STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of:	:	
SVETISLAV JOVANOVIC A/K/A SVETISLAV JOVANIC AND AUTOPREVOZ TRUCKING CORPORATION,	:	
Petitioners,	:	DOCKET NO. PR 10-214
To Review Under Section 101 of the Labor Law: An Order to Comply With Article 6 and an Order Under Article 19 of the Labor Law, both dated May 7, 2010,	:	RESOLUTION OF DECISION
- against -	:	
THE COMMISSIONER OF LABOR,	:	
Respondent.	:	

APPEARANCES

Svetislav Jovanovic (aka Svetislav Jovanic), petitioner *pro se* and for Autoprevoz Trucking Corporation.

Pico Ben-Amotz, Acting Counsel, NYS Department of Labor (Melanie Scotto of counsel), for respondent.

WITNESSES

Svetislav Jovanovic, for petitioners.

Yuri Katilevskyi, claimant; Teri Stewart, Labor Standards Investigator, for the respondent.

WHEREAS:

On July 6, 2010, Petitioners (Petitioners or Jovanovic) 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 (12 NYCRR Part 66), seeking review of two Orders to Comply that the Commissioner of Labor (Commissioner or Respondent) issued on May 7, 2010. The first Order, issued pursuant to Article 6 of the Labor Law (Wage Order), finds that Petitioners failed to pay wages to Yuri Katilevskyi (Claimant) and demands payment of $2,000.00 in wages due and owing, interest at the rate of 16% calculated to the date of the Order in the amount of $318.25 and a civil penalty in the amount of $2,000.00 for a total amount of $4,318.25. The second Order, under Article 19 of the Labor Law (Penalty Order), finds that Petitioners failed to keep and/or furnish true and accurate payroll records and demands a civil penalty in the amount of $500.00.

Also at hearing, Jovanovic denied ever taking a security deposit from employees and asserted that his company withheld Claimant's first week wages because he was in training; wages that Jovanovic stated he was then prepared to pay. However, Jovanovic stated that he was only prepared to pay Claimant $500, or $100 a day, for this period.

SUMMARY OF THE EVIDENCE

Petitioner Svetislav Jovanovic owns Autoprevoz Trucking Corporation (Autoprevoz) and is a subcontractor for FedEx. Autoprevoz owns a number of vehicles for the transportation and delivery of FedEx packages. Claimant Yuri Kateilevskyi worked for Petitioners as a driver from December 5, 2008 until May 9, 2009, when he got into an accident while driving Petitioners' vehicle.[1] Claimant reported the accident to Jovanovic, and according to Jovanovic, Claimant left the scene of the accident, abandoned Petitioners' truck, and did not finish his day's work.

Jovanovic testified that Claimant was in training for his first five days and that he told Claimant that he would be paid $100 a day for this period if he worked for a year. Claimant, however, testified that he was trained for only one day – Friday to Saturday, December 5 to December 6, and that on the next day, Sunday, December 7, he began to work on his own. Claimant also testified that when he was hired, he reached an agreement with Jovanovic to be paid $1000 for 5 nights (one week) of work, though he was actually paid $970 per week because $30 a week was deducted for Worker's Compensation insurance. He also maintained that he had to provide a $1000 deposit when he was hired, which was made through a withholding of his first week's wages, and that this deposit was not returned to him when he left Petitioner's employ. At hearing, Jovanovic ultimately conceded that Claimant was entitled to be paid for his first week's wages, though he maintained that Claimant was only entitled to $100 a day, or $500 for those days.

Jovanovic issued a paycheck to Claimant on Thursday, May 7, 2009, for the pay period ending May 9, 2009, but said that he stopped payment on the check because Claimant did not complete his work on May 9th. At hearing, Jovanovic conceded that he owed Claimant for four of the five days of work in his last workweek, and Respondent agreed to amend the Wage Order to delete the claim for wages for Claimant's last scheduled work day. However, Petitioners and Respondent did not agree on Claimant's pay rate for the four days that Petitioners consented to pay – Respondent claims the pay rate is $200 a day, or $800 for the four days; Petitioners claim the weekly wage was $900, so four days would equal $720.

