

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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 In the Matter of the Petition of: :
 :
 MARVIN MILICH, :
 :
 Petitioner, :
 :
 To Review Under Section 101 of the Labor Law: :
 Two Orders to Comply with Article 19 of the Labor :
 Law, each issued April 16, 2010. :
 :
 - against - :
 :
 THE COMMISSIONER OF LABOR, :
 :
 Respondent. :
 -----X

DOCKET NO. PR 10-145
RESOLUTION OF DECISION

APPEARANCES

Frank & Associates, P.C. (Peter Romero and Scott Laird of counsel), for petitioner.
Pico Ben-Amotz, Esq., Acting Counsel, NYS Department of Labor (Larissa C. Bates of counsel), for respondent.

WITNESSES

Marvin Milich; Labor Standards Investigator Frederick Seifried; Yakov Saacks; Nicholas Kostiw; Niles Goldberg; Judith Milich; and Icela DeLeon.

WHEREAS:

On May 12, 2010, Petitioner Marvin Milich (Petitioner) filed a petition with the Industrial Board of Appeals (Board) to review two orders to comply under Article 19 of the Labor Law that the Commissioner of Labor (Commissioner or DOL) issued against him on April 16, 2010. The first order under Article 19 (minimum wage order) directs payment of \$85,065.38 in wages due and owing to Icela DeLeon (Claimant) together with \$20,695.36 in interest at 16% per annum calculated to the date of the order, and a civil penalty in the amount of \$63,799.03, for a total amount due of \$169,559.77. The second order under Article 19 (penalty order) directs payment of \$2,000.00 in civil penalties for failing to keep and/or furnish true and accurate payroll records and for failing to provide a complete wage statement with each payment of wages.

The petition alleges that the Claimant did not work for Petitioner more than forty four hours per week and that the civil penalties were excessive.¹ An answer was filed on November 10, 2010. Upon notice to the parties, a hearing was held on July 25 and August 2, 2012 in Hicksville, New York before Jean Grumet, Esq., Member 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, to make statements relevant to the issues and to file post-hearing briefs. Petitioner filed a Post Hearing Brief on October 3, 2012, Respondent filed a Post Hearing Brief on November 15, 2012, and Petitioner filed a Post-Hearing Reply Brief on December 6, 2012.

SUMMARY OF EVIDENCE

It is undisputed that Claimant was hired by Petitioner's first wife, Aura Milich, in 2000 to work as a live-in housekeeper in Petitioner's home in Dix Hills, New York. Aura Milich passed away suddenly on September 8, 2000, prior to the time period relevant to this case, and Claimant continued to work in the Milich home until 2008. Petitioner subsequently remarried and resided at the Dix Hills house during the entire relevant period with his second wife, Judith Milich. Petitioner's daughter, Danielle, also resided at the Milich home until she moved away in June 2004, when she graduated from high school, moved to a college dorm and later to her own apartment. Danielle did not reside in the home during the summer of 2003, when she attended camp. Claimant lived in the Bronx, and later in St. Alban's, Queens during her employment and commuted to her job by train. Claimant did not have keys to the Milich home. Petitioner wound down his law practice after his first wife passed away, and fully retired from his law practice seven years ago. He works part time as a business law professor.

The Claim

On October 27, 2008, Claimant filed a sworn Minimum Wage/Overtime claim with the DOL stating that she worked for Petitioner from October 27, 2002 to October 8, 2008. The claim stated that Claimant was a housekeeper working a 105 hour/seven day work week, from 7:30 a.m. to 10:30 p.m. each day. The claim alleged that Claimant's wages were \$300.00 per week from October 27, 2002 until February 29, 2008 and \$400.00 per week from March 1, 2008 to October 8, 2008; that her work week was Sunday to Saturday; that she was paid in cash bi-weekly on Saturday, which was her regular pay day; and that she was provided one meal free of charge. When asked to list all absences, including vacation periods, she stated "NONE" and likewise wrote "NONE" when asked to list all holidays she did not work. Attached to her claim was a detailed list of daily duties for Tuesday through Saturday.

