

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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In the Matter of the Petition of:

FAST FRESH FOOD & GAS, INC.,

Petitioner,

To Review Under Section 101 of the Labor Law:
An Order to Comply with Article 19 of the Labor
Law, dated October 14, 2008,

- against -

THE COMMISSIONER OF LABOR,

Respondent.
-----X

DOCKET NO. PR 08-162

RESOLUTION OF DECISION

APPEARANCES

Bianca Formisano, Esq., for Petitioner.

Maria L. Colavito, Counsel to the New York State Department of Labor, Jeffery G. Shapiro of Counsel, for Respondent.

WITNESSES

Issa Isaa, Ahmed Ahmed, Adil Ahmarrass, and Issam Houssani for the Petitioner; Labor Standards Investigator Jenita Hohenstein for the Respondents.

WHEREAS:

The Petition for review in the above-captioned matter was filed with the Industrial Board of Appeals (Board) on November 6, 2008. Upon notice to the parties a hearing was held on Tuesday, April 29, 2009 in White Plains, New York, before Susan Sullivan-Bisceglia, former 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, and to make statements relevant to the issues.

The Order to Comply with Article 19 (Wage Order) under review was issued by the Respondent Commissioner of Labor (Commissioner) on October 14, 2008 against the Petitioner and directs payment to the Commissioner for wages due and owing to three employees in the amount of \$12,778.00 for the time period from May 12, 2002 to June 24, 2005, interest continuing thereon at the rate of 16% calculated to the date of the Wage Order in the amount of \$8,185.23, and assesses a civil penalty in the amount of \$12,778.00, for a total amount due of \$33,741.23.

In its Petition and amended Petition, Petitioner alleged that the Wage Order was "arbitrary and capricious." Petitioner further alleged that "the [computation of wages] did not comply with accepted accounting procedures." Petitioner's amended Petition added that Petitioner neither owes nor is liable for the amounts in the Wage Order. In addition, Petitioner alleged that some or all of the claimants in this matter had made "false and incredible" allegations.

In her Answer, the Commissioner alleged that the investigation of Petitioner's business began when a former employee filed a complaint for unpaid wages with the New York State Department of Labor (DOL) and due to the lack of payroll and time records, DOL performed its audit of unpaid wages based on employee statements and "in full compliance with all applicable statutes, case law, and prior decisions of the [Board]". In addition, the Commissioner's response to Petitioner's allegation that some or all of the claimants provided the DOL with "false and incredible" allegations, was neither compelling nor burden shifting in this matter based on previous Board decisions.

SUMMARY OF EVIDENCE

Petitioner's Evidence

Testimony of Issa Issa

Petitioner Fast Fresh Food & Gas, Inc. (Fast Fresh) operates as a 24 hour gas station that sells retail gasoline and groceries in Poughkeepsie, New York. Fast Fresh has been in business since January 2001. Issa Issa, (Issa), owner of Petitioner testified that it takes approximately four employees working in staggered shifts to run Fast Fresh for 24 hours per day. Issa agreed that employment at Fast Fresh is transient because employees have issues with "too little hours, too little pay...they are not happy with the clientele." Issa testified that approximately 100 employees have held jobs at Fast Fresh.

Issa testified that the maximum number of hours a Fast Fresh employee would work at the station is eight hours per shift. He testified he worked at Fast Fresh between 12 to 14 hours per day. He mentioned that he wanted to be "hands on" and "...like[d] [his] customers to see [his] face all the time, to know that the owners are there working for them." Issa mentioned that the number of days his employees worked varied, between five to six days per week.

Station employees were paid an hourly wage in cash. The employees received their wages from Issa once a week, at times in an envelope with their names written out on the envelope flap. Issa stated that all employees of Fast Fresh, including the three claimants in

this matter, were paid for the time that they worked. Issa testified that he did not require employees to clock out for breaks and did not deduct time for breaks from their wages. He stated that the only deductions he took were whatever the deductions were on the vouchers supplied by his payroll company, which included "federal taxes, [and] for social security."

