

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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In the Matter of the Petition of: :

JEFFREY C. GANNON AND GALA :
CONSTRUCTION OF DUTCHESS COUNTY, INC., :

Petitioner, :

DOCKET NO. PR 11-156

To Review Under Section 101 of the Labor Law: An :
Order to Comply with Article 6 of the Labor Law, and :
an Order Under Article 19 of the Labor Law, both :
dated April 7, 2011, :

RESOLUTION OF DECISION

- against - :

THE COMMISSIONER OF LABOR, :

Respondent. :
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APPEARANCES

Jeffrey C. Gannon, petitioner *pro se*.

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

WITNESSES

Jeffrey C. Gannon, for petitioners.

Senior Labor Standards Investigator Lori Roberts, for respondent.

WHEREAS:

The petition for review in the above-captioned case was filed with the Industrial Board of Appeals (Board) on July 12, 2011 by Corinne Baratta-Gannon in her capacity as president of Gala Construction of Dutchess County, Inc. The Commissioner of Labor (respondent or Commissioner) filed an answer on August 22, 2011. Upon notice to the parties, a hearing was held on June 21, 2013 in White Plains, New York, before Administrative Law Judge Jeffrey M. Bernbach, the assigned hearing officer in this matter. 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.

The order to comply with Article 6 (wage order) under review was issued by the respondent against petitioners Jeffrey C. Gannon (Gannon) and Gala Construction of Dutchess County, Inc. on April 7, 2011. The wage order directs compliance with Article 6 and payment to the Commissioner for wages due and owing to Luis Mendoza Hernandez in the amount of \$1,800.00 for the time period from May 9, 2010 to July 12, 2010, together with interest continuing thereon at the rate of 16% calculated to the date of the wage order in the amount of \$265.32, and assesses a 100% civil penalty in the amount of \$1,800.00 and liquidated damages at the rate of 25% in the amount of \$450.00, for a total amount due of \$4,315.32.

The order under Article 19 of the Labor Law (penalty order) was issued against the petitioners on the same date. The penalty order imposes a \$500.00 civil penalty against the petitioners for violating Labor Law § 661 and 12 NYCRR § 142-2.6 for failing to keep and/or furnish true and accurate payroll records for each employee.

The petition alleges in relevant part that the orders are invalid or unreasonable because the claimant did not work for petitioner Gala Construction of Dutchess County, Inc.

I. STANDARD OF REVIEW

In general, when a petition is filed, the Board reviews whether the Commissioner's order is valid and reasonable. The petition must specify the order "proposed to be reviewed and in what respects it is claimed to be invalid or unreasonable. Any objections . . . not raised in [the petition] shall be deemed waived" (Labor Law § 101 [2]). The Board is required to presume that an order of the Commissioner is valid (*id.* § 103 [1]).

Pursuant to the Board Rules of Procedure and Practice (Rules) 65.30 (12 NYCRR § 65.30): "The burden of proof of every allegation in a proceeding shall be upon the person asserting it." Therefore, the burden is on the petitioners to prove by a preponderance of the evidence that the orders are invalid or unreasonable (State Administrative Procedure Act § 306 [1]).

II. SUMMARY OF EVIDENCE

Petitioner Gala Construction of Dutchess County, Inc., a corporation duly organized and existing under the laws of the State of New York and solely owned by Corrine Baratta-Gannon (Baratta-Gannon), supplies labor and equipment to construction businesses. Petitioner Jeffrey C. Gannon, an individual engaged in the construction business and doing business as Gala Construction, was named personally on the Commissioner's orders at issue herein. Mr. and Mrs. Gannon are husband and wife, and operate their respective but separate businesses out of their joint residence.

Although claimant correctly named Gannon of Gala Construction as his employer on the claim form and the orders were correctly issued against him, respondent also issued the orders against Gala Construction of Dutchess County, owned by Baratta-Gannon, which is the wrong corporate entity. As a result of respondent's mistake, it appears that at least some of the relevant mailings and correspondence may not have reached Gannon as they were addressed to his attention at Gala Construction of Dutchess County. However, it is clear on the record that

Gannon did become aware of the orders and responded to them during the Department of Labor's (DOL) investigation.

Gala Construction of Dutchess County filed a petition but failed to appear at the hearing. Gannon failed to file a petition but did appear at the hearing. Based on discussions held at hearing, we join Gannon to the proceeding as a petitioner.

