Each job was assigned a time and 15 or 20 minutes would be added for travel.

Claimant Norwood testified at hearing and verified the information contained in her claim. She reported to Fiallo. Her job was to go to offices and residences to clean. Her training consisted of cleaning. Fiallo never asked her the number of hours that she worked.

Senior Labor Standards Investigator Jeremy Kuttruff testified as to the correspondence he had with Fiallo during the DOL investigation. He also explained how the DOL determined that Norwood was still owed \$414.28. Norwood stated that she worked 33.5 hours at the minimum wage rate of \$7.15 during the week ending on July 16, 2009 and earned \$239.53. She received gross wages in the amount of \$122.75 leaving \$116.78 still owed for that week. Norwood worked 35 hours at the rate of \$8.50 per hour during the next pay period for which she received no payment. She is still owed \$297.50 for that week so that the total amount owed to Norwood is \$116.78 + \$297.50 or \$414.28.

### **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).

#### **Recordkeeping Requirements**

Article 19 of the Labor Law, known as the "Minimum Wage Act," defines "[e]mployee," with certain exceptions not relevant to this appeal, as including "any individual employed or permitted to work in any occupation (Labor Law § 651 [5])." Labor Law § 661 requires employers to maintain payroll records for employees covered by the Act and to make such records available to the Commissioner:

"Every employer shall keep true and accurate records of hours worked by each employee covered by an hourly minimum wage rate, the wages paid to all employees, and such other information as the commissioner deems material and necessary, and shall, on demand, furnish to the commissioner or [her] duly authorized representative a sworn statement of the same. Every employer shall keep such records open to inspection by the commissioner or [her] duly authorized representative at any reasonable time. . ."

The Commissioner's regulations implementing Article 19 provide at 12 NYCRR § 142-2.6:

- “(a) Every employer shall establish, maintain and preserve for not less than six years weekly payroll records which shall show for each employee:
- (1) name and address;
  - (2) social security number;
  - (3) wage rate;
  - (4) the number of hours worked daily and weekly, including the time of arrival and departure for each employee working a split shift or spread of hours exceeding 10;
  - (5) when a piece-rate method of payment is used, the number of units produced daily and weekly;
  - (6) the amount of gross wages;
  - (7) deductions from gross wages;
  - (8) allowances, if any, claimed as part of the minimum wage.”

During the DOL investigation, in response to the claim of Norwood, Rick Fiallo first provided a record which indicated that Norwood began employment on June 30, 2009, only worked June 30, July 1 and July 2, resigned on July 8, 2009, was paid at the rate of \$7.50 per hour, and earned a total of \$108.75. On January 11, 2010, in response to receiving a copy of the pay stub which Norwood provided to DOL, Fiallo sent DOL a letter indicating that she started working on June 29 and that her rate of pay was \$7.50 per hour for training and \$8.50 per hour thereafter. Given the inconsistencies in petitioners' representations and the failure at any time to provide time records of the hours that Norwood worked, we find that petitioners failed to maintain and furnish adequate payroll records for claimant.

C. DOL's Calculation of Wages in the Absence of Adequate Employer Records.

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 complaint'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. Labor Law § 196-a provides that employers who keep inadequate records “shall bear the burden of proving that the complaining employee was paid wages, benefits, and wage supplements” (*see Angello v Natl. Fin. 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 [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 calculations 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 she 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).

Given the inconsistencies in petitioners' position regarding what hours Norwood worked and for what wage rate and in light of the credible testimony of Norwood at hearing, the Board finds that petitioners failed to satisfy their burden and the Commissioner's order, which was based on Norwood's claim and pay stub was reasonable and valid.

*Civil Penalty*

The order imposes a 100% 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.

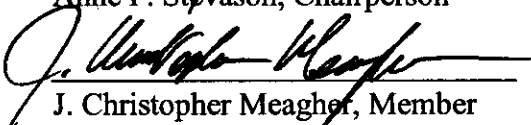
*Interest*

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 Article 6 of the Labor Law dated February 19, 2010 is affirmed; and
2. The petition for review be, and the same hereby is, denied.

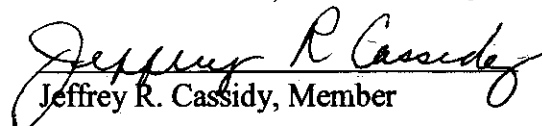
  
 Anne P. Stevason, Chairperson

  
 J. Christopher Meagher, Member

  
 Jean Grumet, Member

Dated and signed in the Office  
 of the Industrial Board of Appeals  
 at New York, New York, on  
 May 30, 2012.

LaMarr J. Jackson, Member

  
 Jeffrey R. Cassidy, Member

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Anne P. Stevason, Chairperson

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J. Christopher Meagher, Member

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Jean Grumet, Member

  
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LaMarr J. Jackson, Member

Dated and signed by a Member  
of the Industrial Board of Appeals  
at Rochester, New York, on  
June 4, 2012.

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Jeffrey R. Cassidy, Member