Issa testified that he had a record of the hours worked by the three claimants in this matter, Ahmed Ahmed (Ahmed), Adil Ahmarrass (Ahmarrass) and Issam Houssani (Houssani) (collectively claimants). Fast Fresh payroll is currently processed by Paychex, a "payroll system" that "calculate[s] everything." Issa explained that Paychex pays Fast Fresh's payroll taxes and provides him with payroll vouchers. However, prior to 2005, Issa's payroll was processed by his accountant, Bernie Pitkoff. Pitkoff's payroll system would calculate Fast Fresh employee payroll deductions, and Pitkoff would send Issa a voucher explaining these deductions. Issa testified he gave Fast Fresh employees the voucher. Issa further testified that he kept time cards of daily hours; however no vouchers or time cards were produced at hearing or to DOL.

Issa testified that his accountant, Mr. Pitkoff, requested all Fast Fresh employee time cards, payroll stubs, receipts and vouchers to work on a sales tax audit of Fast Fresh. Issa testified that he sent Pitkoff the time cards "from day one," as well as "...bills to payroll stubs to time cards to receipt vouchers." Issa further testified that Pitkoff "completely blew off the sales tax audit" and "[Issa's] calls," and when he went to Pitkoff's office, "[Pitkoff] was not there anymore".

Issa testified that employees would complain about pay, specifically tax deductions. Issa testified that he would "...give them raises to compensate for the taxes." He testified this resulted in more tax deductions and subsequently more complaints from his employees about taxes. Issa testified that some employees asked him to put certain hours "on the books" and the remaining hours "off the books" to avoid paying taxes. Issa testified that he denied such requests.

In 2007 DOL requested the Petitioners' daily and weekly time records as part of an investigation of a wage claim filed by Kamel Ayouni. Issa testified that he "gave [the DOL] everything [he] could at the time", including "time cards that [he] had". Issa testified that he did not know how many time cards he provided, did not have copies of the time cards he provided to the DOL, and did not bring the time cards to the hearing. However, Issa also testified that he did not provide time cards to the DOL, and went on to state that he provided DOL with a summary that was prepared by his payroll company. Issa did not have a copy of the summary. Issa entered into a stipulation settling Ayouni's claim in September 2007 because he could not afford a lawyer and "didn't have the time...because [he] was going through another big issue being audited for sales tax."

Issa agreed that Ahmarrass worked for Fast Fresh from January 2004 to June 2005. He denied that Ahmarrass worked 60 hours per week, testifying that Ahmarrass was "a stocker", "one of the floor guys", and someone in Ahmarrass' position would work different hours depending on the day of the week. Issa went on to explain that Thursday, Friday and Saturday were the busiest days of the week for Fast Fresh, due to business from the local "bars and clubs". On those days a "floor guy" would "...come in at 11 o'clock...[and] would

leave by 7:00 at the latest.” Issa testified that Ahmarrass was paid “accurately” by check. He further testified that Ahmarrass complained about taxes.

Issa agreed that Issam Houssani worked for Fast Fresh from June 2004 to June 2005. He denied that Houssani worked 54 hours per week, testifying that Houssani was “a register guy” who worked eight hours a day, five to six days per week. Issa testified that he paid Houssani “accurately” and by check. Issa further testified that Houssani complained to Issa about not being paid enough and requested that Issa “pay him off the books”. Issa testified that he did not agree to Houssani’s request.

Issa agreed that Ahmed worked for Fast Fresh from May 2002 to July 2006. He denied that Ahmed worked 70 hours per week, testifying that Ahmed worked for about 35 hours per week and that it was “ridiculous” for a person “to be working 70 hours a week at a gas station” the size of a small room. Issa testified that he paid Ahmed “accurately” and by cash. Issa stated he would pay Ahmed “...whatever the voucher told me to pay him”. Issa further testified that Ahmed complained about “working weekends”, and denied that Ahmed complained about being underpaid.

