

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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In the Matter of the Petition of:	:
	:
SHOJI KIMURA AND ASIAN PRODUCTS, INC.	:
AND API TECHNOLOGY, INC.,	:
	:
Petitioners,	:
	:
	DOCKET NO. PR 07-085
To Review Under Section 101 of the Labor Law:	:
An Order to Comply with Article 6 of the Labor Law,	:
dated October 19, 2007,	<u>RESOLUTION OF DECISION</u>
	:
- against -	:
	:
THE COMMISSIONER OF LABOR,	:
	:
Respondent.	:
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APPEARANCES

Shoji Kimura, for Petitioners.

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

WITNESSES

Shoji Kimura for the Petitioners; Jean-Paule Westpfahl, and Labor Standards Investigator Frederick Seifried for the Respondent.

WHEREAS:

The Petition for review in the above-captioned case was filed with the Industrial Board of Appeals (Board) on November 29, 2007. Upon notice to the parties a hearing was held on September 10, 2009 in Garden City, 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.

The Order to Comply with Article 6 of the Labor Law (Order) that is under review was issued by the Respondent Commissioner of Labor (Commissioner or Respondent) on

October 19, 2007 against Petitioners Shoji Kimura and Asian Products, Inc. and API Technology, Inc. (Petitioners) The Order directs compliance with Article 6 and payment to the Commissioner for wages due and owing to Claimant Jean-Paule Westpfahl in the amount of \$76,481.34 for the time period from September 20, 2002 to December 30, 2005, with interest continuing thereon at the rate of 16% calculated to the date of the Order, in the amount of \$22,060.15, and assesses a civil penalty in the amount of \$19,120.00, for a total amount due of \$117,661.49.

The Petition states:

“Our appeal is based on the admission that the monies for wages in the amount of \$76481.34 is due to the employees but that the payment schedule of \$6550.00 per month is much too steep for us to pay each month. We are therefore requesting that the monthly payment be of a lesser amount so that we can comply.

“As for the interest at 16% we find this to be excessive as well as the penalty of \$19120.00 and would like these eliminated.”

On May 28, 2008, the Commissioner filed a Motion to Strike pursuant to Board’s Rules of Procedure and Practice (Rules) Rule §65.13(a), (12 NYCRR §65.13[a]) “alleging that the Board does not have jurisdiction under the Labor Law” to review or lower payment schedules, and that the Labor Law mandates the 16% penalty when an Order is issued. The Petitioners did not respond to the Motion, and the Board granted it on October 2, 2008. Accordingly, the sole remaining issue for hearing was the reasonableness of the civil penalty.

SUMMARY OF EVIDENCE

Petitioner Shoji Kimura testified that Asian Products is an importer of parts for air conditioners and other electrical appliances. API Technology is the distributor of products for Asian Products. According to Petitioner Kimura, Claimant worked in his companies for twenty years. He testified that he knows that he owes Claimant money, but after having suffered four strokes since the case arose, he can no longer remember how much money is owed. Kimura admitted that in 2008, he told Claimant not to return to work until this case is settled.

Claimant testified that she worked for Kimura for twenty years as a bookkeeper. She testified that there came a time when Mr. Kimura paid her with a number of checks that she could not cash. Claimant testified that after she filed her claim, Kimura asked her to write a letter to the DOL and to the IBA withdrawing her claim, but she refused to do so. She stated that Kimura told her that she could no longer work for him until the case was resolved.

Labor Standards Investigator Frederick Seifried testified that the DOL received an anonymous complaint in September 2004 stating that for some time, employees of API/Asian Products, Inc. were being paid with checks they could not cash. Seifried made a field visit to the Petitioners' place of business on September 21, 2005, spoke to Kimura's wife, and advised Claimant to tell employees to complete claim forms and forward them to the DOL. On November 30, 2006, Claimant filed a Notice of Claim alleging that she was owed \$78,481.34 in unpaid wages. On February 13, 2007, DOL Senior Investigator Henry Culbertson spoke to Asian Products, Inc. representative, June Audin, who agreed that Claimant would be paid her unpaid wages in three installments.

