

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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In the Matter of the Petition of:	:
	:
VAN PATTEN ENTERPRISES, INC.	:
(T/A KIRBY VACUUM),	:
	:
Petitioner,	:
	:
To Review Under Section 101 of the Labor Law:	:
An Order under Article 19 of the Labor Law and an	:
Order to Comply with Articles 6 and 19 of the Labor	:
Law, both dated May 9, 2008,	:
	:
- against -	:
	:
THE COMMISSIONER OF LABOR,	:
	:
Respondent.	:
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DOCKET NO. PR 08-090
RESOLUTION OF DECISION

APPEARANCES

Mark D. Greenwald, Esq., for Petitioner.

Maria L. Colavito, Counsel to the New York State Department of Labor, Mary McManus of Counsel, for Respondent.

WITNESSES

Robert W. Smith, Elizabeth A. Ares, and Lisa MacDonald for the Petitioner; Robert W. Smith and Elizabeth A. Ares for the Respondent.

WHEREAS:

The Petition for review in the above-captioned case was timely filed with the Industrial Board of Appeals (Board) on June 26, 2008. Upon notice to the parties a hearing was scheduled and held on February 2, 2009 in Albany, 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 to file post-hearing briefs.

The Orders under review in this proceeding were issued by Respondent Commissioner of Labor (Respondent or Commissioner) on May 9, 2008, and direct compliance with Labor Law Articles 6 and 19 Labor Law. The Order to Comply with Articles 6 and 19 of the Labor Law (Wage Order) directs payment to the Commissioner for wages due and owing to over 200 named individuals for various periods from February 12, 2001 to December 10, 2007, in the amount of \$43,622.60, with interest continuing thereon at the rate of 16% calculated to the date of the Order, in the amount of \$14,272.97, and assesses a civil penalty in the amount of \$10,946.00, for a total amount due of \$68,841.57. The Order under Article 19 of the Labor Law (Penalty Order) assesses a civil penalty against the Petitioner in the amount of \$500.00 for failing to keep and/or furnish true and accurate payroll records for each employee for the period February 12, 2004 through June 24, 2007.

The Petition challenges the Commissioner's findings that Petitioner was an employer of the Claimants and that it owes them wages for the time that they spend in training. Petitioner alleges that the Claimants who sold vacuum cleaners through in-home demonstrations (dealers) were independent contractors and not employees. However, the Petition does not dispute that Claimants who engaged in telemarketing were employees and owed wages for time that they spent in training. Respondent answered the Petition, denying its material allegations and asserting that the degree of control that Petitioner exercised over the dealers demonstrates that Petitioner was their employer and therefore owed them wages for their time spent in training.

SUMMARY OF EVIDENCE

Multiple joint exhibits were admitted into evidence. The first, a "voluntary orientation form" provides that:

"The undersigned understands that orientation associated with the marketing and sale of Kirby cleaning systems to consumer end-users through in-home demonstrations is strictly voluntary and involves no "work." As such, said orientation is designed to provide you with marketing techniques; completion of legal documents, including retail installment agreements; financing options; explanation of warranties and rebuilding agreements involving the manufacturer associated with said Kirby cleaning system; demonstration techniques; and promotion opportunities under "Road to Success."

"Should you agree to participate in the voluntary orientation program, you do so with the understanding that no compensation will be paid and that, at any time, you are free to leave said orientation. [Emphasis in original.]"

Joint exhibit "voluntary training/orientation form" provides that:

“The independent dealer understands that orientation associated with the marketing and sale of Kirby cleaning systems to consumer end-users through in-home demonstrations is strictly voluntary and involves no “work.” As such, said orientation is designed to provide the independent dealer with the marketing techniques; completion of legal document [sic], including retail installment agreements; financing options; explanation of warranties and rebuilding agreements associated with said Kirby cleaning system; demonstration techniques; and promotion opportunities under “Road to Success.”

“Some or all orientation may take place in the office or in the field.

“Should the independent dealer agree to participate in the voluntary orientation program, he or she does so with the understanding that no payments will be made in the way of federal or state minimum wage during the time the independent dealer is in orientation.”