Testimony of Ahmed Ahmed

Ahmed worked at Fast Fresh from May 2002 to July 2006. Ahmed testified that his schedule at Fast Fresh was 8 a.m. to 5 p.m., but Issa would specifically ask him to stay later than 5 p.m. “[a]ll the time”. He testified that his schedule was “basically” 70 hours per week. Ahmed testified that when he began working at Fast Fresh, he was paid in cash, and Issa deducted about \$40 from those cash payments. Ahmed stated that Issa explained to him that the deduction was “[t]o pay [his] taxes.” Ahmed denied receiving any voucher or payment stub indicating his pay and tax deductions when he was paid in cash from Issa.

Ahmed testified that he knows Ayouni and was aware of his wage claim. Ahmed testified that he accompanied Ayouni to the United States Department of Labor (USDOL) and translated Arabic to English for Ayouni. Ahmed admitted that he was aware that Ayouni received a settlement from Issa. Ahmed further testified that he knows the other two claimants in this matter, Ahmarrass and Houssani.

After Fast Fresh began issuing weekly paychecks, Ahmed testified that only a portion of the hours he worked were paid by check, and the rest of his hours were paid in cash. Ahmed testified that he complained to Issa about not receiving overtime wages and that for roughly four years he trusted Issa to correct the payments. Ahmed admitted that he was fired in July 2006. He stated that in September 2007, he filed a wage claim with the USDOL because he did not know what to do, and it was the USDOL that directed him to DOL.

Ahmed’s letter, dated September 27, 2007, submitted to DOL states that he worked 70 hours per week and that he was not paid overtime. The supporting documents include paychecks dated from August 2005 to August 2006. Ahmed testified that he spoke with a DOL representative a few days after submitting his letter, and he had informed the representative that he “basically work[ed] from 60 to 70 hours every week”. He further testified that the paychecks he submitted to the DOL only reported part of his hours. Ahmed

testified that Issa "...put some on the books and the rest in cash". Ahmed stated Issa promised to pay him and that was the reason he continued to work for Petitioner.

Testimony of Adil Ahmarrass

Ahmarrass was called as a witness by Petitioner but testified that he did not speak English well. Hearing Officer Sullivan-Bisceglia offered to adjourn the hearing to obtain an interpreter for Mr. Ahmarrass but Petitioner did not accept the offer, choosing instead to withdraw the witness.

Testimony of Issam Houssani

Houssani testified that he worked at Fast Fresh from June 2003 to June 2005. Houssani testified that his schedule would change every week, but that he worked between 60 and 65 hours over a 6 day workweek. Houssani further testified that he was paid cash on a weekly basis; adding that the cash would be in an envelope at times.

Houssani produced copies of the envelopes he received from Issa at the hearing. The envelope copies showed words and numbers written on each envelope flap. The markings indicated Houssani's name, and a set of numbers, some under headings marked "gross," "taxes," "net," or "total". Houssani testified the number represented the hours he worked for that week, and an amount of \$25 deducted from his wages for that week. Houssani testified the \$25 deductions were for taxes. He denied receiving any voucher or payment stub indicating his pay and tax deductions from Petitioner. Houssani denied writing the markings. There are no signatures on the envelopes or personal identifiers to indicate who wrote the markings. Houssani indicated that he has seen Issa's signature once and testified that the markings were written in Issa's handwriting. Issa later testified that he wrote Houssani's name on the envelopes, but not the numerical figures.

Houssani testified that he complained to Issa about not receiving overtime wages and that he worked for Petitioner for roughly two years because "[i]t was hard to leave" because it was the best opportunity he had at the time. Houssani admitted that he was fired from Fast Fresh.

