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INDUSTRIAL BOARD OF APPEALS

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STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of:

LEAH WILEN & DARREN WILEN,

Petitioners,

To review under Section 101 of the New York State Labor Law: An Order to Comply with Article 19 of the Labor Law, dated May 26, 2006,

-against-

THE COMMISSIONER OF LABOR,

Respondent.

DOCKET NO. PR-06-048

RESOLUTION OF DECISION

WHEREAS:

This proceeding was commenced on June 23, 2006 when Petitioners Darren Wilen and Leah Wilen (the Wilens) 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). The Petitioners ask the Board to review an Order to Comply with Article 19 of the Labor Law (Order) that the Commissioner of Labor (Commissioner) issued against them on May 26, 2006.

The Order finds that the Petitioners failed to pay overtime to a named Complainant in violation of Article 19 of the Labor Law and 12 NYCRR Part 142. It directs payment to the Commissioner of wages due in the amount of $1,369.00 for the period from July 21, 2003 to December 15, 2003, continuing interest on the wages due at the rate of 16% calculated to the date of the Order in the amount of $535.29, and a civil penalty in the amount of $350.00, for a total amount due of $2,254.29.

Upon notice to the parties, the Board held a hearing in Garden City, New York on May 12, 2007 before then Board Member Gregory A. Monteleone, the designated hearing officer in this case. Petitioner appeared *pro se*, and the Respondent Commissioner was represented by Maria Colavito, Counsel to the New York State Department of Labor (DOL), Benjamin T. Garry of counsel. Each party was afforded full opportunity to present documentary evidence, examine and cross-examine witnesses, and raise relevant arguments.

SUMMARY OF EVIDENCE

DOL Labor Standards Investigator Frederick Seifried (Seifried) and DOL Senior Labor Standards Investigator Carol Weissberg (Weissberg) testified concerning the investigation that led to the Order under review.

Siefried testified that on January 2, 2004, DOL's Division of Labor Standards received a complaint for unpaid overtime wages against the Petitioner from a Complainant whose name is known to the parties. The Complainant alleged that she worked as a live-in babysitter and housekeeper for the Petitioners from July 21, 2003 to December 15, 2003 during which time she was paid a weekly salary of $420.00 for working 6:00 a.m. to 7:30 p.m. Tuesday to Friday and Sunday; 6:00 a.m. to 11:00 p.m. Saturday; and 6:00 a.m. to 9:00 a.m. and 6:00 p.m. to 7:30 p.m. on Monday.

Seifried spoke to the Complainant to verify the accuracy of her claim and requested payroll records and a response from the Petitioners. Additionally, Seifried confirmed that an employment agency had placed the Complainant with the Petitioners. On May 26, 2006, DOL issued the Order based solely on the allegations contained in the Complainant's claim form because the Petitioners failed to produce any payroll records indicating the hours worked and wages paid to the Complainant.

Weissberg testified that in assessing the amount of the civil penalty charged against the Petitioners, DOL considered the gravity of the violation and whether the Petitioners had previously violated the Labor Law and fixed the lowest civil penalty charged by DOL.

Leah Wilen testified that the Complainant only worked five days per week from morning until early evening and was terminated for poor job performance. Ms. Wilen further explained that when she originally contacted the employment agency to obtain a domestic employee, she informed the agency that the employee would work only five days.

Ms. Wilen stated that the Complainant lived at the Petitioners' home for the five days she worked. The Complainant's days off were Sunday and Monday. Ms. Wilen further testified that she paid the Complainant $420.00 per week plus $30.00 for commuting costs.

Darren Wilen testified that his recollection of the hours the Complainant worked was "7:30 in the morning or so until about . . . 10 or 11, she'd have at least an hour or two hours off." Mr. Wilen further explained that "Saturday was a late night, sometimes it would be 11, but I would say half the times it would be earlier." He continued by explaining that:

> "So my statement is she did not work Sundays, primarily she didn't work Mondays. Her hours were 7:30 to 6:00 or 7:00 and I guess you can calculate the hours from there, and she had time off during the day."

Mr. Wilen testified that during the five months that the Complainant worked for the Petitioners, "probably a total of 10, 12, 16; 16 or 17 of those days there were no children there. . ."