In evidence is a December 5, 2009 document, captioned "Autoprevoz Trucking Co." which states that drivers are obligated to pay a $1,000 security deposit when hired. According to the document, the security deposit is returnable unless a driver does not give two weeks resignation notice, abandons his job or vehicle, fails to follow directives that cause financial loss, or damages Autoprevoz vehicles without cause. The document contains a signature, which Jovanovic testified was not his signature.

On July 14, 2009, Claimant filed a wage claim with the Department of Labor (DOL) for five days pay at $200 a day for the week ending December 12, 2008 and for five days pay at $200 a day for the payroll period ending May 9, 2009. DOL Investigator Teri Stewart testified that, based on her review of DOL's investigative file, Petitioners did not provide any

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[1] Jovanovic testified that he believed Claimant began work on December 15, 2008, but conceded that he was unsure when he started. Claimant testified with certainty that his first day of work was December 5, 2008.

payroll records or time sheets that DOL had requested until the Orders were issued. Once the Orders were issued, Petitioners provided time logs, but did not provide payroll records. Stewart explained that initially Jovanovic asserted that Claimant was not paid for his first week of work either because he was in training or because of a deduction taken from each employee. Stewart also explained that Petitioners issued a check to Claimant for his last week of work, but that a stop payment was put on the check.

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]). It also provides that a Commissioner's order shall be presumed "valid" (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 a petitioner's burden at the hearing to prove the allegations that are the basis for the claim that the order under review is invalid or unreasonable (Board 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."); *Angelo v Natl. Fin. Corp.*, 1 AD 3d 850, 854 [3d Dept 2003]). It is therefore Petitioners' burden to prove, by a preponderance of evidence that the Orders are invalid or unreasonable.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

1. Petitioners Violated Article 6 of the Labor Law by Failing to Pay Wages to Claimant.

There are two wage issues in dispute in this matter – whether Claimant is owed wages for his first week and last week, and what Claimant's wage rate is for those weeks. Petitioners, at hearing, consented to pay Claimant for his first week's wages and for four days of his last week's wages. Respondent agreed to amend the Wage Order by including only Claimant's last four workdays. However, Petitioners dispute Claimant's wage rate for all nine days, contending that Claimant was in training for his first work week at a rate of $100 a day, and that his weekly wage rate was $900 a week, or $180 a day. Respondent maintains that Claimant was in training for only one day; that Claimant's first week of wages was withheld as a security deposit; and, that regardless of the number of days in training, Claimant's agreed-upon wage rate is $1000 a week, or $200 a day.

We find that Petitioners required Claimant to pay a security deposit by withholding his first week's pay; that regardless of the number of days that Claimant may have been in training, his agreed-upon rate of pay was $200 a day or $1000 a week; and that he is due and owed $1000 a week for his first week of employment and $800 for his last four days of work.

We credit Claimant's testimony that his first week's wages were withheld as a security deposit against damage to Petitioners' vehicles, and other employee misconduct, and

were not wages withheld for training. Petitioners submitted into evidence a document that they attached to their petition titled "Driver Rules & Regulations" which demands a $1000 security deposit from all drivers, which was to be returned at the end of employment provided the driver complied with its conditions. This document includes a signature line with Jovanovic's name and title, and includes what appears to be Jovanovic's signature when compared to other documents he signed that are in evidence, although he denies it is his signature.

Further, Jovanovic's position of why Claimant's wages were withheld varied with the petitions that he filed. The first petition stated Claimant was not entitled to his $2000 wage claim as the "$2000 was split between $1000 for week of the working deposit and $1000 for one week of completed work he never completed." However, Petitioners' amended petition claimed that Claimant's first week's wages were withheld because he was in training. The amended petition also claims that Claimant was in training for ten days, which contradicts Jovanovic's own sworn testimony that Claimant was in training for five days.

Withholding Claimant's wages for damages to an employer's property, or as a penalty for failure to properly perform his job violates Labor Law 193 because such withholding is neither authorized by any law, rule or regulation, nor one of the deductions allowed by the statute (*Matter of William Dictor and Hanlon Auto Transport, Inc. PR 09-003* [June 18, 2009] [deductions for breach of duty to company, deposit to cover damages to employer's property, or for damages caused by employee to company vehicle are barred by statute]; *Guepet v International Tao System, Inc.*, 110 Misc. 2d 940, 941 (Sup. Ct. Nassau County, 1981) ["Nowhere does [Section 193] permit an employer to make contemporaneous deductions from wages because an employee failed to perform properly."]). The regulations also prohibit deductions for fines or penalties for misconduct committed by an employee (12 NYCRR § 142-2.10). An employer may not withhold wages "because the employee failed to submit documents and receipts, damaged the employer's property, received loans or advances, or failed to properly perform the work assigned" (*Tomasz Wojtowicz and Tommy Transportation*, PR 10-102 [June 12, 2013]).

