

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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 In the Matter of the Petition of: :
 :
 GEORGE SUKKARIEH AND AMERICAN :
 LANDSTAR TRANSPORT INC., :
 :
 Petitioners, :
 :
 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 issued :
 February 7, 2011, :
 :
 - against - :
 :
 THE COMMISSIONER OF LABOR, :
 :
 Respondent. :
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DOCKET NO. PR 11-077

RESOLUTION OF DECISION

APPEARANCES

George Sukkarieh, *pro se* petitioner and for petitioner American Landstar Transport Inc.

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

WITNESSES

George Sukkarieh, for petitioners.

Paul Kalka, Senior Labor Standards Investigator, for respondent.

WHEREAS:

On March 14, 2011, petitioners George Sukkarieh and American Landstar Transport Inc. (petitioner) filed a petition to review two Orders that the Commissioner of Labor (Commissioner) issued against them on February 7, 2011. The first order is an Order to Comply with Article 6 of the New York Labor Law (Wage Order) and directs petitioner to pay \$689.00 in unpaid wages owed to Stephanie Kovalsky (claimant) for the period June 29, 2009 through July 7, 2009, \$215.20 in interest, \$172.25 in liquidated damages and \$1,396.00 in civil penalties for a total of \$2,472.45.

The second Order was issued under Article 19 (Penalty Order) and directs petitioner to pay \$1,500.00 in civil penalties based on: (1) the failure to provide wage statements to employees with every payment of wages (\$500); and (2) the failure to keep and furnish the requisite payroll records from June 16, 2009 through July 7, 2009 (\$1,000).

The petition alleges that the claimant's last day of work was June 26, 2009 and that she did not work for petitioner from June 29 through July 7, 2009, and was paid all wages that were due her. It also alleged that the time cards submitted by claimant were falsified and not from petitioner.

In his answer, dated April 18, 2011, the Commissioner alleges that on or about July 18, 2009, Stephanie Kovalsky filed a claim with the Department of Labor (DOL) alleging that she worked for petitioner and has not been paid for 53 hours.

Upon notice to the parties, a hearing was held on April 20, 2013, in New York City before Anne P. Stevason, Chairperson 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, and to make statements relevant to the issues.

I. SUMMARY OF EVIDENCE

Testimony of George Sukkarieh

American Landstar Transport Inc. is a trucking company wholly owned by petitioner Sukkarieh and managed by petitioner's father. Petitioner is in the office three or four times a week.

Claimant was hired by petitioner's father around May 2009. She was responsible for inputting driver data into the computer and did some bookkeeping and filing. Claimant's employment was terminated on June 26, 2009 by petitioner's father. Petitioner was not present when claimant was terminated. Sukkarieh testified that claimant did not work during the period of the claim, from June 29, 2009 to July 7, 2009. However, Sukkarieh was not present in the office during that period of time.

Petitioner testified that he was told by his father that after he terminated claimant's employment on June 26, claimant's boyfriend came to the office on either that Friday or Monday and assaulted petitioner's father. Petitioner was not present for the assault but later picked up his father and took him to the hospital.

Petitioner presented time sheets which he testified were the time records kept by the company. The time was recorded on a computer spread sheet. Petitioner's office manager Danielle kept the records and manually entered everyone's time on a daily basis. There was no time clock at the office.

Petitioner also testified that each employee received a paystub with each payment of wages and that the paystub shows hours worked and all necessary deductions. Petitioner did not bring any payroll records to show amounts paid to claimant.

Testimony of Senior Labor Standards Investigator Paul Kalka

Senior Labor Standard Investigator (SLSI) Paul Kalka testified, based on the Department of Labor (DOL) investigative file, that on July 18, 2009, Stephanie Kovalsky filed a claim for unpaid wages for the period of June 29, 2009 through July 7, 2009. Along with her claim, she filed copies of three time cards for the period in question and two paystubs. The time cards were the sort that contain imprinted time which indicates that a time clock was used. The paystubs listed the employer and the specific payroll period but did not contain any deductions or hours worked. Claimant claimed \$689.00 in unpaid wages which was based on 53 hours multiplied by her wage rate of \$13.00 per hour.

Entered into evidence was the claim form filed by claimant for \$689.00, based on working 38.5 hours for the week ending July 3, 2009 and 14.5 hours for the week ending July 10, 2009. Attached to her claim form were copies of her time cards for the weeks ending June 19, 2009; June 26, 2009; and July 4, 2009 and the corresponding wage statements for June 19 and June 26.