¹ In an Interim Resolution in this matter dated November 18, 2010, the Board granted the Respondent's motion to strike paragraphs of the Petition regarding the preclusive effect of a Workers' Compensation Board's determination. The Board found that collateral estoppel was not appropriate in this matter because: (1) neither the Claimant nor the DOL had any opportunity before the Workers' Compensation Board to contest the issues arising under Article 19; (2) the Workers' Compensation judge made no findings with respect to Petitioner's liability for wages and civil penalties under Article 19; and (3) findings of credibility are not findings of evidentiary or ultimate fact for which issue preclusion is appropriate. The Petition also alleged that the Claimant was an independent contractor, but acknowledged during the hearing that Claimant was an employee and withdrew the allegation.

Labor Standards Investigator Frederick Seifried (Seifried) testified that he spoke to the Claimant by telephone three times during his investigation. His Narrative Report and testimony demonstrate that in his first conversation with Claimant on March 11, 2009, she indicated that she lived in the basement of the Milich home, was provided one meal which she ate while standing and working, sometimes had weekends and Christmas off, went home Saturday night, was off Sunday and returned Monday. During this conversation, she initially stated that she did not work when Petitioner was on vacation, but later said that Petitioner was on vacation two times a year, for two weeks and she "sometimes stayed." In an April 15, 2009 telephone conversation, Claimant indicated that she worked 15 hours per day with no meal period, ate standing while working, and was provided with one meal per day. During Seifried's last phone conversation with the Claimant on June 17, 2009, she told him: "Not given time off when her husband passed. Off one week, not paid. States she was always at home when [Employer] was away on vacation." She also told Seifried that she was hired through an agency whose name she could not recall and paid a \$450.00 broker's fee.

Testimony Regarding Claimant's Hours and Work Day

Petitioner testified that during the relevant period, Claimant worked a five day/ 40 hour work week, and always had two days off. When she began her employment at the Milich home, Claimant worked Tuesday through Saturday. Early in 2002, Claimant requested the weekends off, and her schedule was switched to Monday through Friday. Petitioner testified that Claimant's work week began on Monday morning at 10 a.m., after he or his wife met her train at the Wyandanch train station and drove her to his home, and ended on Friday afternoon usually by 4:30 p.m. -- but no later than 7:30 p.m.-- when Petitioner or his wife drove her back to the train station.² Petitioner testified that Claimant began work at 8 a.m. (Tuesday through Friday), took a half hour break at 9:30 each morning for breakfast and a lunch break at 1:00 in the afternoon, and finished work between 4:00 and 4:30 p.m. each day.

During 2002-2008, according to Petitioner, Claimant worked two to four weekends per year: for an annual Channukah party that was held on a Sunday; an annual summer barbeque; and when Rosh Hashonah or Passover seders occurred on weekends. When Claimant worked during these weekends, she would leave work on Sunday night and return to the Milich home on Wednesday morning. Petitioner estimated that based on a work week beginning Monday, there were thus two to four weeks a year when Claimant worked a seven-day, 49-hour week followed by a short work week with Monday and Tuesday off; according to Petitioner, Claimant never worked any other seven-day weeks. He testified that she never stayed at the Milich home when he was on vacation, and never had a key to the house. When the Miliches went on vacations, their dog Sushi stayed with Petitioner's parents, who lived ten minutes away, or was boarded at the Willow Pet Motel. A neighbor, Nicholas Kostiw, who unlike the Claimant, had a key to the Milich home, took in the mail and fed their feral cats while the Miliches were away.

Judith Milich testified that Claimant began her work week on Monday morning at 10 a.m., after she or her husband picked Claimant up at the train station, and that she or her husband "always attempted to make the 4:30 train for her" on Fridays. According to Judith Milich,

² Milich testified that there is only one track at the Wyandanch station and if Claimant missed the 4:30 train, because of the rush hour, there would not be another west bound train until 7:30 p.m. If Claimant missed the 4:30 train, he would drive her to the Hicksville station where there were two trains every hour.

Claimant only worked on Saturday or Sunday two or three times when they had big parties; other than that, Claimant was off on weekends. On the occasions that Claimant would work over the weekend, the Miliches would bring her home Sunday night, Claimant would have Monday and Tuesday off, and she worked a three-day week the following week.