On April 30, 2007, Siefried visited Asian Products' Ronkonkoma, New York office and met with Petitioner Kimura to discuss Claimant's unpaid wage claim. During this visit, Kimura admitted to Siefried that the amount of the claim was correct. Siefried requested payroll records, but Kimura stated none were on the premises and that Claimant did all record keeping. Kimura stated that he was willing to pay \$2,000.00 per month, and could begin making payments in May 2007. Investigator Siefried told Kimura that he would have to increase the monthly payments significantly and pay off the claim within six months. Seifried prepared and sent Kimura a monetary stipulation and schedule of payments that required seven monthly payments of \$6,550.00 per month. Kimura made one payment of \$2,000.00 on June 30, 2007, but did not make any further payments, nor did he sign the monetary stipulation and schedule of payments.

Seifried testified that he recommended a 25% civil penalty, which is the minimum penalty, and that he considered the employer's willingness to comply and the fact that there were no prior labor law violations as factors in imposing the minimum penalty. Seifried testified that Kimura "said he would come into compliance and agreed that the amount due was correct and that he wanted to make payments to correct the situation." The "Background Information – Imposition of Civil Penalty" form also indicates that Seifried took into account that Petitioners paid Claimant with "NG" [no good] checks, and that over \$1,000 was owed.

STANDARD OF REVIEW AND BURDEN OF PROOF

In general, when a Petition is filed, the Board reviews whether the Commissioner's order is valid and reasonable. The Petition must specify the order "proposed to be reviewed and in what respects it is claimed to be invalid or unreasonable. Any objections . . . not raised in the [Petition] shall be deemed waived" (Labor Law § 101). The Board is required to presume that an order of the Commissioner is valid. (Labor Law § 103 [1]).

Pursuant to Rule 65.30 [12 NYCRR 65.30]: "The burden of proof of every allegation in a proceeding shall be upon the person asserting it." Therefore, the burden is on the Petitioners to prove that the civil penalty assessed in the Order under review is not valid or reasonable.

FINDINGS AND CONCLUSIONS OF LAW

Pursuant to Rule 65.39 (12 NYCRR 65.39), the Board finds that the Petitioners have not met their burden to show that the civil penalty in the Order is invalid or unreasonable, and we find that the considerations required to be made by the Commissioner in connection with the imposition of a 25% civil penalty were proper and reasonable in all respects.

The 25% Civil Penalty is Reasonable and Valid

Labor Law § 218 provides that if the Commissioner determines that an employer has violated Article 6, the Commissioner is required to issue a compliance order, which includes a demand that the employer pay the total amount of wages, benefits, or wage supplements found to be due and owing. Along with the issuance of an order directing compliance, the Commissioner is authorized to assess a civil penalty, in addition to or concurrently with any other remedies or penalties provided under the Labor Law, based upon the amount determined to be due and owing. Labor Law § 218 provides, in pertinent part:

“1. ... In no case shall the order direct payment of an amount less than the total wages, benefits or wage supplements 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, benefits or supplements violations, the failure to comply with recordkeeping or other non-wage requirements.

“4. The civil penalty provided for in this section shall be in addition to and may be imposed concurrently with any other remedy or penalty provided for in this chapter.”

DOL Investigator Siefried testified that the 25% minimum penalty was imposed on Petitioners based on his determination that the employer was cooperative and agreed that \$76,481.34 in unpaid wages was due to Claimant, and that there were no prior labor law violations. Siefried also testified and indicated on the penalty form that Claimant was paid with checks that were returned for nonsufficient funds and the amount owed was more than \$1,000.00. We find the penalty assessed to be reasonable and valid.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The Order is affirmed; and
2. The Petition for Review be, and the same hereby is, denied.



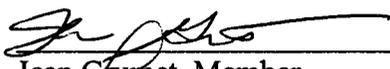
Anne P. Stevason, Chairman



J. Christopher, Member



Mark G. Pearce, Member



Jean Grunet, Member



LaMarr J. Jackson, Member

Dated and signed in the Office of
The Industrial Board of Appeals,
At New York, New York, on
March 24, 2010.