STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of: NEIL FESETTE AND FESETTE REALTY, INC., Petitioners To Review Under Section 101 of the Labor Law: An Order to Comply with Article 6 and an Order under Article 7 of the Labor Law, both dated February 16, 2010, - against - THE COMMISSIONER OF LABOR, Respondent.	DOCKET NO. PR 10-112 RESOLUTION OF DECISION

APPEARANCES

Niles & Bracy, PLLC (Evan F. Bracy of counsel), for Petitioners.

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

WITNESSES

Neil Fesette and Alberta Blaine, for Petitioners.

Lori Roberts, Senior Labor Standards Investigator, for Respondent.

WHEREAS:

On April 15, 2010, Petitioners filed a petition with the New York State Industrial Board of Appeals (Board), pursuant to Labor Law § 101 and Part 66 of the Board's Rules of Procedure and Practice (Board Rules) (12 NYCRR Part 66), seeking review of two Orders that the Commissioner of Labor (Respondent) issued on February 16, 2010. On January 25, 2013, Petitioners filed an Amended Petition (petition). The first Order is an Order to Comply with Article 6 of the Labor Law (Supplemental Wage Order), which finds that Petitioners failed to pay wage supplements (medical bills) to Leanne Christiana (Claimant) and demands payment of $5,981.90 in supplemental wages due and owing, interest at the rate of 16% calculated to the date of the order in the amount of $1,237.68 and a civil penalty in the amount of $5,981.90, for a total amount of $13,201.48. The second Order is an Order under Article 7 of the Labor Law and assesses a penalty of $500.00 for the failure to notify Claimant of the cancellation of health insurance.

The petition asserts that the Orders are invalid or unreasonable because Petitioners informed Claimant of the termination of her health insurance, and her right to continue it under COBRA (Consolidated Omnibus Budget Reconciliation Act), at the time of her termination and that Claimant failed to maintain coverage by paying the necessary insurance premiums.

The Respondent's Answer alleges that its determination that supplemental wages were due and owing was reasonable and valid as Petitioners failed to timely notify Claimant of the termination of her health insurance resulting in her incurring unreimbursed medical bills.

Upon notice to the parties, the Board held a hearing in the offices of the Board, in Albany, New York on February 12, 2013, before Jeffrey R. Cassidy, Board Member and designated hearing officer. Each party was afforded a full opportunity to present documentary evidence, examine and cross-examine witnesses, and raise relevant arguments.

SUMMARY OF THE EVIDENCE

Petitioner Neil Fesette owns Fesette Realty, Inc. and employed Claimant as a bookkeeper from May 2007 until her employment was terminated on September 26, 2008. Claimant was responsible for various administrative, bookkeeping and accounting tasks, including the monthly transmittal of health insurance premiums for herself and Petitioner's other employees. At the time of Claimant's discharge, health insurance premiums for all employees had been paid to the end of September, 2008. Effective October 1, 2008, Claimant was taken off Petitioner's health insurance plan.

Claimant submitted $5,690.90 for medical bills that were incurred on October 4 or 5, 2008 to Petitioner's insurance provider. In addition, she incurred an $80 bill for medical services, though the bill in evidence does not list a service date. Also, there is no evidence that the $80 bill was submitted to the insurance provider. On October 4 and 5, 2008, Claimant also incurred medical bills in the amount of $211.00, though there is also no evidence that they were submitted to the insurance provider for reimbursement. On April 28, 2009, Claimant completed a Department of Labor "Claim for Unpaid Wage Supplements," seeking reimbursement for her unreimbursed unspecified medical bills, and stating that her insurance had been cancelled.

Alberta Blaine worked as Petitioner's bookkeeper for three to four years prior to Claimant's employment and began working again for them the day after Claimant was discharged. Within a few days of being rehired, Blaine called Petitioner's health insurance provider to inquire about legal procedures to terminate Claimant's insurance and was told that Claimant's coverage could be terminated immediately. However, Blaine did not immediately terminate Claimant's coverage because the premium had been paid to the end of the month and Petitioner was willing to keep her insured for the few remaining days in September.[1]

Blaine also had a conversation with the health insurance provider about COBRA (Consolidated Omnibus Budget Reconciliation Act) requirements. Blaine testified that based

[1] Unless otherwise indicated, all dates are in 2008.

on that conversation, and her prior experience working with health insurance issues, she sent a certified letter to Claimant telling her that she had a right to continue health insurance under COBRA, the amount she would have to pay, and that she had sixty days to respond. Blaine also testified that her letter stated that Claimant would be covered retroactively to October 1, provided that she responded within a sixty-day window. Blaine believed that she sent the letter on either September 29 or 30th and received a post-office green card, indicating delivery of the letter, three or four days after sending the letter. Blaine explained that she did not keep a copy of the letter, and that the green card was placed on a bulletin board, but that she and Petitioner were unable to locate it.

Blaine stated that Claimant called her within a couple of days after the letter was sent, and requested that Petitioner pay for her coverage. According to Blaine, she told her that Petitioner would not pay for her coverage and that her payment had to be made by either cash or certified check. Blaine and Claimant continued to talk for about a week, and according to Blaine, Claimant threatened to not reveal company computer passwords unless Petitioner paid for her insurance.

Neil Fesette testified that when Claimant was terminated he told her that her insurance would end on October 1. He also testified that he did not tell the Department of Labor during its investigation that Claimant was notified in writing of the termination of her insurance because he was unaware of Blaine's letter until after the hearing in this proceeding was scheduled. Blaine confirmed that she did not inform Petitioner of her letter, or of the receipt of the green card, at or around the time the letter was sent.