Joint exhibit “optional independent dealer agreement” provides in relevant part that:

“1. The Dealer must demonstrate the Kirby cleaning system to a minimum of [blank in original] different individual, qualified prospects during said seven-day period; and

“2. A qualified prospect is a head of the house, consumer end-user, and steadily employed, and who sees a complete demonstration in their own home; and

“3. To receive credit for the demonstration, the Dealer needs to call the Distributor at the beginning and end of each demonstration; and

“4. Where the Dealer satisfies the terms and conditions set forth herein, the Dealer will be paid [blank in original] Dollars for said [blank in original] demonstrations during said seven-day period; and

“6 [sic]. WHERE THE FULL NUMBER OF QUALIFYING DEMONSTRATIONS ARE NOT PERFORMED DURING SAID SEVEN-DAY PERIOD(S), NO PRORATIONS SHALL BE MADE AS TO THE FIXED AMOUNT SET FORTH HEREIN AND THE ACTUAL NUMBER OF DEMONSTRATION [sic.] MADE. IN THE EVENT THIS AGREEMENT IS RENEWED FOR ANY

ADDITIONAL PERIOD(S), THERE WILL BE NO CARRY OVER OF DEMONSTRATIONS MADE IN EXCESS OF THE MINIMUM NUMBER OF SAME SET FORTH HEREIN. [All caps in original.]

“7. This Agreement may be renewed for up to three (3) additional one-week period(s) by written acknowledgment between the parties.

“The Distributor has no right, by contract or in fact, to exercise control over the Dealer in the Dealer’s business activities. It is acknowledged that the Dealer is not engaged in personal services on behalf of the Distributor and the Dealer is free to hire helpers and/or advertise (at the Dealer’s own cost and expense and without prior permission of the Distributor).

“For purposes of this Agreement, and in accordance with the terms of the existing Independent Dealer Agreement with Dealer, Dealer shall not be treated by the Distributor as an employee with respect to any services, for federal, state or local taxes and workers’ compensation purposes.

“In the event Dealer wishes to terminate his/her relationship with Distributor, Dealer must immediately notify Distributor in writing that he/she is ending said association.

“Other than the compensation set forth herein, this agreement shall not supersede the terms and conditions of the Dealer’s Independent Dealer Agreement. In the event Dealer’s demonstrations, as set forth herein, result in a sale of a Kirby cleaning system, the Dealer shall receive the greater of the amounts set forth in this Optional Agreement, net of any amounts already paid to the Dealer hereunder or the profits earned under Dealer’s Independent Dealer Agreement. [Emphasis in original.]”

Another joint exhibit sets forth the terms and conditions of a “15 Demonstration, \$475 Guarantee”:

“The 15 Demonstration, \$475 Guarantee is for motivational purposes only. In order to qualify under the program, the following requirements must be met:

“1. Starting the day you receive your equipment, you must put on a minimum of 15 demonstrations per week.

“2. Upon entering the home, a phone call must be made to the office or to the manager’s cell phone.

“3. Demonstrations must follow the demo sequence and the proof book for you to be given credit.

“4. Demonstrations must have a minimum of 100 dirt pads used.

“5. All Demonstrations must include a 50 stroke comparison test and a sand test against the prospect’s present equipment.

“6. Before leaving the home, a phone call must be made to the office or the manager’s cell phone.

“The following qualifies as a demonstration:

“1. Demonstration to a single person in their own home or apartment, provided that person is employed or retired.

“2. Demonstration to a couple in their own home or apartment, provided that one or both are employed or retired.

“In addition, the following is required:

“1. You must make yourself available to cover 15 demonstrations.

“2. You must attend all 6 morning meetings per week.

“3. You must provide the phone staff with an average of at least 10 referrals from each appointment, complete with names and phone numbers, and where possible addresses.

“If you do not meet these requirements, we do not guarantee you \$475.”

Another joint exhibit “15 demonstration, \$435 per week guarantee” contains the following additional terms:

“6. Before leaving the home, a phone call **MUST** be made to the office or to the manager’s cell phone. **If you do not call, you do not get credit. You must complete a consumer reaction report with every customer. It must be signed by customer and handed in the next day.** [Emphasis in original.]

“The following qualifies as a demonstration:

“1. No single guy renters. (If they live in an apartment they must have a 2000+ year vehicle and have a Discover or American Express credit card.)

“2. Demonstration to a couple **Both parties must be present to count as a demo.** [Emphasis in original.]”

A joint exhibit consignment agreement provides, in part, that:

“1. CONSIGNEE IS FULLY RESPONSIBLE TO CONSIGNOR FOR THE CONDITION AND QUALITY OF GOODS AND FOR ANY LOSS OF GOODS WHETHER BY THEFT OR OTHERWISE. CONSIGNEE IS SOLELY RESPONSIBLE FOR ALL COSTS AND EXPENSES INCURRED IN SELLING THE GOODS.

