

HUMBERTO MERCHAN (D/B/A HA CUTTING)

Docket No. PR 06-069

The Petition asserts that the penalty was assessed in error because Petitioner's accountant did timely register Petitioner with the Commissioner for the 2006 year and paid the necessary fee, but Petitioner never received confirmation of his registration. The Petition also asserted that, as Petitioner never had any employees and didn't plan on hiring any, Petitioner was unaware that he had to file a WC/DB form with his registration. Finally, the Petition stated that Petitioner had since obtained the form, filed it with the Workers Compensation Board (WCB), and was awaiting confirmation from the WCB in order to file it with the Department of Labor (DOL).

Respondent Commissioner filed an Answer to the Petition, denying its material allegations and interposing as affirmative defenses that the Petition contains insufficient and conclusory allegations.

Upon notice to the parties, a hearing was held on February 26, 2008 before J. Christopher Meagher, Member of the Board and the Board's designated hearing officer in this case. Each party was afforded full opportunity at the hearing to present documentary evidence, to examine and cross-examine witnesses, and to make statements relevant to the issues. A Spanish language interpreter translated the proceeding for the Petitioner.

SUMMARY OF EVIDENCE

Petitioner, Humberto Merchan (D/B/A HA Cutting) (Merchan), formerly ran a single operator shop at 247 West 38th Street in New York, New York where he cut garment samples for sale to wholesalers in the apparel industry. For all relevant purposes, Merchan is both a manufacturer and contractor governed by the registration requirements of Article 12-A of the Labor Law.

Nancy Gao (Gao) is a Labor Standards investigator assigned to DOL's Apparel Industry Task Force (AITF). Gao testified concerning the investigation that led to the Order under review.

Gao testified that all apparel manufacturers and contractors must register with the Commissioner by January 15 of every year. After this date each year, AITF does site inspections of apparel operators to verify compliance with registration. If a manufacturer/contractor does not display an up to date registration certificate, AITF issues the operator a Notice of Labor Law Violation for failure to register and an Order to Register (OTR) within 20 days.

On February 9, 2006, Gao and a coworker did a site inspection of Merchan's operation and spoke with him. Merchan explained that he had filed for his registration in December, 2005 but had not yet received the 2006 certificate. Upon checking with DOL's Albany registration unit, however, Gao learned that Merchan had not completed the registration process because he had not submitted a required form certifying that Workers Compensation and Disability insurance is unnecessary as a single operator with no employees (WC/DB-100 form). DOL had sent Merchan notice on January 12, 2006 informing him that his registration was incomplete and he would not be issued a 2006 certificate until this form had been filed. In a report summarizing the investigation, Gao stated that she and a co-worker explained the requirements of the law to

Merchan, advised him that he needed to complete registration within twenty days, and provided him with the materials to complete the renewal process. Since Merchan had not displayed an up to date 2006 registration, however, he was issued a Notice of Violation for failure to register and an OTR to register within 20 days.

On February 13, 2006, DOL sent Merchan final notice informing him that his 2006 apparel registration was still incomplete. The notice attached DOL's earlier correspondence advising Merchan that he must file a WC/DB-100 form before a registration certificate could be issued.

On February 17, 2008, DOL sent Merchan notice of a compliance conference scheduled for March 9, 2006 where he could be heard on why an Order to Comply should not be issued or a penalty not imposed for his failure to register. Merchan did not appear at the conference.

A report summarizing the compliance conference stated that Merchan had: (1) timely filed his 2006 renewal application but had not completed registration by filing the WC/DB form despite several notices from DOL; (2) operated his business without the proper apparel registration certificate from January 15, 2006 to June 21, 2006; (3) attended an education seminar in 2005, and; (4) been assessed penalties for four prior violations of Labor Law § 345[1] in 1999, 2001, 2003, and 2004. Citing the penalty criteria of Labor Law § 345[4][a], the report stated that the Assistant Commissioner therefore imposed a penalty of \$3,000 for violation of Labor Law § 345[1]. Based on DOL's investigation and the report of its compliance conference, the Commissioner issued the instant Order to Comply against Merchan on August 11, 2006.

At the hearing, DOL asserted through counsel that the maximum fine of \$3,000 was justified because Merchan had four prior violations of Article 12-A. Gao testified that she was not involved in deciding Petitioner's specific penalty but that it was determined by the compliance conference officer. According to Gao, the officer would customarily take into account such factors as a record of prior violations and whether the operator comes into compliance in a timely manner. Gao stated that she believed the fine was reasonable because Petitioner had been in business since 1999, knew he had to annually register by January 15, and had previous violations.

