

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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 In the Matter of the Petition of: :
 :
 SAAD ABDULLAH AND FALCONS USA, INC., :
 :
 Petitioners, :
 :
 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, each :
 dated April 8, 2011, :
 :
 - against - :
 :
 THE COMMISSIONER OF LABOR, :
 :
 Respondent. :
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DOCKET NO. PR 11-160
RESOLUTION OF DECISION

APPEARANCES

Saad Abdullah, petitioner *pro se* and for Falcons USA, Inc.

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

WITNESSES

Saad Abdullah, Labor Standards Investigator Angel Medina, and Faruque Hossain.

WHEREAS:

The petition in this matter was filed with the Industrial Board of Appeals (Board) on June 2, 2011, and seeks review of two orders issued by the Commissioner of Labor (Commissioner or respondent) against petitioners Saad Abdullah and Falcons USA, Inc. on April 8, 2011. Upon notice to the parties a hearing was held in this matter on July 30, 2013 in New York, New York, 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, make statements relevant to the issues, and file post-hearing briefs.

The order to comply with Article 6 (Wage Order) under review directs payment to the Commissioner for wages due and owing to Faruque Hossain in the amount of \$2,100 for the time period from July 13, 2009 to July 31, 2009, with interest continuing thereon at the rate of 16% calculated to the date of the order, in the amount of \$567.06, and assesses a civil penalty in the amount of \$2,100, for a total amount due of \$4,767.06.

The order under Article 19 (Penalty Order) assesses a \$500.00 civil penalty against the petitioners for violating Labor Law § 661 and 12 NYCRR 142-2.6 by failing to maintain and furnish true and accurate payroll records for each employee for the period from July 11, 2009 through July 31, 2009.

The petition alleges that the Wage Order is not reasonable or valid because the claimant Hossain was not an employee of petitioners. Respondent answered the petition on July 7, 2011 alleging that the Wage Order was based a claim filed by Hossain and petitioners' failure to respond to respondent's request for documents.

SUMMARY OF EVIDENCE

Petitioners have a construction business and claimant Hossain worked as an estimator for the business at the rate of \$700.00 per week for approximately one year. Although the number of jobs that Hossain estimated varied per week, he always received \$700.

On August 26, 2009, Hossain filed a claim with the Department of Labor (DOL) alleging that he was owed three weeks' wages, or \$2,100, for the period of July 13, 2009 through July 31, 2009. Attached to his claim form was a dishonored check for \$1,500 from petitioners, dated July 29, 2009.

At hearing, Abdullah testified that he paid Hossain \$2,100 the week before the hearing: \$500 in check and \$1,600 in cash. Hossain testified and confirmed that he received this money the week before.

ANALYSIS

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).

A. No wages are due to Claimant.

The uncontradicted testimony at hearing was that claimant was paid \$2,100 the week prior to the hearing and therefore, no wages are currently due.

B. Interest is due and owing

Although claimant was paid the wages prior to hearing, petitioners are still responsible for the interest on the wages up until the time claimant was paid. 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."

C. Civil Penalty

The Order assesses civil penalties in the amount of 100% of the wages ordered to be paid. Labor Law § 218 provides, in relevant part:

"In addition to directing payment of wages, benefits or wage supplements found to be due, such order, if issued to an employer who previously has been found in violation of those provisions, rules or regulations, or to an employer whose violation is willful or egregious, shall direct payment to the commissioner of an additional sum as a civil penalty in an amount equal to double the total amount found to be due. In no case shall the order direct payment of an amount less than the total wages, benefits or wage supplements found by the commissioner to be due, plus the appropriate civil penalty. Where the violation is for a reason other than the employer's failure to pay wages, benefits or wage supplements found to be due, the order shall direct payment to the commissioner of a civil penalty in an amount not to exceed one thousand dollars . . . In assessing the amount of the penalty, the commissioner shall give due consideration to the size of the employer's business, the good faith of the employer, the gravity of the violation, the history of previous violations and , in the case of wages, benefits or supplements violations, the failure to comply with recordkeeping or other non-wage requirements."

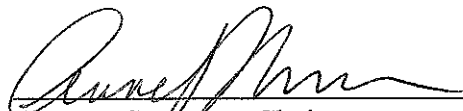
The Board finds that the considerations required to be made by the Commissioner in connection with the imposition of the civil penalty amount in the Order is proper and reasonable in all respects. The petitioners failed to contest the penalty in their petition, and therefore, waived any objection to imposition of the civil penalty (Labor Law § 101 [2]).

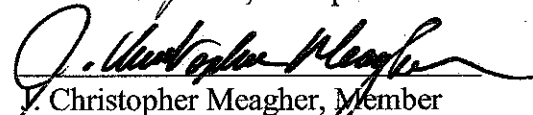
D. Penalty Order

The penalty order found that the petitioners violated Labor Law § 661 and 12 NYCRR 142-2.6 by failing to furnish true and accurate payroll records for each employee for the period from July 11, 2009 through July 31, 2009, and imposed a \$500.00 civil penalty for such violation. Petitioners failed to submit the time and payroll records to DOL when requested and failed to submit records at hearing. Accordingly, the civil penalty for violating Labor Law § 661 and 12 NYCRR 142-2.1 (2009) is upheld and we note that the penalty was not specifically challenged by the petitioners was therefore waived (Labor Law § 101 [2]).

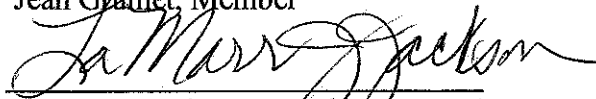
NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The order to comply with Article 6 (wage order) is modified to delete the amount of wages due and to adjust the interest to reflect the date that the claimant was paid and is otherwise affirmed; and
2. The order under Article 19 (penalty order) is affirmed; and
3. 6. The petition for review be, and the same hereby is, granted in part and denied in part.


Anne P. Stewason, Chairperson


J. Christopher Meagher, Member


Jean Gramet, Member


LaMarr J. Jackson, Member

Dated and signed in the Office
of the Industrial Board of Appeals
at New York, New York, on
January 16, 2014.

Jeffrey R. Cassidy, Member