“2. TITLE IN THE GOODS SHALL REMAIN VESTED IN THE CONSIGNOR UNTIL SUCH TIME AS CONSIGNEE PROVIDES TO CONSIGNOR PROOF THAT THE GOODS HAVE BEEN PURCHASED AND PAID IN FULL BY AN END USER-PURCHASER. CONSIGNEE SHALL SATISFY THE PAID IN FULL REQUIREMENT BY TENDERING TO CONSIGNOR THE CASH EQUIVALENT OF THE FULL PURCHASE PRICE OR AN APPROVED FINANCING AGREEMENT EXECUTED BY THE END USER-PURCHASER.

“3 CONSIGNEE FURTHER AGREES NOT TO REMOVE ANY OF THE GOODS FROM THE STATE IN WHICH RECEIVED, WITHOUT WRITTEN PERMISSION OF CONSIGNOR AND, UNLESS SOLD TO AN END USER-PURCHASER SUBJECT TO THE FOREGOING PROVISIONS, AND TO RETURN GOODS PROMPTLY UPON DEMAND OF CONSIGNOR, FREE FROM ANY ENCUMBRANCE WHATSOEVER, INCLUDING FREIGHT EXPRESS CHARGES.”

Joint exhibit “Kirby Independent Dealer Agreement” provides in relevant part as follows:

“WHEREAS, Distributor is engaged in the business of selling Kirby Systems at wholesale to independent Kirby Dealers for resale; and

“WHEREAS, the Dealer desires to engage in his/her own business of buying and reselling Kirby Systems to consumer end-users as an independent dealer;

“Now, THEREFORE, the parties hereto agree as follows:

“3. Dealer fully understands that in order to protect and maintain the Kirby Company’s trade name, reputation and competitiveness in the marketplace, Kirby Systems must be sold exclusively to consumer end-users by in-home demonstration.

“4. Dealer certifies and agrees that any Kirby System consigned to Dealer will only be sold to consumer end-users after a personal demonstration which will be conducted in the home of the consumer end-user. Dealer understands that any other type of resale of Kirby Systems to wholesalers, retailers, or to anyone who is purchasing the product for the purpose of resale as opposed to consumer end-use, will constitute a breach of this Agreement and that Dealer’s right to sell Kirby Systems will be terminated immediately.

“5. Dealer is and at all times will operate as an independent merchant and is not subject to direction and control by Distributor with respect to his/her selling activities. Dealer is not an agent of or employee of Distributor and shall have no authority to pledge, bind or obligate Distributor in any manner or for any purpose.

“6. The relationship between Distributor and Dealer is that of vendor and vendee and all work and duties to be performed by Dealer shall be performed by him/her as an independent contractor, and Dealer shall not be treated as an employee with respect to any services for federal, state, local taxes and workers’ compensation purposes. Dealer understands that he/she is a self-employed individual and not the agent or employee of Distributor and/or the Kirby Company and has no authority to bind or obligate Distributor and/or the Kirby Company Division, the Scott Fetzer Company in any way whatsoever. Dealer understands his/her duty as a self-employed individual to assume full responsibility for the payment of his/her federal, state and local income taxes and to pay self-employment social security taxes required by the Self-Employment Contribution Act (“SECA”). . . .

“8. Dealer should keep such records as will show the name and address of the consumer end-user, the date of sale, and any other information reasonably requested by Distributor with respect to each Kirby System sold by Dealer, and should comply with all directives of the Kirby Company with regard to said limited warranty”

Another joint exhibit contains a form headed “notice” that states:

“If you do not call or show up for 24 hours after when you are supposed to be present at the office, any equipment that you have in your possession belonging to Van Patten Enterprises, Inc. will be considered stolen and any and all appropriate actions will be taken, including but not limited to any legal actions such as getting a warrant for your arrest. Be aware that due to the value of the equipment, the warrant will be for Grand Larceny, a felony.”

An untitled form admitted as a joint exhibit states:

“I [name] understand that the two-hour second interview session is not compensated. For the first hour, I will be assigned to shadow a senior appointment setter while following a script. The second hour, I will be assigned to a telephone to make calls to determine if I like the position, and for the company to determine if I am selected for the position. After this session, I will talk to a manager who will instruct me on the next step. If selected for the position, I will be given time to return for a regular work schedule. On that shift, I will fill out appropriate forms to be started on payroll.”