Petitioner's next door neighbor, Nicholas Kostiw, testified that he knew Petitioner brought Claimant to his house on Monday mornings and saw him take her to the station on Friday afternoons, and that he, himself, drove Claimant to the Wyandanch station several times when Petitioner could not take her, and one time to the Huntington station. Niles Goldberg, who has played tennis with Petitioner on Saturday mornings and sometimes on Fridays since 1999, and played cards with Petitioner on the first Friday evening of each month, testified that he only saw Claimant at the Milich home one time on a Saturday, and never on a Friday night. Goldberg could not recall whether or not Aura Milich was still alive on the Saturday that he saw Claimant at the Milich home.

When called by Respondent, Claimant testified that she worked most Saturdays, and two weeks straight without a day off every other month because she had to take care of Danielle. Even after Danielle moved out to attend college in 2004, according to Claimant, "I had to be there when they were gone to take care of the dog." At other points, however, Claimant agreed that when the Miliches travelled, she did not work. Claimant testified that she worked four or five Sundays during 2003 and did not remember how many Sundays she worked other years, and that her work day began at 7:30 a.m. on weekdays and 8:30 a.m. on weekends.

When called by Petitioner as an adverse witness, Claimant testified that "most of the time" during 2002-2008, she began work Mondays at 10:00 a.m. and "most of the time" and "more often than not" went home on Friday, and was off on Saturdays and Sundays. She later testified, however, "sometimes for three, two weeks I do not go home" and on such occasions she was never given a day off. At another point, when asked if she told Seifried that she usually went home on Fridays, she replied:

"A: No, because it is not every Friday. It is once in awhile....

"Q: Do you recall being asked the following question and giving the following answer at the Workers Compensation hearing on September 25, 2009, which can be found at page 46: 'Question: You normally went home on Friday evenings? Answer: Yes.' Do you recall giving that testimony?

"A: I said yes, but it not every Friday.... [S]ometimes. Normally, sometimes."

Claimant also testified that when the Miliches went out on Friday nights, she remained at their home "until 10:30, 11:00 still doing something because they don't take me to the train station until when they come back," and that if Petitioner drove her to the train earlier than 10:30 p.m. it was "not a constant thing."

When Claimant was asked why she wrote on her claim that she worked 7:30 a.m. to 10:30 p.m. Sunday through Saturday with no days off during the entire relevant period, she

stated "because that is the fact." She further stated that "[m]ost" Mondays "I am still in the house there... so he doesn't have to come and pick me up because I am in the house."

Testimony Regarding Claimant's Wages

Petitioner testified that the agreed upon compensation when Claimant was hired through an employment agency in 2000 was \$325 per week. Each spring, on the anniversary date of her employment, Claimant received a \$25 per week raise, and earned \$500 per week when she was terminated in 2008. According to Petitioner, Claimant also received a yearly Christmas bonus equal to one week's salary.

Although her claim alleges that she earned \$300 per week from 2002 until February 2008 and \$400 per week from March 1, 2008 to October 8, 2008, Claimant testified that she began working in 2000 for \$200 per week, received \$25 weekly raises each year, and earned \$350 per week in 2007. At other points, she testified that "Two years I remember he never give me any raise;" that she received \$25 raises in 2002, 2003 and December 2007; and that by January 2008 she was earning \$400 per week. Claimant stated that she did not remember telling Seifried that in 2002 she was paid \$300 per week, and that "I have to be honest with you. There are things that I cannot remember." When asked whether she received an annual bonus, she stated that Petitioner gave her "\$50 one year. The next year he gave me \$50," and that "One year, he gave me" a week's pay. When asked whether she testified before the Workers' Compensation Board, as the transcript of its hearing showed, that Petitioner gave her a week's pay as a bonus, Claimant testified: "I can't say yes and I can't say no, because I don't remember."

Testimony Regarding Claimant's Time off From Work

Petitioner testified that Claimant was off on all major holidays including Christmas, Thanksgiving, the day after Thanksgiving, Labor Day, Memorial Day, July 4, and New Year's Eve and New Year's Day. According to Petitioner, his family never celebrated Thanksgiving at the Milich home, and one Thanksgiving, Claimant worked at Judith Milich's daughter's house and was paid substantial extra money to work that day. He testified that in addition to her regular days off, Claimant took off approximately ten Mondays for doctor's appointments over the years she was employed. Prior to Claimant's husband's death on April 29, 2006, she took off three weeks to care for him, and after his death, took an additional month off.