Respondent's Evidence

Testimony of Jenita Hohenstein

DOL Labor Standards Investigator (LSI) Hohenstein testified that she participated in the DOL's investigation of the Petitioner which was initiated due to a complaint for unpaid wages filed by Kamel Ayouni with the DOL in January 2007.¹

LSI Hohenstein was assigned to the case in April 2007. LSI Hohenstein testified she worked with Senior LSI Charles Lombardo on part of Ayouni's case. A DOL assignment log in the DOL's file in this matter indicates that Senior LSI Ares and Senior LSI Lombardo

¹ Ayouni was not present at the hearing.

worked on this case as well.² The investigation was broadened to other employees since minimum wage violations were alleged.

DOL requested payroll records from Petitioner on a number of occasions. First, a Notice of Revisit, dated May 29, 2007, indicates that LSI Hohenstein requested payroll records for hours worked and wages received from January 2001 till May 29, 2007 for Ayouni and Ahmed. LSI Hohenstein testified that a Notice of Revisit advised the Petitioner that she was requesting those records on behalf of DOL and that the records were to be made available when she returned.

Issa was notified that Ahmarrass submitted a wage complaint to DOL in a letter dated May 27, 2008 from Senior LSI Ares. DOL requested payment of owed wages or evidence that the money was not due for Ahmarrass. LSI Hohenstein testified that the documents Issa produced in response to that request were weekly payroll records, not daily time records.

LSI Hohenstein further testified that Issa provided "few" records, such as "some stubs" and a summary from Issa's accountant indicating the hours the claimants worked during the week and how much they were paid. LSI Hohenstein stated that she could not determine if a Fast Fresh employee had been underpaid because the records did not indicate how many hours each employee worked each day. LSI Hohenstein testified that Issa did not provide the DOL with records of daily hours worked for any employee.

LSI Hohenstein described how she calculated the wages owed to Ahmed and Houssani. She stated that she credited the Petitioner with the amounts Ahmed and Houssani stated they were paid. LSI Hohenstein further testified that Ahmed and Houssani's underpayment was derived by subtracting the amount they alleged they were respectively paid straight time by Petitioner, from the amount they should have been paid for those hours under the state minimum wage law. Ahmarass' computation sheet was not created by LSI Hohenstein therefore no testimony was provided regarding the accurateness of Ahmarrass' underpayment computations.

LSI Hohenstein stated that the 100% civil penalty assessed in the Wage Order was not her recommendation. LSI Hohenstein testified that she does not have the authority to assess penalties and does not know how the Petitioner's penalty of 100% was assessed. The DOL did submit an investigative form entitled "Background Information – Imposition Of Civil Penalty" containing various boxes checked relating to the size of the firm, good faith of the employer, gravity of the monetary violations, history of past violations, and records provided or not provided concerning non-wage violations. Under a section titled "Recommendations," the form recited the statutory language of Labor Law § 218 relating to civil penalties to support a 100% penalty recommended by LSI Ares. DOL did not submit the testimony of Senior LSI Ares or any other witness particularizing how such penalty was determined.

There were two other penalty sheets in the DOL file regarding this matter. Both sheets were dated the same as the 100% penalty assessment. One sheet indicated a 0% penalty and the other sheet indicated a 25% penalty. LSI Hohenstein could not explain why there were two other penalty sheets in the DOL file submitted to the Petitioner.

² Senior LSI Lombardo and Ares did not testify.

FINDINGS AND GOVERNING LAW

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

Standard of Review and Burden of Proof in Proceedings Before the Board

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 commissioner under the provisions of this chapter” (Labor Law § 101 [1]). It also provides that an order of the Commissioner “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 hearing to prove the allegations that are the basis for the claim that the order under review is invalid or unreasonable (*See*, Rules § 65.30 [12 NYCRR § 65.30] [“The burden of proof of every allegation in a proceeding shall be upon the person asserting it”]; *Angello v Natl. Fin. Corp.*, 1 AD3d 850, 854 [3d Dept 2003]).

It is therefore Petitioner’s burden in this case to prove the allegations raised in its amended Petition that: (I) it is not liable for the amounts in the Wage Order; and (II) the Commissioner’s Wage Order calculation of the overtime underpayments owed to Complainants Ahmed, Houssani and Ahmarrass, interest, and civil penalty are invalid or unreasonable.