Further, Petitioners' deductions from Claimant's wages are prohibited by Labor Law § 193 regardless of whether they were withheld for training or for a security deposit. The law prohibits an employer from deducting monies from an employee's wages except as "are made in accordance with the provisions of any law" or as "are expressly authorized in writing by the employee and are for the benefit of the employee." The statute specifies the deductions that an employee may authorize and these do not include withholding wages for a security deposit or for training.

We also find that Claimant's agreed-upon wage rate is $1000 a week, or $200 a day and that there was no agreement to pay less than that even if the wages withheld were for training and not as a security deposit. Jovanovic's assertion that Claimant's wage rate for work other than training was $900 a week is contradicted by copies of paychecks he issued to Claimant. Thirteen of twenty paychecks Petitioners submitted into evidence show that Claimant was paid $970 a week, and none of the other checks are for the $900 a week Jovanovic claimed was Claimant's pay. While the $970 amounts are different from Claimant's $1000 wage claims, we credit Claimant's testimony that the reduction was made by Petitioners for Worker's Compensation premiums, which also is a deduction not permitted under Labor Law § 193.

Further, Petitioners' original petition recognized that Claimant was entitled to $1000 a week as it stated that Claimant's $2000 claim for two weeks was split between $1000 for a security deposit and $1000 for uncompleted work:

> "...Mr. Katilevskyi is not entitled to the $2000 he is making a claim to. To review: the $2000 was split between $1000 for week of the working deposit and $1000 for one week of completed work he never completed. Again Mr. Katilevskyi is not entitled to the $1000 deposit return because of the damage he caused to the equipment on more than one occasion. In addition he is not entitled to the other $1000 since he never completed his work."

Moreover, Jovanovic forwarded a letter to the DOL on August 15, 2009, stating that Claimant's first week of wages was held as a security deposit.

For the reasons discussed above, we affirm the Wage Order as modified by the parties at hearing.

2. Civil Penalty

Petitioners did not submit evidence showing that the 100% civil penalty was unreasonable or invalid. The Board finds that the civil penalty assessed is reasonable and valid in all respects.

3. Interest

Labor Law § 219 (1) provides that when the Commissioner determines that wages are due, 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 percent per centum per annum."

4. The Penalty Order is Affirmed Since Petitioners Failed to Keep Adequate Records.

An employer's obligation to keep adequate employment records and to make such records available to the Commissioner is found in Labor Law § 661 (Article 19, Minimum Wage Act) as well as the New York Code of Rules and Regulations (NYCRR). Specifically, title 12 of the NYCRR, § 142-2.6 provides, in pertinent part:

> "(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 . . . ;
> (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;
> (9) net wages paid; and

(10) student classification

" . . .

"(d) Employers . . . shall make such records... available upon request of the commissioner at the place of employment."

Labor Law § 661 provides:

> "...every employer shall establish, maintain, and preserve for not less than six years contemporaneous, true, and accurate payroll records showing for each week worked the hours worked, the rate or rates of pay and basis thereof, whether paid by the hour, shift, day, week, salary, piece, commission or other basis; gross wages; deductions; allowances, if any, claimed as part of the minimum wage; and net wages for each employee, plus such other information as the commissioner deems material and necessary...Every employer shall keep such records open to inspection by the commissioner or his duly authorized representative at any reasonable time..."

Here, Petitioners have failed to maintain, or produce, any time records for Claimant, and have otherwise failed to maintain, or produce, payroll records that were in compliance with Labor Law § 661, as further specified in NYCRR §§ 142-2.6. DOL investigator Stewart testified that Petitioners did not supply the Commissioner with payroll records until the Orders were issued and then only supplied time logs, an assertion not rebutted by Petitioners. We affirm the Penalty Order.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The Wage Order is modified to the amount of $1,800. The interest and civil penalty are affirmed, subject to recalculation based on $1,800; and

2. The Penalty Order is affirmed; and

3. The petition for review be, and the same hereby is, otherwise 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
November 20, 2013.