Petitioner testified that after he retired from his law practice, he and Judith Milich travelled extensively. During the six year relevant period, they travelled to Italy (twice), Mexico (twice), Hawaii, Jamaica, the Canadian Rockies, Aspen, California, Maine and Eastern Canada, the Caribbean, Israel, and Colorado, and took several long weekends in Florida, as well as weekends in Puerto Rico, the Hamptons, San Diego, Paradise Island, Las Vegas, New York City and Kentucky. Claimant did not work when the Miliches were on vacation.

When asked what holidays she remembered being off, Claimant stated "I know I am off on Christmas. I don't remember - I asked him for a Good Friday. He said no. I would have to work... Maybe another two days, might be. I got ... two days." After initially testifying that she "always worked Thanksgiving," she testified she got Thanksgiving off "sometimes." Claimant testified that she took off three weeks of work when her husband fell ill in 2006 and following

his death, an additional month. She stated that she took time off to see her attorney and tried to schedule doctor's appointments on Saturdays, when she did not work.

Testimony Regarding Claimant's Duties

Petitioner testified that after Danielle left for college in 2004, he and Judith lived alone with their dog Sushi,³ with the result that there was less work for Claimant at Petitioner's house. According to Petitioner, in May 2005 he asked her to work at his rabbi's house rather than in the Milich home on Wednesdays from 10 a.m. to 2 p.m., and Claimant did so until her husband's death in 2006. When Danielle moved to a new apartment in June 2007, the Miliches brought Claimant to clean the apartment for five hours during her regular work hours. According to Petitioner and Judith Milich, they ate dinner out almost every night and Claimant never cooked for them.

Claimant testified that many of her duties involved taking care of Danielle. During the investigation, Claimant provided DOL with a schedule – for a five-day, Tuesday-to-Saturday work week – given to Claimant in 2000 by Petitioner's first wife, Aura.⁴ The schedule indicated that Claimant would "help with" dinner on weekdays, and "make Danielle dinner" on Saturdays. At the hearing, after testifying she cooked dinner for the Miliches "[m]ost of the time," Claimant agreed that they often ate out and "there are nights when I don't prepare dinner for them," but stated that on such nights "I have to prepare for the daughter." She also testified: "Sometimes for days and nights I don't have anything in the house to eat, because they are going out to eat, and he knows that I have nothing in the house."⁵

Documentary Evidence

Petitioner admitted that he did not maintain payroll records, but introduced in evidence six years of calendars that his wife, Judith, contemporaneously maintained and which list the dates the Miliches took vacations and celebrated holidays. The calendars also contain occasional notations by Judith indicating dates that Claimant either worked or was off from work.

The DOL's Calculations

Because the Petitioner did not maintain payroll records, Seifried used the DOL's standard formula for computing wages for live-in domestic workers, which assumes a 13-hour work day and a six-day work week. An Issuance of Order to Comply Cover Sheet entered into the record as part of the DOL's investigative file states: "Lodging allowance applied and 1 meal/day meal credit applied along with spread of hours. Total MWOT [minimum wage and overtime] computed is \$85,065.38. ER was credited with 2 wks vac/yr. OT computed after 44 hrs/wk."

³ While Claimant testified that Judith Milich's son, Randy, lived at the Milich residence "most of the time," Petitioner and Judith Milich testified that Randy never lived there, although he did visit for one week in 2008.

⁴ It is undisputed that at Claimant's request, her schedule was changed from Tuesday through Saturday to Monday through Friday prior to the start of the relevant period. Petitioner testified that even before Claimant's work week changed, the schedule was not rigorously followed after Aura's death.

⁵ Claimant also testified that she was "sometimes" provided with one meal a day, and "[b]eing honest, yes, sometimes" provided two meals per day. The transcript of the Workers' Compensation Board hearing, which Petitioner introduced as an exhibit, records her as having testified, when asked what she ate for dinner: "Sometimes I eat chicken and broccoli. Whatever she bring.... [S]he come in with it most of the time."