The Wage Order

In its amended petition, Petitioner challenged the Wage Order as “arbitrary and capricious”. The Wage Order includes: (1) the amount of minimum wage underpayments that were calculated due to the claimants; (2) the amount of interest calculated on those due; and (3) a civil penalty assessed by the DOL. With the exception of the civil penalty imposed on the Petitioner, we reject Petitioner’s contention that the Wage Order was “arbitrary and capricious” and that “the [computation of wages] did not comply with accepted accounting procedures.” The Wage Order assessed a 100% civil penalty. The Board finds DOL’s failure to adequately explain its application of the criteria that must be given “due consideration” under Labor Law § 218 in assessing Petitioner a 100% civil penalty in the Wage Order, to be arbitrary and therefore unreasonable.

MINIMUM WAGES DUE & OWING

An Employer’s Obligation to Maintain Records

The law requires employers to maintain payroll records that include, among other things, its employees’ daily and weekly hours worked, wage rate, and gross and net wages paid (Labor Law §§ 195 and 661, and 12 NYCRR § 142-2.6). Employers must keep such

records open to inspection by the Commissioner or her duly authorized representative at any reasonable time. (Labor Law § 661).

Here, Petitioner testified that he maintained payroll records that indicated the daily hours each claimant worked during the relevant time period. Petitioner failed to produce these alleged time records at either the hearing or during the Commissioner's investigation. Petitioner accused his former accountant, Bernie Pitkoff, of absconding with these records, after Pitkoff appropriated them for a "sales tax audit" of Fast Fresh. Petitioner did not put forth any further evidence that he maintained payroll records for the claimants other than his own testimony. LSI Hohenstein testified that Issa did not provide the DOL with records of daily hours worked for any employee. LSI Hohenstein further indicated that Petitioner only produced "few" records, such as "some stubs" and a summary from Issa's accountant indicating the hours the claimants worked during the week and how much they were paid. No time records were produced during DOL's investigation or at hearing.

Based on the hearing testimony, we find that Petitioner failed to prove that he kept adequate payroll records that indicated daily and weekly hours worked, wage rate, and gross and net wages paid during the relevant time period for each claimant; and that Petitioner did not produce adequate records for the Commissioner to inspect during her investigation.

DOL's Calculation of Wages in the Absence of Adequate Employer Records

An employer's failure to keep adequate records does not bar employees from filing wage complaints. Where employee complaints demonstrate a violation of the Labor Law, DOL must 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 proving that the disputed wages were paid. (See, Labor Law § 196-a; *Angello v. National Finance Corp.*, 1 AD3d 850 [3d Dept. 2003].) 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." (Emphasis added).

In *Anderson v Mt. Clements Pottery Co.*, 328 U.S. 680, 687-88 (1949), *superseded on other grounds by statute*, the U.S. Supreme Court long ago discussed the fairness of relying on employee statements where the employer failed to keep adequate records:

"[W]here the employer's records are inaccurate or inadequate [t]he solution. . . is not to penalize the employee by denying him any recovery on the ground that he is unable to prove the precise extent of uncompensated work. Such a result would place a premium on an employer's failure to keep proper records in conformity with his statutory duty; it would allow the employer to keep the benefits of an employee's labors without paying due compensation as contemplated by the Fair Labor Standards Act."

Citing to *Anderson v Mt. Clemens*, the Appellate Division in *Mid-Hudson Pam Corp.*, 156 AD2d at 821, agreed:

“The public policy of providing protection to workers is embodied in the statute which is remedial and militates against creating an impossible hurdle for the employee. . . . Were we to hold otherwise, we would in effect award petitioners a premium for their failure to keep proper records and comply with the statute. That result should not pertain here.”

Here, the claimants reported that Petitioner was in violation of the Labor Law because they did not receive the “right amount of overtime,” indicating that they received straight time for hours worked over 40 in a workweek. Thereafter, it was the Petitioner’s burden to prove that the disputed wages were indeed paid. (*See*, Labor Law § 196-a) We find that Petitioner did not meet this burden.