When the claim was sent to petitioner he responded by letter stating that claimant's time sheets were not of the kind used by petitioner and enclosing copies of petitioner's time sheets. These time sheets were signed by the manager and not claimant. The in and out times indicated on the time sheets were identical to the times listed on the time cards. The only difference is that petitioner failed to submit a time record for the week ending July 4, 2009. DOL gave credence to claimant's time sheet due to the fact that it was made from a mechanical time clock and because petitioner's time records were computer generated and not signed by claimant. Thereafter an Order to Comply was issued against petitioner on February 7, 2011.

SLSI Kalka testified that a 200% civil penalty was added to the wage order due to the fact that a related company, Ranger Nationwide Translimited Corp. (Ranger), has a previous Labor Law violation.

Rebuttal

In rebuttal, petitioner testified that Ranger was his father's company and that he had no ownership interest in the company.

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 [C]ommissioner 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”]; State Administrative Procedure Act § 306; *Angelo v Natl. Fin. Corp.*, 1 AD 3d 850, 854 [3d Dept 2003]). It is therefore Petitioners’ burden to prove, by a preponderance of the evidence, that Claimant’s wages are not due and owing. It is also Petitioners’ burden to prove, by a preponderance of evidence that the Civil Penalty is invalid or unreasonable.

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 Rule 65.39 (12 NYCRR § 65.39).

I. The Wage Order - Petitioners have failed to maintain required records.

A. An Employer’s Obligation to Maintain Records

An employer’s obligation to keep adequate employment records is found in Labor Law § 195 as well as in 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) the 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.”

§ 142-2.7 further provides:

“Every employer. . . shall furnish to each employee a statement with every payment of wages, listing hours worked, rates paid, gross wages, allowances, if any, claimed as part of the minimum wage, deductions and net wages.”

Petitioner failed to meet its burden of proving that it maintained all required payroll records for the period in question. There were no time records or records of payment produced for the period in question. Claimant's paystubs were in evidence but they did not contain all required elements including the number of hours worked or rate of pay.

B. Calculation of Unpaid Wages Due

DOL calculated the amount of unpaid wages based on the claim filed by the claimant. Her claim was credible in that it contained copies of time cards which showed the exact times that she worked and accompanying pay stubs which proved her rate of pay of \$13.00 per hour. It was reasonable for DOL to credit these time cards, imprinted by a time clock, as opposed to the computer records produced by petitioner, which although they substantially matched claimant's time cards, did not include the week in question. Mr. Sukkariéh testified that he was not present at all in the office during the week in question, nor was there any documentary evidence to show that claimant's employment terminated on June 26, 2009.

We affirm the wage order and find that claimant is owed \$689.00 in unpaid wages.

C. Interest is due.

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.

D. The Civil Penalty is modified.

The order imposes a 200% civil penalty against the petitioners. SLSI Kalka testified that the 200% was based in part on the previous violation of Ranger. Other than Sukkariéh's testimony that Ranger was his father's company, there was no evidence submitted to indicate why petitioners should be deemed to have had a previous violation. Therefore, we find that there was no previous violation which would support a 200% penalty and ~~reduce~~ the penalty ^{revoked} ~~accordingly to 100%.~~

II. The Penalty Order is affirmed in full.

Petitioners were cited \$1,000 for failure to maintain and/or furnish payroll records; and \$500 for failure to provide wage statements with wages. The petition fails to raise any objections to the penalty order. At the hearing, petitioner moved to amend his petition to raise the reasonableness and validity of the penalty order. The hearing officer took the matter under advisement. Having failed to raise the issue in his petition, petitioner waived the right to appeal the penalty order (See Labor Law §101).

However, even if petitioner had raised the issue, he would have been unsuccessful since the pay stubs (wage statements) entered into evidence at the hearing did not comply with the law

since they did not contain all the required information; and no payroll records were ever furnished to DOL.

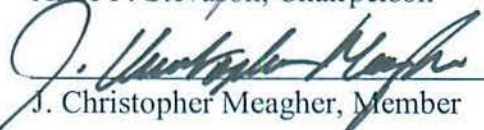
The Board affirms the penalty order in full.

NOW THEREFORE, IT IS HEREBY RESOLVED THAT

1. The Wage Order is modified to eliminate the civil penalty but otherwise affirmed; and
2. The Penalty Order is affirmed; and
3. The Petition for review be, and the same hereby is, otherwise denied.



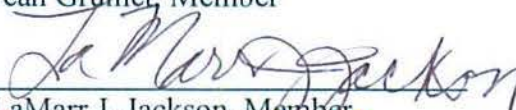
Anne P. Stevason, Chairperson



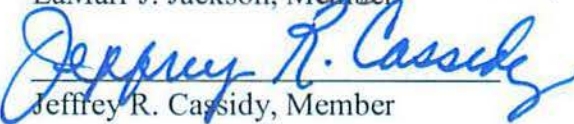
J. Christopher Meagher, Member



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
October 2, 2013.