Seifried recommended, based on the employer's size and good faith and the gravity of the monetary violations, that a 25% civil penalty be imposed in the Wage Order, but for reasons Seifried did not know, the Chief Labor Standards Investigator overruled his recommendation and assessed a 75% penalty. No one provided Seifried with an explanation, nor was one provided at the hearing.

Seifried acknowledged that much of the information Claimant provided during the investigation contradicted her hearing testimony, including regarding days and hours worked, holidays and vacations. For example, Claimant never disclosed that she took a total of seven weeks of family leave before and after her husband passed away. During the investigation, Claimant insisted that she was given only one meal a day, and the DOL revised its initial underpayment calculation based on that insistence, increasing the underpayment found from \$77,331.05 to \$85,065.38.

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]). The petitioner has the burden at the hearing of proving that the Commissioner's order under review is invalid or unreasonable (Board Rules of Procedure and Practice (Board Rule) § 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; *Angello 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.

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 that an employer must maintain and preserve for a period of six years, weekly payroll records showing, *inter alia*, the employee's social security number, wage rate, daily and weekly hours worked, gross wages, deductions, any allowances claimed as part of the minimum wage, and net wages. Upon request of the Commissioner, the employer is required to make the records available at the place of employment. Section 142-2.7 further provides that an employer shall furnish each employee with 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. This required recordkeeping provides proof to the employer, the employee and the Commissioner that the employee has been properly paid. In the

instant case, it is undisputed that Petitioner did not maintain required payroll records and did not provide required wage statements to Claimant.

Burden of Proof in the Absence of Adequate Employer Records

Where an employee files a complaint for unpaid wages with DOL and the employer has failed in its statutory obligation to keep records, the employer bears the burden of proving that the employee was properly paid. Labor Law § 196-a provides, in relevant part:

“Failure of an employer to keep adequate records, in addition to exposing such employer to penalties . . . shall not operate as a bar to filing of 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.”

Where employee complaints demonstrate a violation of the Labor Law, DOL may credit the complainant’s assertions and relevant employee statements and calculate wages due based on the information the employee has provided. The employer then bears the burden of showing that the Commissioner’s order is invalid or unreasonable by a preponderance of the evidence of the specific hours that the claimants worked and that they were paid for these hours, or other evidence that shows the Commissioner’s findings to be invalid or unreasonable. (*See* Labor Law § 196-a; *Angello v. National Finance Corp.*, 1 AD3d 850 [3d Dept. 2003], *Matter of Henry Foods, Inc.*, Board Docket No. PR 10-060 at page 8 [March 20, 2013] [*appeal pending*]). In *National Finance Corp.*, the Court stated that “the burden of disproving the amounts sought in the employee claims fell to [the employer], not the employees, and its failure in providing that information, regardless of the reason therefore, should not shift the burden to the employees” (*Angello*, 1 AD3d at 854).

If the Petitioner meets its burden and establishes by credible evidence that the order is invalid or unreasonable, the burden then shifts to the Commissioner to rebut the Petitioner’s testimony and establish that the orders under review are reasonable and valid. (*Matter of Pamela Blum*, Board Docket No. PR 08-111 [December 14, 2009]; *Matter of Richard Delldone*, Board Docket No. PR 08-145 [July 22, 2009]).

Minimum Wages and Overtime

Article 19 of the Labor Law, known as the Minimum Wage Act, requires an employer to pay each of its covered employees the minimum wage in effect at the time payment is due (*see* Labor Law § 652). The applicable minimum wage in effect in New York during the time period covered by the Wage Order was \$5.15 per hour from February 26, 2002 through December 31, 2004; \$6.00 per hour from January 1, 2005 through December 31, 2005; \$6.75 an hour from January 1, 2006 through December 31, 2006; and \$7.15 an hour from January 1, 2007 to October 8, 2008, the last date covered by the Wage Order (12 NYCRR § 142-2.1).