Both Petitioners stated that they had additional evidence they could provide and were afforded an opportunity by the hearing officer to do so, but no such evidence was ever submitted to the Board.

GOVERNING LAW

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).

The Board is required to presume that an order of the Commissioner is valid. Labor Law § 103 (1) provides, in relevant part:

> "Every provision of this chapter and of the rules and regulations made in pursuance thereof, and every order directing compliance therewith, shall be valid unless declared invalid in a proceeding brought under the provisions of this chapter."

Pursuant to the Board's Rules of Procedure and Practice 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 that the Order is not valid or reasonable.

Premium Pay for Overtime

An employer is required to pay residential employees at a wage rate of 1 ½ times the employer's regular rate for all hours worked over 44 in a work week (12 NYCRR 142-2.2). The term "regular rate" is defined at 12 NYCRR § 142-2.16 as:

> "the amount that the employee is regularly paid for each hour of work. When an employee is paid on a piece work basis, salary, or any other basis other than hourly rate, the regular hourly wage rate shall be determined by dividing the total hours worked during the week into the employee's total earning."

There is a rebuttable presumption that salary does not include a premium for overtime hours. The burden is on the employer to prove that there is an express agreement that the salary provides a premium for overtime hours (*Cayuga Lumber, Inc. v. Commissioner of Labor*, PR 05-009 [Decision on Reconsideration, dated September 26, 2007]). The employee's regular rate of

pay is not presumed to be minimum wage unless there is evidence that that is the agreed rate of pay. The regular rate is calculated based on the compensation of the employee and the number of hours worked (*id*).

FINDINGS

The Board having given due consideration to the pleadings, hearing testimony and documentary evidence, makes the following findings of fact and law pursuant to the provisions of Board Rule 65.39 (12 NYCRR 65.39).

Labor Law § 661 provides in relevant part that:

> "Every employer shall keep true and accurate records of hours worked by each employee covered by an hourly minimum wage rate . . . . Every employer shall keep such records open to inspection by the commissioner or his duly authorized representative at any reasonable time . . . ."

Labor Law § 195(4) requires all employers to "establish, maintain and preserve for not less than three years payroll records showing the hours worked, gross wages, deductions and net wages for each employee." Additionally, every employer is required to establish, maintain and preserve for not less than six years, weekly payroll records showing, *inter alia*, the wage rate and number of hours worked daily and weekly of each employee (12 NYCRR § 142-2.6 [a] [4]).

Labor Law § 196-a provides in relevant part that ". . . [f]ailure of an employer to keep adequate records . . . shall not operate as a bar to filing a complaint by an employee. In such a case the employer in violation shall bear the burden of proving that the complaining employee was paid wages, benefits and wage supplements."

The Petitioners admit that they did not maintain the required payroll records. Additionally, despite requesting and being granted an opportunity to submit additional evidence of the hours worked by the Complainant after the hearing, the Petitioners failed to submit any such additional information to the Board. Having failed to maintain the payroll records required by 12 NYCRR § 142-2.5, DOL's calculation of the wages due based on the Complainant's statement must be credited unless the Petitioners met their burden to prove that the Complainant did not work the hours alleged by DOL (*see e.g. Matter of Mid Hudson Pam Corp. v. Hartnett*, 156 AD2d 818, 821 [3d Dept. 1989] ["When 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"]). The Petitioners have failed, in part, to meet this burden.

The Order was based on the Complainant's claim form and the statement she provided to DOL. The Complainant testified at the hearing as a witness for DOL; however, her capacity to testify was limited due to her inability to communicate adequately in English, and because DOL failed to request an interpreter at any time prior to or during the hearing. However, even without considering the Complainant's testimony, the burden remains with the Petitioners to demonstrate that the Order is invalid or unreasonable.