Petitioner’s witness Lisa MacDonald testified that she worked for Van Patten Enterprises for three years, from approximately 2004 to 2007, as a Dealer Power Specialist (DPS) or recruiter. Her job was to hire new dealers and telemarketers and provide orientation or training to them.

She testified that the orientation or training occurred over the course of three days and totaled between 8 to 10 hours. The orientation/training sessions did not last full days. During the training, Ms. MacDonald told the potential dealers about the history of the company, demonstrated how the machines worked, allowed for hands on work with the machines, suggested sales techniques, and had those interested in becoming dealers sign forms, samples of which were entered as exhibits at the hearing. Every potential dealer was required to pass a background check. Dealers were given a binder or book containing information about the machines, and also a finance book.

Ms. MacDonald testified that those dealers who opted to take machines on consignment, as opposed to buying the machines themselves, were required to check in with the Petitioner on a daily basis. The Petitioner set the suggested retail price for the machine,

but did not set any price for the sale of accessories. Ms. MacDonald further testified that the Petitioner suggested, but did not require, that the dealers use 100 filters at all demonstrations.

Ms. MacDonald described the optional guarantee program as an option for newly hired demonstrators to be paid for doing in-home demonstrations as opposed to working for straight commissions during their first 30 days. Finally, Ms. Macdonald testified that dealers were offered sales demonstration referrals either in person at the office or by phone, and were free to turn down these referrals.

Labor Standards Investigator Robert W. Smith testified that the unpaid orientation/training consisted of a total of nine hours. He further testified that he computed the wages owed to the dealers for the unpaid training/orientation as follows: he assumed that every dealer who had signed a dealer agreement performed three days of training the week prior to the date the agreement was signed; in the absence of Petitioner's records of the actual hours that each dealer participated in training, he assumed that each dealer had worked 8 hours during each of the three days of training; therefore, he calculated that the dealers were owed 24 hours of wages at the applicable minimum wage rate. The telemarketers were determined to be owed for two hours of training time at minimum wage.

Senior Labor Standards Investigator Elizabeth A. Ares testified that the determination that the dealers were employees was largely based on the Petitioner's own records and forms: where the Petitioner did not keep records of the dealers' actual training hours, eight hours were assumed because "there is a section of the Labor Law that says that a standard day is eight hours." She testified that in one instance a dealer indicated in her claim form that the training was 18 hours. In that instance, DOL determined that Claimant was owed for only 18 hours of training time at the minimum wage rate.

Senior Investigator Ares testified that DOL "had trouble getting Claimant interviews, because the claims had gotten very old as time went by." She further testified that "we weren't able to conduct interviews, because they weren't there when we visited the establishment." No Claimants testified before the Board.

ORAL ARGUMENT

After the record of evidence was closed, the Board requested and received oral argument on the following question of law: "Does the [outside sales] exemption found at 12 NYCRR 142-2.14 (c) (5) apply to the time the petitioner's dealers spent in orientation or training prior to engaging in any outside sales?" Counsel complied with argument before the Board on June 18, 2009.

FINDINGS AND CONCLUSIONS OF LAW

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

The Petitioner is a distributor of Kirby cleaning systems operating in the Albany, New York area. We infer from the records and testimony that Petitioner hires dealers to perform demonstrations of the Kirby cleaning system in potential buyers' homes with the goal of selling the machines. Dealers can either buy the machines or take the machines on consignment. Prior to becoming a dealer, an individual must first attend a three-day training or orientation that lasts a total of eight to ten hours. The dealers are not paid for attending this orientation/training.

The Petitioner also hires telemarketers to schedule demonstration appointments for the dealers. The telemarketers are required to attend a two hour unpaid orientation/training session.

The Department of Labor (DOL) received complaints against the Petitioner for various alleged violations of the Labor Law. After an investigation conducted by Labor Standards Investigator Robert W. Smith under the supervision of Senior Labor Standards Investigator Elizabeth A. Ares, the Commissioner issued the Orders under review. The Orders find that the dealers and telemarketers were employed by the Petitioner, and that they were therefore entitled to receive minimum wages for the unpaid training/orientation time. The petitioner contends that the dealers are independent contractors and that therefore no wages are owed.