LSI Hohenstein testified that the Commissioner found that Petitioner’s records were inadequate. Petitioner did not maintain all required records and the “few” records Petitioner produced did not indicate how many hours each employee worked each day. While some pay stubs were produced, Petitioner did not produce any time cards for the three claimants. DOL computed underpayments based on each claimant’s statement because the Petitioner did not provide the DOL with payroll records that reflected daily hours worked during the relevant time period.

DOL’s Calculations were Reasonable

While Petitioner alleged in its amended Petition that DOL’s “[computation of wages] did not comply with accepted accounting procedures,” the Board finds that the Petitioner failed to prove that DOL’s calculation of claimants’ underpayments were invalid or unreasonable.

Employers are required to pay covered employees overtime pay equal to one and a half times the worker’s hourly rate for each hour worked in excess of 40 hours in a work week. (12 NYCRR 142-2.2). The premium pay due to an employee for time working in excess of 40 hours a week is based on the employee’s regular or hourly rate, even when that rate exceeds the statutory minimum rate. (*Cayuga Lumber, Inc. v Commissioner of Labor*, PR 05-009 [Decision of the Board on Reconsideration September 26, 2007]).

LSI Hohenstein certified that the audit of the wages owed to Petitioners’ employees was based on employee statements that Issa paid straight time for hours worked in excess of 40 hours per week. In fact, as a result, Issa was credited with more than what is reflected on claimant’s paystubs.

Ahmed’s claim and testimony indicated that he worked at Fast Fresh between 60 and 70 hours per week at \$8 per hour, however DOL’s computation sheets for Ahmed are based on a 57 hour work week at \$8 per hour for a period from 05/12/2002 to 12/28/2003. Houssani testified that he worked at Fast Fresh between 60 and 65 hours per week, however DOL’s computation sheets for Houssani are based on a 51 hour work week at \$8 per hour for a period

from 06/15/2003 to 06/12/2005. While Ahmarrass did not testify at hearing, Senior LSI Ares' May 27, 2008 letter to Issa indicates that Ahmarrass alleged working between 65 and 70 hours per week at \$7 per hour, however DOL's computation sheets for Ahmarrass are based on a 60 hour work week at \$6 to \$6.50 per hour for a period from 01/01/2004 to 06/24/2005. It is clear to the Board that while the Commissioner used the claimants' statements as a basis for the calculation of wages due, her calculations utilized fewer hours than alleged by the claimants. We find the Commissioner reasonably extrapolated the number of hours each employee worked, on average, based on their statements and the paystubs that were available because the Petitioner did not supply her with time records.

We reject Issa's general denials that the claimants did not work as many hours as alleged or indicated on their claim forms. Issa admitted that each claimant worked at Fast Fresh during the period alleged in their claim forms and utilized in DOL's computation sheets. Issa did not dispute the hourly wage rates utilized in DOL's computations. In fact, DOL's computation sheets indicate that it credited Issa's statement regarding the hourly wage rate for Ahmarrass, applying his assertion that Ahmarrass was paid \$6 to \$6.50 per hour.

LSI Hohenstein reliably testified to calculating Ahmed's and Houssani's underpayments. She credited the Petitioner with the amounts Ahmed and Houssani stated they were paid. LSI Hohenstein testified that Ahmed and Houssani's underpayment was derived by subtracting the amount they alleged they were paid by Petitioner, a certain amount of hours at straight time, from the amounts they should have been getting paid under the state minimum wage laws. While Ahmarass' computation sheet was not created by LSI Hohenstein, the Board's review of his computation sheet reveals that the DOL calculated his underpayment based on the claim that Petitioner paid straight time for overtime hours. This actually credits the Petitioner for more than what is reflected on the few paystubs he provided.

Therefore, the Board finds that DOL's assessment of unpaid wages owed was reasonable.