The Minimum Wage Order for Miscellaneous Industries and Occupations, 12 NYCRR Part 142, requires an employer to pay a live-in domestic employee such as the claimant for overtime at a rate of time and one half the state minimum wage for all hours worked in excess of 44 in a work week (12 NYCRR § 142-2.2; *see Matter of Diana Allaham*, Board Docket No. PR

10-059 [February 7, 2011]; *Samirah & Enug v Sabhnani*, 772 F Supp 2d 437 [EDNY 2011]; *Almeida v Aguinaga*, 500 F Supp 2d 366 [SDNY 2007]; *Manliguez v Joseph*, 226 F Supp 2d 377 [EDNY 2002]). A residential employee shall not be deemed to be working at any time when she is free to leave the place of employment (12 § NYCRR 142-1[b]).⁶

Under the Wage Order, an employer is entitled to a credit for each day of lodging (12 NYCRR § 142-2.5[a][ii]) and a credit for each meal provided as payment towards the minimum wage (12 NYCRR § 142-2.5[a][i]).

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).

Claimant Was Not Credible

The Commissioner argues that the best available evidence in this case was the information provided by the Claimant on her claim form since it was completed a couple of weeks after her termination, when her memory of the events was fresh. We do not agree. Because the hearing before the Board is *de novo* (Board Rule 66.1 [c]), we must consider the testimony and evidence received at the hearing in making our determination whether to affirm, revoke or modify the Orders (*Matter of Henry Foods, Inc.*, Board Docket No. PR 10-060 ([March 20, 2013] [*appeal pending*])). Claimant averred in her sworn claim that she worked 15-hour days, seven days a week for a total of 105 hours per week, and did not miss a single day of work during the six-year relevant period for vacation periods, holidays, and sick or personal days and she was paid \$300 per week from 2002 through February 2008 and \$400 per week thereafter. The claim on its face contradicted evidence that the DOL obtained during the investigation including the days and hours worked by Claimant, the days she did not work, and how many meals she was provided. During the investigation, she told LSI Siefried, that she was not allowed to take time off after her husband's death, and insisted that she was provided one meal per day which she ate standing up while working.

At the hearing, however, Claimant acknowledged that she was off most Saturdays and Sundays, gave an account of her pay history which contradicted her sworn claim, evaded questions about holidays and other days off, acknowledged that she took seven weeks off when her husband died, and testified that she only worked five weekends during 2003 and could not remember how many weekends she worked in other years. Claimant also testified that that she started at 10:00 a.m. rather than 7:30 a.m. on Mondays, that when she worked on a weekend she started at 8:30 a.m., and that she worked until 10:30 p.m. on Fridays only sometimes. She vehemently insisted during the investigation that she was only provided with one meal, yet testified “[b]eing honest, yes, sometimes” she was supplied with two. Claimant gave shifting

⁶ Spreadshift is not owed in this case because the total wages paid per week 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 *Matter of Leah Wilen & Darren Wilen*, Board Docket No. 06-048, fn 1 (June 25, 2008); *Seenaraine v Securitas Security Services USA, Inc.*, 37 AD3d 700 [2007]; *Chan v. Sung Yue Tung Corp.*, 12 Wage & Hour Cas 2d [BNA] 507 [SDNY 2007]; NY St Dept of Labor Opinion Letter No. RO-06-0027 [April 12, 2006]).

accounts of how often she was expected to cook, where the Milichs ate, and whether there was food in the house. Her claim and testimony that she stayed in the Milichs' home when they were away made no sense not only because there would obviously be little work for a housekeeper under those circumstances, but also because it was undisputed that she had no house key.

Claimant's repeated failures to remember contradictory testimony she herself had given either at the Workers' Compensation Board or, in many cases, earlier in the present hearing undermined her credibility. Her testimony that she was required to spend long hours caring for Petitioner's daughter Danielle made no sense, since for most of the relevant period, Danielle did not even live with Petitioner. Indeed, much of Claimant's account of her hours and duties appeared to be based on the brief period she worked before the death of Petitioner's first wife Aura in 2000, or shortly afterwards, rather than during the relevant period which began in October 2002. In her testimony, Claimant repeatedly pointed to the schedule for a Tuesday to Saturday work week given to her by Aura in 2000, to demonstrate that she worked on Saturdays, when it was undisputed that Claimant changed to a Monday-to-Friday work week at her request prior to the start of the relevant period. Although Claimant expressed anger at being asked to work in others' houses on occasion, her evidence in this regard also supports Petitioner's and Judith Milich's testimony that after Danielle's departure, there was less work in their house and no need for long hours.

