STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of: PAULINE THOMPSON AND MERLE THOMPSON, Petitioners, To Review Under Section 101 of the Labor Law: An Order to Comply with Article 19 of the Labor Law and an Order Under Article 19 of the Labor Law, both dated March 10, 2009, - against - THE COMMISSIONER OF LABOR, Respondent.	DOCKET NO. PR 09-110 RESOLUTION OF DECISION

APPEARANCES

Tremiti LLC, Joseph F. Tremiti, Esq. of Counsel, for the Petitioners.

Maria L. Colavito, Counsel, NYS Department of Labor, Benjamin A. Shaw of Counsel, for the Respondent.

WITNESSES

Pauline Thompson and Merle Thompson for the Petitioners; Senior Labor Standards Investigator Vincent Hammond and Joan Phillip for the Respondent.

WHEREAS:

The petition for review in the above-captioned case was filed with the Industrial Board of Appeals (Board) on February 26, 2010. Upon notice to the parties a hearing was held on October 13, 2010 in New York, New York, before Devin A. Rice, Associate Counsel to 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 file legal briefs.

The Commissioner of Labor (Commissioner or respondent) issued the order to comply with Article 19 (wage order) under review on March 10, 2009 against the petitioners. The

wage order directs compliance with Article 19 and payment to the Commissioner for wages due and owing to the claimant in the amount of $12,028.87 for the time period from June 6, 2004 through October 26, 2007, with interest continuing thereon at the rate of 16% calculated to the date of the order, in the amount of $9,158.32, and assesses a 25% civil penalty in the amount of $3,007.00, for a total amount due of $24,194.19.

The Commissioner also issued an order under Article 19 (penalty order) assessing a $300.00 civil penalty against the petitioner for failure to keep and/or furnish true and accurate payroll records and failing to provide the claimant with a wage statement with each payment of wages.

SUMMARY OF EVIDENCE

Petitioners Pauline Thompson and Merle Thompson hired claimant Joan Phillip in June 2004 as a caretaker for their elderly father Kermit Thompson[1]. Ms. Phillip worked in that capacity until she was fired on October 6, 2007. During her employment as Mr. Thompson's caretaker, Ms. Phillip worked four to five days a week at Mr. Thompson's home and was on duty 24 hours a day. The parties stipulated that the Petitioners paid Ms. Phillip $380 a week for five days of work for the time period from June 2, 2004 to December 31, 2004; $385 a week for five days of work for the time period from January 1, 2005 to September 15, 2005; $390 a week for five days of work for the time period from September 18, 2005 to December 15, 2005; and $320 a week for four days of work for the time period from December 18, 2005 to July 12, 2007. Ms. Phillip testified that the Petitioners paid her $400 a week for four days of week for the time period from July 20, 2007 to October 26, 2007.

Pauline Thompson testified that Ms. Phillip's job duties included preparing meals for Mr. Thompson, cleaning the dishes after meals, helping Mr. Thompson to shower, and socializing with him. Her duties also included ensuring Mr. Thompson's safety to prevent injuries and helping him with his personal care and hygiene. Pauline Thompson testified that the following specific duties were part of Ms. Phillip's work: supervising Mr. Thompson's ambulation, doing his laundry, assisting him with his medication, and taking him to doctor's appointments.

Merle Thompson testified that a typical work day for Ms. Phillip included helping Mr. Thompson get up in the morning, preparing breakfast, showering and dressing, exercise such as taking a walk, preparing lunch, watching television or listening to the radio with Mr. Thompson, and preparing dinner.

The claimant, Joan Phillip, testified that her duties included laundry, helping Mr. Thompson in the shower, preparing his meals, taking him to church and appointments, and helping him with math and spelling. She described a typical day as getting up at 7 a.m., preparing breakfast, helping Mr. Thompson shower and get dressed, going for a walk, preparing lunch, preparing dinner, preparing a snack, helping Mr. Thompson change his

[1] Mr. Thompson was 91 years old at the time of the hearing and had Alzheimer's disease and diabetes. Additionally, the claimant testified that he had Parkinson's disease.

clothes, helping him in bathroom, and putting him to bed. She also testified that she helped Mr. Thompson to take his medication based on the Petitioners' instructions and the directions on the bottles. Ms. Phillips sometimes colored with Mr. Thompson or read to him, and she also talked to him about what they watched on t.v.