Definition of "employer" under the New York Labor Law

Under Article 6¹ of the New York Labor Law, "employer" is defined as "any person, corporation or association employing any individual in any occupation, trade, business or service" (Labor Law § 190[3]). "Employed" is defined as "permitted or suffered to work (Labor Law Article 1 § 2[7])." The federal Fair Labor Standards Act (FLSA) also defines "employ" to include "suffer or permit to work" (29 USC § 203[g]). Because the statutory language is identical, the New York Labor Law and the FLSA follow the same test to determine the existence of an employment relationship (*see e.g. Ansoumana v Gristede's Operating Corp.*, 255 F Supp 2d 184, 189 [SDNY 2003]).

In determining whether an individual is an employee covered by the Labor Law or an independent contractor without wage and hour protections, "[t]he ultimate concern is whether, as a matter of economic reality, the workers depend upon someone else's business for the opportunity to render service or are in business for themselves" (*Brock v Superior Care Inc.*, 840 F 2d 1054, 1059 [2d Cir 1988]). The factors to be considered in assessing such economic reality include (1) the degree of control exercised by the employer over the workers, (2) the workers' opportunity for profit or loss, (3) the degree of skill and independent initiative required to perform the work, (4) the permanence or duration of the working relationship and (5) the extent to which the work is an integral part of the employer's business (*id.* at 1058-1059). No one factor is dispositive (*id.* at 1059).

¹ We use the definition of employer set forth in Article 6 because that is the authority cited to in the Order to Comply with Articles 6 and 19 which states at paragraph A that "at all times mentioned in this Order the above named was an Employer as defined in Section 190.3 of the New York State Labor Law and conducted business at the above address." We note that the definition of employer found in Article 19 is substantially the same (*see* Labor Law §§ 651 [5] and [6]).

We find that the Petitioner exercises sufficient control over the dealers to uphold the Commissioner's Orders as reasonable.

(1) Control

The Petitioner exercised significant control over the manner in which dealers performed their work. Dealers were restricted to selling Kirby cleaning systems to only end-use consumers and were required to perform an in-home demonstration prior to any sale. Additionally, the sale price of the machine was set by the petitioner, and those dealers who took the machines on consignment were required to call the Petitioner every day. We also find that the Petitioner required the orientation/training that is the subject of this appeal. There is no evidence in the record suggesting that an individual could become a dealer without first completing the orientation/training.

The Petitioner exercised even more control over new dealers who opted not to be paid by straight commissions. Those dealers were subject to the Petitioner's control over almost every aspect of their work. The Petitioner required them to perform a set number of home demonstrations during a specific time period and restricted in minute detail the way these home demonstrations were performed. Indeed, in some instances the Petitioner exercised such extreme control over the dealers that qualified home demonstrations to "single guy renters" were not allowed, and could perform demonstrations for couples who lived in an apartment only if they had a 2000 or newer model car and an American Express or Discover Card. Dealers were also required to call the office or a manager before and after each demonstration, and to attend a set number of meetings per week.

We also find that the punitive nature of many of the Petitioner's rules demonstrates control. New dealers who failed to perform the required number of demonstrations during a set time period were not paid any portion of the promised wages, and would not earn any money at all if they made no sales. In addition, the Petitioner, according to its own policies, could take legal action against any dealer who failed to attend a required meeting and then did not show up or call within 24 hours.

(2) Opportunity for profit or loss

The record is largely silent with respect to the dealers' opportunity for profit or loss. The petitioner's business structure does appear to contemplate the possibility of a significant investment on the part of the dealers because they have the option to buy the cleaning systems from the petitioner; however, based on our review of the documents in evidence, we believe that the majority of dealers made no actual investment instead taking the machines on consignment from the petitioner. In contrast, the petitioner owned the cleaning systems and had a much greater opportunity for both profit and loss.

(3) The degree of skill and independent initiative required to perform the work

There is no evidence in the record suggesting that the dealers required any special skills or independent initiative beyond what the petitioner could provide to them in three partial days of orientation/training.

(4) The permanence or duration of the relationship

There is no evidence in the record concerning the permanence or duration of the relationship between the Petitioner and the dealers. However, the agreement entered between the Petitioner and the dealers, by its own terms, could be terminated by either party at any time.

(5) The extent to which the work is an integral part of the employer's business

The Petitioner is a distributor of Kirby cleaning systems and operates no retail outlets. Sales are made only through the door-to-door sales efforts of dealers. Therefore, the dealers are not only an integral part of the petitioner's business, but are essential to marketing and selling the Petitioner's product.

Based on the above factors, we find that an employment relationship existed between the Petitioner and the dealers, and that the dealers were not independent contractors as alleged by the Petitioner.