Senior Labor Standards Investigator Lori Roberts testified that Claimant told her that the health insurance provider notified her in November 2008 that her health insurance was cancelled, and that Claimant "Did not inform [her] of any other notice that she had received regarding cancellation of her insurance [.]"

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]). It also provides that an order of the Commissioner shall be presumed "valid" unless declared invalid in a proceeding brought under the provisions of this chapter (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 the 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 (Board's Rules of Procedure and Practice § 65.30 at 12 NYCRR § 65.30 ["The burden of proof of every allegation in a proceeding shall be upon the person asserting it"]; State Administrative Procedure Act § 306; *Angello v Natl. Fin. Corp.*, 1 AD 3d 850, 854 [3d Dept 2003]).

FINDINGS AND CONCLUSIONS OF LAW

The Board makes the following findings of fact and law pursuant to the provisions of Board Rule 65.39 (12 NYCRR § 65.39). For the reasons stated below, we find that Petitioners met their burden of proving that the Orders were invalid or unreasonable and we revoke the Orders in their entirety.

Respondent argues that Petitioner did not notify Claimant that her health insurance was cancelled on October 1, and that she incurred medical bills on October 4th and 5th which Petitioner is now responsible to reimburse. Respondent also contends that notwithstanding Blaine's testimony that Claimant was notified by certified letter of the cancellation of her insurance, and her entitlement to coverage under COBRA, Petitioners were unable to produce a copy of the letter. Because of the inability to produce the letter, or the green card indicating Claimant's receipt of it, Respondent contends that Blaine's testimony regarding when she forwarded it is unreliable. Respondent also questions whether notice to Claimant, if provided at all, was provided within the five working days required by statute.

Respondent relies upon Labor Law § 195(6), which states:

> "Every employer shall notify any employee terminated from employment, in writing of the exact date of such termination as well as the exact date of cancellation of employee benefits connected with such termination. In no such case shall notice of such termination be provided more than five working days after the date of such termination. Failure to notify an employee of cancellation of accident or health insurance subjects an employer to an additional penalty pursuant to [Labor Law §217]."

Respondent also relies upon Labor Law §217(1), which states:

> "[I]t is the declared public policy of the state of New York that sufficient and timely notice be afforded each employee covered under a group accident or group health policy of the intended termination or substitution of such policy and that employers be required to remit premiums to insurers on behalf of individuals exercising their right to continuation coverage under the law."

Petitioner responds that 11 NYCRR 360.7 is the "corresponding regulation" to § 217 of the Labor Law, and 11 NYCRR 360.7 does not require that written notification of insurance cancellation be provided an employee.

11 NYCRR § 360.7 (b) (4) provides:

> "(4) Within 14 days of receipt of the notification described in paragraphs (2) and (3) of this subdivision, and within 14 days of any other event, condition or action which, as described in sections 3221(m), 4304(k) and 4305(e) of the Insurance Law, cause termination of employment or membership in the class or classes eligible for coverage under the policy or contract, the employer, policyholder or remitting agent, as applicable, shall notify the employee or member or spouse of the employee or member (if any)

> of their rights under the continuation of benefits coverage described in subdivision (a) of this section."

Petitioner also argues that the 14-day notification requirement under 29 USCS § 1166 does not require written notification to qualified beneficiaries of their rights under COBRA. 29 USCS § 1166 requires employers to notify qualified beneficiaries of their right to continued health insurance coverage under the same current health plan, but does not require a specific method of notification, though "[c]ourts have generally approved the employer's methods of giving notice where those methods are reasonably calculated to reach the employee." *Ramallo Brothers Printing*, 203 F. Supp. 2d 120, 125 [2002].

Respondent correctly argues that the issue before the Board is not whether Petitioner was in compliance with its obligations under COBRA, but rather whether Petitioner violated the requirement for termination of insurance benefits under the state Labor Law. Further, 11 NYCRR § 360.7, which is a regulation of the state Insurance Law, does not supplant the clear written notification requirement under Labor Law 195(6). The issue before the Board is whether Claimant was provided with written notification within five days of the cancellation of her insurance benefits. We find that Petitioner notified Claimant in writing and within five working days of her termination.

We credit Blaine's testimony that she forwarded written notice to Claimant within five working days of her termination. Blaine testified that she forwarded, by certified mail, notice to Claimant on either September 29th or 30th, or within one or two working days of Claimant's September 26th termination. She also confirmed that the post office green card showed Claimant's signature in receipt of the letter and that it was returned within three or four days after the letter was sent. We do not find that the failure of Petitioners to produce either the letter or the green card as evidence that the letter was not sent.

The Claimant failed to attend the hearing and thus provided no testimony to counter the testimony of the Petitioners' witnesses that both written and oral notice of termination of insurance was provided to the claimant along with information on how to continue the coverage by paying insurance premiums.

We find that Petitioners met their burden of proof at the hearing by showing that written notice of termination of insurance was given to the Claimant and thereby the basis for the orders under review was invalid.

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NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The Supplemental Wage Order in the amount of $5,981.90 is revoked in its entirety, including interest in the amount of $1,237.68.

2. The Civil Penalty of $5,981.90 is revoked in its entirety.

3. The Penalty Order under Article 7 of the Labor Law in the amount of $500.00 is revoked in its entirety.

4. The petition for review be, and the same hereby is, granted.

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
April 29, 2013.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The Supplemental Wage Order in the amount of $5,981.90 is revoked in its entirety, including interest in the amount of $1,237.68.

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Jeffrey R. Cassidy, Member

Dated and signed by a Member
of the Industrial Board of Appeals
at Rochester, New York, on
April 29, 2013.