Claimant, who failed to appear at the hearing, filed a claim seeking \$1,800.00 in unpaid wages for hours worked between May 15, 2010 and July 13, 2010, based upon an hourly rate of \$14.00 per hour. Gannon testified that claimant's correct hourly rate was \$8.00 per hour, and produced copies of records from his payroll company showing that during the time period in question, checks were issued to the claimant in total amounts that when divided by the hours reported by Gannon to the payroll company indicate payments at \$8.00 an hour. However, no weekly or daily time records were produced, nor do the payroll company records show the dates specific checks were issued. Gannon testified that claimant's failure to submit time cards, as he was required to do, caused him to rely on information from the client on whose project claimant had worked in order to compute claimant's hours. On the basis thereof, he determined that claimant had worked and was paid for a total of 64 hours which, at the rate of \$8.00 per hour, amounted to \$512.00. The parties agreed that during respondent's investigation of the claim, Gannon paid to respondent \$450.00 toward the amount due under the wage order.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

The petitioners have the burden to show that the orders are invalid or unreasonable (State Administrative Procedure Act § 306 [1]; Labor Law § 101, 103; 12 NYCRR § 65.30).

Although Gannon failed to file a petition herein, and Gala Construction of Dutchess County, Inc. failed to appear at the hearing, Gannon is deemed to have filed a petition and to have appeared at the hearing on his own behalf. The Board also finds, as is undisputed in the record, that Gala Construction of Dutchess County was not claimant's employer, but rather that Jeffrey Gannon was his employer. As Gannon's testimony was clear, cogent and forthright, the Board credits Gannon's testimony that the claimant was not employed by Corinne Baratta-Gannon or Gala Construction of Dutchess County, Inc.

Employers are required to maintain payroll records that include, among other things, their employees' daily and weekly hours worked, wage rate, and gross and net wages paid (Labor Law § 195 and 12 NYCRR § 142-2.6). Employers are required to keep such records open to inspection by the Commissioner or a designated representative.

As the Appellate Division stated in *Matter of Mid-Hudson Pam Corp v Hartnett*, 156 AD2d 818, 821 (3rd 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" (*see* Labor Law § 196-a; *Angello v National*

Finance Corp., 1 AD3d 850 [3d Dept 2003]).

In the absence of Gannon's production of properly maintained records of the hours worked by claimant demonstrating his actual rate of pay for the period covered by the orders, the Board accepts the computation of hours worked and wages owed supplied by the Commissioner, which was based on the best available evidence, the claim filed by the claimant. Thus, claimant is due \$1,800.00 less the \$450.00 already paid on account, for a total due of \$1,350.00.

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 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 Section 14A sets the "maximum rate of interest at sixteen per centum per annum." Thus, interest on the amount due claimant calculated at the statutory rate of 16% is mandatory, but it will be recalculated for the modified amount of wages due.

Civil Penalty

The respondent imposed a 100% civil penalty against the petitioners. Since petitioner Gannon's failure to timely respond to respondent's investigation is largely due to respondent's mistakes in naming the correct employer, Gannon showed good faith in already making a partial payment of the wages due, and Gannon demonstrated general cooperation in the investigation, the Board finds the imposition of a civil penalty inappropriate on this record.

Liquidated Damages

The respondent imposed liquidated damages of 25% against petitioners. Labor Law § 198 provided at the time the minimum wage order was issued that unless the employer proves a good faith basis to believe its underpayment was in compliance with the law, the respondent may collect liquidated damages for the claimant equal to 25 % of the underpayments found due.¹ On the record before us, petitioners have not met their burden to show a good faith basis to believe the underpayments were in compliance with the law. Therefore, the imposition of liquidated damages is reasonable and the amount is reduced consistent with this decision.

Penalty Order

Respondent imposed a \$500.00 civil penalty against petitioners for violating Labor Law § 661 and 12 NYCRR § 142-2.6 by failing to keep and/or furnish true and accurate payroll records for each employee for the period from May 9, 2010 through July 12, 2010. Although Gannon produced at hearing records showing the daily hours worked by claimant, the records do not cover the period in question; only part of the year 2008. Gannon testified that he did not have any such records for the period in question. Accordingly, we affirm the penalty order.

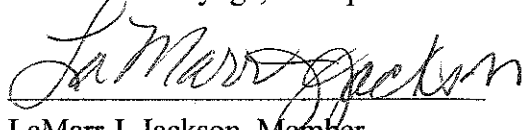
¹ Amended effective April 9, 2011 to increase the amount of liquidated damages from 25% to 100%.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The orders against Gala Construction of Dutchess County, Inc. are revoked;
2. With respect to Jeffrey C. Gannon, the orders are modified as follows:
 - A. The wage order is reduced to \$1,350.00, and the interest is reduced accordingly,
 - B. The civil penalty is revoked from the wage order; and
 - C. The liquidated damages are reduced to \$337.50; and
 - D. The penalty order is affirmed; and
3. The petition for review be, and the same hereby is, granted in part and denied in part.



Vilda Vera Mayuga, Chairperson



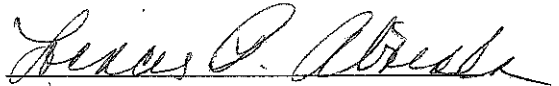
LaMarr J. Jackson, Member

Absent

J. Christopher Meagher, Member



Michael A. Acuri, Member



Frances P. Abriola, Member

Dated and signed in the Office
of the industrial Board of Appeals
at New York, New York, on
December 17, 2014.