Failure to pay wages under Articles 6 and 19 of the Labor Law

Labor Law § 191 requires every employer to pay its employees wages. As discussed above, we find that the dealers were employees of the Petitioner. Labor Law § 652 requires an employer to pay its employees minimum wages in statutorily prescribed amounts. The Petitioner's failure to pay at least minimum wage to its dealers for training time is a violation of Articles 6 and 19 of the Labor Law.

Moreover, we find that the outside sales exemption is not applicable to the dealers' participation in training/orientation because such training/orientation took place as a preliminary to their engaging in any outside sales on behalf of the Petitioner (*see* 12 NYCRR 142-2.14 [c] [5] [providing that an outside salesperson is an "individual who is customarily and predominately engaged away from the premises of the employer and not at any fixed site and location for the purpose of: (i) making sales; (ii) selling and delivering articles or goods; or (iii) obtaining orders or contracts for service or for the use of facilities"])). We, therefore, uphold the Commissioner's determination that the Petitioner must pay at least minimum wage to the dealers for the time that they spent in training.

Nonetheless, the method that DOL used to determine the amount of wages due was unreasonable. Investigators Smith and Ares each testified that the Claimants indicated that the training was three days but did not state the number of hours of training per day. DOL determined, in the absence of Petitioner's records showing the actual number of training hours for each dealer, that the training was 8 hours per day for a total of 24 hours per dealer, with the exception of one dealer who indicated on her claim form that she attended 18 hours of unpaid training, in which case DOL determined that the Petitioner owed her wages for 18 hours.

DOL's determination that the training/orientation was 24 hours is not supported by the evidence. Lisa MacDonald testified that the training/orientation spanned three days and totaled eight to ten hours. Investigator Smith's testimony that the training was nine hours

corroborated Ms. MacDonald's testimony. Since the testimony at the hearing by witnesses for both parties was that the total orientation/training for dealers was nine hours on average, we find that the Order must be modified to reduce the number of hours of unpaid work for the dealers from 24 hours to 9; however, in the absence of employer records, we uphold DOL's determination that the one Claimant who specifically stated in her claim form that she attended an unpaid training/orientation for 18 hours must be paid for 18 hours of work (*see* Labor Law § 196-a).

Civil Penalty for failure to pay wages

The Wage Order assesses a civil penalty in the amount of \$10,946.00. We uphold the civil penalty because the Petitioner did not object to the civil penalty in its pleadings (*see* Labor Law § 101 [2] [objections to the order not raised in the appeal shall be deemed waived]).

Penalty Order under Article 19 of the Labor Law

The Penalty Order assesses a civil penalty in the amount of \$500.00 for failing to keep and/or furnish true and accurate payroll records for each employee as required by 12 NYCRR 142-2.6. There is adequate evidence in the record to uphold the Penalty Order as reasonable.

INTEREST

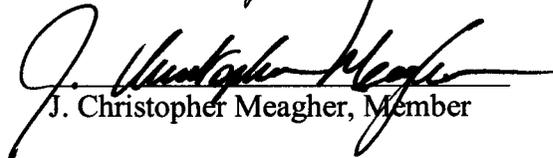
Labor Law § 219(1) provides that when the Commissioner determines that wages are due, then the order directing payment shall include "interest at the rate of interest then in effect as prescribed by the superintendent of banks pursuant to section fourteen-a of the banking law per annum from the date 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."

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT

1. The Commissioner shall issue an Amended Order to Comply With Articles 6 and 19 of the Labor Law that is consistent with this Decision by reducing from 24 to 9 the number of hours that Petitioner owes wages to all Claimants except one and as to that one, the Order to Comply with Articles 6 and 19 be, and hereby is, affirmed; and
2. The Order under Article 19 of the Labor Law, dated May 9, 2008, be, and the same hereby is, affirmed; and
3. The Petition be, and the same hereby is, denied.



Anne P. Stevason, Chairman



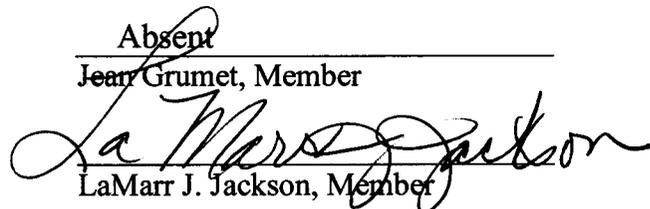
J. Christopher Meagher, Member

Absent

Mark G. Pearce, Member

Absent

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 July 22, 2009.