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." The Board finds that the considerations and computations required to be made by the Commissioner in connection with the interest set forth in the Order are valid and reasonable in all respects.

CIVIL PENALTY FOR FAILURE TO PAY WAGES

If the Commissioner determines that an employer has violated Article 6 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 based on the amount owing. Labor Law § 218 (1) continues:

“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 these provisions, rules, or regulations, or to an employer whose violation has been found to be willful or egregious, shall direct payment to the Commissioner of an additional sum as 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...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 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.”

In this case, the Commissioner assessed a penalty of 100% in the amount of \$12,778 in the Wage Order. In its amended petition, Petitioner challenged the Wage Order as “arbitrary and capricious”. The Wage Order includes the civil penalty assessed by the DOL. Petitioner challenged the penalty determination at hearing by inquiring into factors that are considered in assessing the penalty, and DOL did not object to litigating these issues. Issa testified that he provided a payroll summary to the DOL and “everything [he] had.” The DOL’s investigator in this case corroborated such assistance. Issa also alluded to the size of the business being small. Moreover, one of the sections under the “Background Information – Imposition of Civil Penalty” form entitled “history of past violations” indicates a box checked off “No prior History- new establishment”. Also, under the section entitled “good faith of the employer” a box is checked off that indicates Petitioner “promises future compliance”.

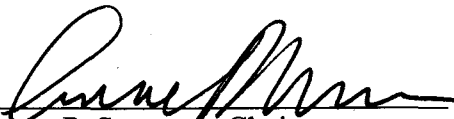
DOL failed to submit sufficient testimony from a witness particularizing how the applicable factors were weighed to assess the 100% penalty in the Wage Order and provided no explanation for the two penalty assessment sheets, indicating a 0% and 25% penalty, in its file for the present matter.

The Board finds the testimony of LSI Hohenstein was insufficient since she did not explain how the statutory factors were considered to arrive at the 100% penalty amount in the Wage Order. LSI Hohenstein testified that the penalty was recommended by a senior investigator not at the hearing and repeated that she did not have the authority over the 100% penalty determination. It is unclear to the Board which factors were weighed, and what weight, if any, was given to each factor when considering the 100% penalty assessment in the Wage Order.

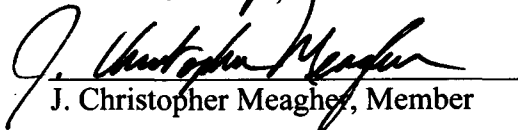
We therefore revoke the 100% civil penalty assessed in the Wage Order for failure of the Commissioner to substantiate “due consideration” of the statutory criteria required by Labor Law § 218, and modify the final Order accordingly.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The Wage Order is modified to reduce the amount of civil penalty due and owing to 0%, and in all other respects is affirmed; and
2. The Petition for review be and the same hereby is, denied.



Anne P. Stevason, Chairman



J. Christopher Meagher, Member



Jean Grumet, Member

LaMarr J. Jackson, Member

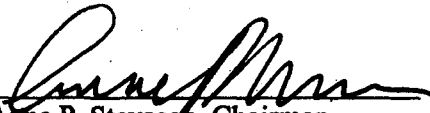
Absent


Jeffrey R. Cassidy, Member

the Industrial Board of Appeals
Dated and signed in the Office of
at New York, New York, on
July 28, 2010.

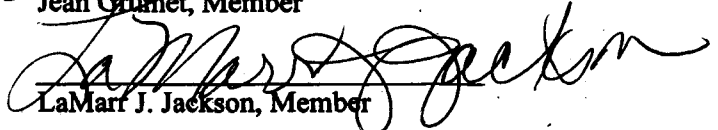
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Anne P. Stevason, Chairman


J. Christopher Meagher, Member


Jean Grumet, Member


LaMarr J. Jackson, Member

Absent
Jeffrey R. Cassidy, Member

the Industrial Board of Appeals
Dated and signed in the Office of
at New York, New York, on
July 28, 2010.