Merchan testified that after opening his cutting business in 1999, he always relied on a friend to prepare the paperwork for him to register every year.¹ This person prepared the 2006 renewal application and filed it in December, 2005 with the \$150 registration fee. Merchan testified that if the friend made a mistake and omitted something, he was unaware of it.

Merchan testified that after DOL notified him that his 2006 registration would not be issued, the friend told him that it was because DOL had changed its practices and now required him to carry Workers Compensation, although Merchan previously thought compensation coverage was unnecessary if he was a sole operator. Merchan said the friend then told him that he could no longer help him complete registration. Faced with having to carry compensation insurance, and without the help he had to register, Merchan testified that he gave up and went out of business.

¹ We note that Merchan is of Limited English Proficiency (LEP).

Merchan explained that after receiving the \$3,000 fine imposed by the Order, he brought this appeal because he believes such a large fine is unfair. Merchan testified that he cuts only small lots, his business is slow, and he earns just enough to pay the rent and eat. He cannot afford to pay a \$3,000 fine and still operate a business. Merchan acknowledged that he has been wrong and fined in the past but argued that the present fine is unfair because he has always paid the fines. Merchan claimed that DOL agreed to reduce his last fine and allowed him to pay it in installments so he could stay in business. Merchan argued that his circumstances justify a reduction in the present fine and a similar arrangement.

After the hearing and at the request of the Board, DOL submitted a copy of Merchan's registration records for 2003, 2004, and 2005 and a record of his prior violations of Article 12-A. Copies were provided to Merchan. DOL was afforded the opportunity to submit testimony at a supplemental hearing to explain the nexus between the prior violations and penalties and the present one. Merchan was afforded the opportunity to submit further evidence concerning the prior violations. Neither party availed itself of such opportunity.

Merchan's prior history reveals the following:

1999: DOL issued Merchan an OTR on May 21, 1999 for failure to display a registration certificate on a site inspection by AITF. Merchan completed registration. DOL and Merchan agreed by stipulation to a \$150 fine for the violation. Merchan paid the fine.

2000: No record of any violation.

2001: DOL issued Merchan an OTR on May 25, 2001 for failure to display a registration certificate on a site inspection by AITF. Merchan completed registration by June 14, 2001. DOL did not assess a fine for the violation but instead referred Merchan to a seminar.

2002: No record of any violation.

2003: DOL issued Merchan an OTR on July 3, 2003 for failure to display a registration certificate on a site inspection by AITF. Merchan completed registration by July 25, 2003. DOL initially recommended a \$1,000 fine but reduced it to \$150 after Merchan appeared at a Compliance Conference and asked that the fine be reduced because "business was slow," "no money was coming in," and "he would not be able to pay." Merchan paid the fine.

2004: Merchan filed his application on January 29, 2004. DOL did not issue him a registration certificate, however, because he had not filed a WB/DB 100 form certifying that Workers Compensation was unnecessary². DOL issued notices to Merchan in February and March,

² There is no indication in the records that Merchan's registration was withheld for failure to file a WC/DB 100 certification before 2004. In 2003, Merchan filed a cover letter with his application in which he stated that he had

2004 to do so. Merchan filed the form and completed registration by May 24, 2004. In the interim, however, DOL issued him an OTR on February 25, 2004 for failure to display a registration certificate on a site inspection by AITF. DOL issued Merchan an Order to Comply on September 10, 2004 imposing a \$1,000 fine for the violation. At a conference held with him on March 9, 2005, DOL agreed to settle the fine for \$500 after Merchan explained that he operated a one man shop, cut small lots, and requested that the fine be reduced. Merchan paid the fine.

2005: Merchan filed his application with the WC/DB 100 form on February 18, 2005. In the interim, however, DOL issued him an OTR on January 20, 2005 for failure to display a registration certificate on a site inspection by AITF. DOL voided the violation at the conference when the prior year's fine was settled.