While we find that the Petitioners met their burden to show that the Complainant worked only five days per week, not six as alleged by DOL, the Petitioners' general testimony of the hours worked by the Complainant is not specific enough to negate the reasonableness of the Commissioner's calculations of the daily hours worked by the Complainant (*see Chao v. Vidtape, Inc.*, 196 F.Supp.2d 281, 294 [EDNY 2002]). Accordingly, we find that the Complainant worked 6:00 a.m. to 7:30 p.m., Tuesday to Saturday, at a weekly salary of $420.00 from July 21, 2003 to December 15, 2003, which consists of 67.5 total hours worked per week including 23.5 overtime hours. The table below sets forth the weekly amounts owed:

Hours worked	Regular Hours	Overtime Hours	Regular Rate	Overtime Rate	Spreadshift[1]	Meal Credits	Lodging Credits	Wages Earned	Wages Paid	Amount owed
67.5	44	23.5	$6.22	$9.33	$0.00	15 @ $1.75	6 days @ $2.20	$453.49	$420.00 per wek	$33.49 per week

The Complainant worked 21 weeks for the Petitioners and therefore the Order should be modified to reflect total wages due and owing in the amount of $703.29 (21 x $33.49).

Finally, the Board is not persuaded by the Petitioners' argument that the Complainant did not work all hours claimed because she was free to do whatever she wanted when the Petitioners' baby was napping or when none of the children was at home. While it may be true that when the baby slept, the Complainant was able to engage in personal activities, we find that this was compensable time because the Complainant was necessarily at the house for the benefit of the Petitioners and she would have been negligent to leave the premises while the baby was sleeping and we cannot imagine that the Petitioners expected the Complainant to leave the baby unattended (*see e.g. Jiao v. Chen*, 2007 U.S. Dist. LEXIS 96480 *39 [S.D.N.Y. 2007]). In addition, the Petitioners have clearly failed to meet their burden of proving the number of hours during the work day during which the Complainant was allegedly not working.

CIVIL PENALTIES FOR FAILURE TO PAY WAGES

If the Commissioner determines that an employer has violated Article 19 of the Labor Law, she is required to issue a compliance order to the employer that includes a demand that the employer pay the total amount found to be due and owing (Labor Law § 218 [1]).

Along with the issuance of an order directing compliance, the Commissioner is authorized to assess a civil penalty and interest based on the amount owing. Labor Law § 218 (1) continues:

> "In no case shall the order direct payment of an amount less than the total wages . . . found by the commissioner to be due, plus the appropriate civil penalty . . . . In assessing the amount of the penalty, the commissioner shall give due consideration to the size of the employer's business, the

[1] Spreadshift is not owed in this case because the total wages paid in this case, less the applicable lodging and meal credits, are equal to or greater than the total due for all hours at the then applicable minimum wage plus one additional hour at the then applicable minimum wage for each day the Complainant worked in excess of 10 hours (*see e.g. Seenaraine v. Securitas Security Services USA, Inc.*, 37 AD3d 700 [2007]; *Chan v. Sung Yue Tung Corp.*, 12 Wage & Hour Cas.2d [BNA] 507 [S.D.N.Y. 2007]; NY St Dept of Labor Opinion Letter No. RO-06-0027 [April 12, 2006]).

> good faith of the employer, the gravity of the violation, the history of previous violations and, in the case of wages . . . the failure to comply with recordkeeping or other non-wage requirements."

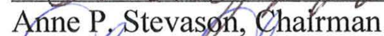
The Order under review includes a 25% civil penalty against the Petitioners. The Board finds that the considerations and computations required to be made by the Commissioner in connection with the imposition of the civil penalty set forth in the Order is proper and reasonable in all respects.

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 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."

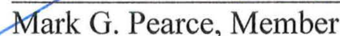
NOW, THEREFORE, IT IS HEREBY RESOLVED THAT

1. The Order to Comply with Article 19 of the Labor Law, dated May 26, 2006, is modified to direct payment to the Complainant the sum of $703.29 in unpaid wages together with a 25% penalty in the amount of $175.82 and interest at 16% calculated to the date of the Order; and
2. The Order is remanded to the Commissioner to substitute an amended Order to Comply consistent with the Board's Resolution; and
3. The Petition be, and the same hereby is, dismissed in all other respects.


Anne P. Stevason, Chairman

Susan Sullivan-Bisceglia, Member

J. Christopher Meagher, Member


Mark G. Pearce, Member

Jean Grumet, Member

Dated and signed in the Office
of the Industrial Board of Appeals
at New York, New York, on
June 25, 2008