Claimant's statements to DOL were misleading: for example, by telling LSI Seifried during his investigation that Petitioner would not allow her to take time off when her husband died, when her own testimony shows she took off three weeks prior to his death to care for him and an additional month afterwards. When confronted with such contradictions, Claimant offered no explanation, instead simply continuing to insist that she was in the right. A good example is Claimant's testimony – when asked why she wrote on her claim that she worked 7:30 a.m. to 10:30 p.m. Sunday through Saturday with no days off when her own evidence at the hearing showed the contrary – that she did so “because that is the fact.”

By contrast, Petitioner's testimony was credible, was corroborated by other witnesses (including, in many cases, Claimant herself), and was supported by the contemporaneous calendar notations made by his wife. While not every single day when Claimant worked or did not work is included (understandably, since the calendar was not a payroll record and its purpose was not to keep track of Claimant's hours), these notations support Petitioner's testimony concerning when he and his wife were on vacation, concerning Mondays when Claimant was off work for doctor's appointments, and concerning Claimant's hours (for example, as to her having been given Mondays and Tuesdays off after occasionally working holiday weekends). Thus, for example, the calendar for August 1 and 22, 2005, Mondays, bore the notations (respectively) “Icelda not coming” and “No Icelda;” a notation for Tuesday August 2 stated, “/p/u [pick up] Icelda.” The calendar for Friday through Monday October 28 through 31, 2005, recorded an 8:00 a.m. scheduled flight to Las Vegas on Friday, a Barry Manilow concert on Saturday, and a Monday return flight. In many other cases, the calendar day following a vacation was notated “p/u Sushi” or variants, corroborating not only the fact of the vacation, but also that the Milichs' dog was boarded, confirming Nicholas Kostiw's testimony, and undercutting the likelihood that Petitioner's housekeeper remained in the house.

The Wage Order is Revoked

We find that the Wage Order does not reflect a reasonable or valid approximation of the hours worked by Claimant, whose testimony at hearing was incredible and contained inconsistent statements which contradicted, disavowed, and undermined the allegations in her sworn claim, statements made to the DOL investigator during the investigation, her testimony at the Workers' Compensation Board, and even her testimony at hearing in the instant case. In the circumstances of this case and based on the credibility findings discussed below, we find that it is appropriate to credit Petitioner's testimony and the school calendar as the best available evidence in this case. While Petitioner did not maintain the payroll records which are required by law,⁷ we find that Petitioner met his burden to disprove the Claimant's claim, to establish by credible evidence that the Wage Order is invalid or unreasonable, and to provide evidence establishing the Claimant's actual hours and wages (*Matter of Pamela Blum*, Board Docket No. PR 08-111 [December 14, 2009]).

We credit the Petitioner's testimony and find that Claimant's wages were \$350 per week in spring 2002, \$375 in spring 2003, \$400 in spring 2004, \$425 in spring 2005, \$450 in spring 2006, and \$475 in spring 2007 and \$500 in spring 2008. Claimant's testimony to lower pay rates was internally inconsistent and not credible. Her testimony that she received a \$25.00 raise each year corroborates Petitioner's testimony. While Petitioner did not furnish proof in the form of canceled checks, it was undisputed that Claimant was paid in cash.

We find that Claimant's usual work hours were Monday from 10 a.m. to 4:30 p.m. and Tuesday through Friday from 8 a.m. to 4:30 p.m. with two 30-minute meal breaks per day (one on Monday) – typically, a 36-hour work week. While Petitioner acknowledged there were occasions when Claimant missed the 4:30 p.m. Friday train, there was no proof that her work week extended later, and her testimony that she often worked until they returned from dinner at 10:30 p.m. or 11:00 p.m. was internally inconsistent and not credible.

We find that Claimant's regular work week was Monday to Sunday, and credit Petitioner's testimony that Claimant worked two to four weekends per year for which an overtime premium was due: an annual Channukah party that was held on a Sunday; an annual summer barbeque; and when Rosh Hashonah or Passover seders occurred on weekends. Based on all the evidence including which years Rosh Hashonah and the first nights of Passover fell on weekends as recorded in the calendars, as well as occasional annotations in the calendars corroborating the weekend celebrations, we find that Claimant worked one such weekend during the relevant portion of 2002, two in 2003, two in 2004, two in 2005, two in 2006, two in 2007 and two in 2008. We credit Claimant's testimony that she began her weekend work day at 8:30 a.m., and credit Petitioner's testimony that when Claimant worked on weekends, he took her home on Sunday nights, and find that on these weekends, Claimant worked from 8:30 a.m. to 10:30 p.m. per day.