In summary, the records show that Merchan operated a single operator shop for eight years. During such time, DOL issued him violations on four occasions and assessed fines that were within Merchan's ability to pay (i.e. \$150, \$0, \$150, and \$500) given the small size of his operation. In the last two registration years involving the filing of the WC/DB 100 form -- i.e. 2004 and 2005 -- DOL initially assessed a \$1,000 fine the first year for failure to timely file the form, but later reduced it to \$500. In the second year, Merchan submitted the form with his application. DOL voided a violation or penalty for a late registration filing for that year. In both of these years involving the form, penalties for late or incomplete registrations were reduced or voided after Merchan argued that a large fine was beyond his capacity to pay.

GOVERNING LAW

A. 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 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 (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]).

no employees and therefore did not have WC insurance. In 2004, Merchan filed a similar cover letter but the registration was withheld for failure to file a WC/DB 100 form.

It is therefore Petitioner's burden in this case to prove by a preponderance of evidence the allegations in his Petition that the penalty imposed by the Commissioner's Order is invalid or unreasonable.

B. Article 12-A of the Labor Law

Article 12-A of the Labor Law requires all "manufacturers" and "contractors" engaged in the apparel industry to register with the Commissioner by January 15 of every year (Labor Law § 341). Those who fail to register, or who fail to comply with an order of the Commissioner to register, are in violation of the statute (Labor Law §§ 345[1] and 345[2]). The Commissioner may assess a "civil penalty" for registration violations of up to \$1,500 for an initial violation, and up to \$3,000 for a second or subsequent violation (Labor Law § 345[4][a]).

A "special task force" is established within the DOL to concentrate enforcement of the Labor Law affecting "production employees" in the apparel industry (Labor Law § 342). On their behalf, the task force is assigned duties to inspect manufacturers and contractors to insure compliance with registration, the Labor Law, and orders of the Commissioner (Labor Law § 343), and is given powers to inspect their books, records, and premises for compliance with payroll tax, building, health, and safety laws, and to refer violations to proper authorities (Labor Law § 344).

C. Civil Penalties

Article 12-A empowers the Commissioner, in her discretion, to assess civil penalties for violation of registration requirements. In applying such discretion, however, the Commissioner must balance the following factors to determine the amount of the penalty. Section 345.4 (a) provides:

In assessing the amount of the penalty, the Commissioner *shall give due consideration* to the size of the manufacturer's or contractor's business, its good faith, the gravity of the violation, the history of violations of this article and the manufacturer's or contractor's compliance with the recordkeeping or other requirements of the labor law [emphasis added.]

Article 12-A and its discretionary civil penalties were adopted by the Legislature in 1986.³

FINDINGS

We affirm the Commissioner's determination finding Petitioner to have violated Article 12-A by failing to complete registration but modify the penalty assessed for such

³ See L. 1986, Ch. 764 and *Matter of Mudd (USA) (T/A Mudd Jeans)*, PR 06-049 at pp. 9-11 (November 28, 2007) (reviewing legislative history of Article 12-A).

violation to \$1,000 in light of Petitioner's testimony concerning the filing of the WC/DB form.

Petitioner testified that he had timely filed his application for 2006 but failed to complete registration by filing the WC/DB form because of mistake and misunderstanding between Petitioner and his representative. In light of the record from the prior year -- i.e. 2005 where Petitioner's representative *did* file the WC/DB form with the registration -- we credit Petitioner's testimony that the failure to file the form the next year arose from such mistake and misunderstanding. Petitioner further testified that he operated a single operator shop and would be forced out of business by a \$3,000 fine. He believed he had shown good faith by always paying the fines for his prior violations.

In light of Petitioner's testimony concerning the mistake in filing the form, and the statutory factors to be duly considered under the statute, a \$1,000 fine is therefore reasonable.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The Order to Comply with Article 12-A of the Labor Law, dated August 11, 2006, is hereby modified to substitute a penalty of \$1,000 for Petitioner's violations of Labor Law §§ 341 and 345.2, and in all other respects is affirmed; and
2. The Petition is in all other respects denied.



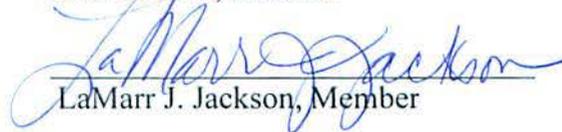
Anne P. Stevason, Chairman



J. Christopher Meagher, Member



Jean Grumet, Member



LaMarr J. Jackson, Member

Dated and signed in the Office
Of the Industrial Board of Appeals
at New York, New York on
April 21, 2010.