Ms. Phillip further testified that she washed the dishes after meals, washed Mr. Thompson's clothes twice a week, and cleaned the house twice a week. She estimated that the laundry took her 20 minutes to do, and that she spent about 30 minutes cleaning the apartment.

Senior Labor Standards Investigator Vincent Hammond testified that the respondent issued the orders against the petitioners based on Ms. Phillip's claim form and the job duties sent to him by the petitioners. He determined based on that information that she was a home health aide and not a companion under the federal Fair Labor Standards Act (FLSA) because her primary job duty was housekeeping. The respondent computed the overtime wages allegedly due to the claimant at 1 ½ times the state minimum wage rate based on a 13 hour work day because in the absence of detailed records of hours worked for live-in employees, the respondent's policy is to administratively determine that 12 hours are worked each day plus an additional hour of spread-shift pay at the state minimum wage.

Hammond testified that in reaching the determination that the claimant was owed overtime, he consulted the FLSA, but admitted he was unaware of a "domestic services exemption." Hammond further testified that he assessed a 25% civil penalty in this case because it was the "lowest penalty [he] could think of". He stated that he could have given a 10% penalty or a 200% penalty.

FINDINGS AND CONCLUSIONS OF LAW

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

The minimum wage order for miscellaneous industries at 12 NYCRR 142-2.14 (c) (1) excludes "companion" from the definition of employee. "Companion" is defined as "someone who lives in the home of an employer for the purpose of serving as a companion to a sick, convalescing or elderly person, and whose principal duties do not include housekeeping" (12 NYCRR 142-2.14 [c] [1] [ii]). We find that the petitioners have met their burden of proof that the claimant was a "companion", and therefore not subject to the minimum wage and overtime provisions of Article 19 of the Labor Law then in effect. [2]

It is undisputed that the petitioners, as power of attorney for their father, Kermit Thompson, hired the claimant to provide services for Mr. Thompson in his home. It is likewise undisputed that Mr. Thompson is an elderly person who was unable to live unassisted. The petitioners testified that Mr. Thompson suffers from Alzheimer's and diabetes, and the claimant testified that Mr. Thompson also suffers from Parkinson's disease. Although the parties did not agree on the number of hours the claimant worked

[2] Amendments to Article 19 effective November 29, 2010 removed the companionship exemption from the Minimum Wage Act (*see* Labor Law § 651 [5] [2011]).

each week during the relevant time period, they did agree that she lived at Mr. Thompson's residence[3] on her scheduled work days and was with Mr. Thompson 24 hours a day on those days, which varied from four to five days a week depending on the time period.

The petitioners testified that the claimant prepared meals for their father, cleaned up the kitchen and bathroom after use, helped their father shower, helped him dress, took him on walks and did activities with him such as reading and watching television, supervised his ambulation to prevent falls, reminded him to take his medication, and washed his laundry. The claimant testified that her duties also included taking Mr. Thompson to church and doctor's appointments, giving him his medications according to the petitioners' instructions, cleaning the dishes, and doing the laundry twice a week. The claimant estimated that she spent 15 to 20 minutes twice a week doing laundry, and half an hour twice a week cleaning the apartment.

We do not find that this limited amount of "housekeeping" can be considered one of the claimant's principal duties. Instead, we find that her principal duties were to provide companionship and security to Mr. Thompson. Accordingly, the claimant was not an employee as that term is defined by Article 19 of the Labor Law, and the orders are unreasonable and invalid.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The orders under review herein are revoked; and

2. The petition be, and the same hereby is, granted.

Anne P. Stevason, Chairman

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 7, 2011.

[3] The respondent raises for the first time in its post-hearing brief that Mr. Thompson's home was not the claimant's residence. We do not find that the statute requires that the companion live permanently in an elderly person's home, only that he or she lives there when she is working.