⁷ As discussed below, we affirm the Penalty Order in its entirety.

Based on notations in the school calendar and Petitioner's testimony that when Claimant worked during the weekend, she received time off the following week,⁸ we find that Claimant worked three additional weekends for which an overtime premium is due: November 22-23, 2002, January 11-12, 2003, and February 13-14, 2004.

With the exception of the three specific weekends listed above, we credit the Petitioner and find that the Claimant did not work when the Milichs were away on vacations or long weekends, that Claimant did not work on eight holidays (New Year's Eve and Day, Memorial Day, July 4, Labor Day, Thanksgiving, the day after Thanksgiving, Christmas), or on ten Mondays when she had appointments, or during a seven week period in April and May 2006, when Claimant and Petitioner both agree that Claimant took off three weeks to take care of her husband and four weeks of bereavement leave.

It is undisputed that Petitioner provided all food at no expense to Claimant, who admitted that she was provided with two meals per day. For those weeks where she worked seven days, we credit the Petitioner with a total of thirteen meal allowances per week: one on Monday and two each day from Tuesday through Sunday. We also credit the Petitioner with six daily lodging allowances per week.

Based on our findings above, the Wage Order is revoked where the Petitioner owes no wages for the 16 weeks during the claim period that the Claimant worked overtime. Our calculations are as follows:

	Wages Paid	Hourly Rate ⁹	O/T Rate ¹⁰	O/T Hours ¹¹	Wages Earned	Weekly Lodging Allowance ¹²	Weekly Meal Allowance ¹³	Total Allowances from MW	Wages Owed
2002	\$350.00	\$ 6.25	\$ 7.73	12	\$367.70	\$13.20	\$22.75	\$35.95	\$0.00
2003	\$375.00	\$10.42	\$ 7.73	12	\$387.34	\$13.20	\$22.75	\$35.95	\$0.00
2004	\$400.00	\$11.11	\$ 7.73	12	\$406.99	\$13.20	\$22.75	\$35.95	\$0.00
2005	\$425.00	\$11.81	\$ 9.00	12	\$441.93	\$15.30	\$26.65	\$41.95	\$0.00
2006	\$450.00	\$12.50	\$10.13	12	\$475.07	\$17.40	\$29.90	\$47.30	\$0.00
2007	\$475.00	\$13.19	\$10.73	12	\$501.91	\$18.30	\$31.85	\$50.15	\$0.00
2008	\$500.00	\$13.89	\$10.73	12	\$521.62	\$18.30	\$31.85	\$50.15	\$0.00

⁸ While we credit Petitioner's testimony that when Claimant worked weekends, she was given time off during the following week, the law does not permit compensation for overtime to be given in the form of extras time off in a future pay period.

⁹ Wages paid divided by total hours worked (total hours worked = 56) (12 NYCRR 142-2.6).

¹⁰ O/T rate is the applicable minimum wage rate x 1.5 (12 NYCRR 142-2.2) (domestic employees exempted from FLSA entitled to overtime at 1.5 minimum wage).

¹¹ O/T hours are 12 per week based on a 56 hour work week (56-44=12) (12 NYCRR 142-2.2 (overtime premium for residential employees for hours worked over 44 in a week).

¹² 12 NYCRR 142-2.5 (ii) sets forth the applicable lodging allowance. We calculated based on six days a week.

¹³ 12 NYCRR 142-2.5 (i) sets forth the applicable meal allowance. We calculated based on 13 meals: one on Monday and two on Tuesday through Saturday.

The Penalty Order is Affirmed

It is undisputed that Petitioner did not maintain lawfully required time and payroll records and did not provide the Claimant with a wage statement each time the Claimant was paid. Under these circumstances, we affirm the Penalty Order.

NOW THEREFORE, IT IS HEREBY RESOLVED THAT

1. The Wage Order is revoked ; 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
June 12, 2013.

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