STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of: ABDUL A. SAADAT, Petitioner, To Review Under Section 101 of the Labor Law: An Order to Comply with Article 6 of the Labor Law, dated April 29, 2008, - against - THE COMMISSIONER OF LABOR, Respondent.	DOCKET NO. PR 08-098 RESOLUTION OF DECISION

APPEARANCES

Joseph N. Campolo, Esq., for Petitioner.

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

WITNESSES

Abdul Saadat, Christine Robustello, Kevin Keefe, and Terrence Gallagher for Petitioner; John Sarsfield 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 28, 2008. Upon notice to the parties a hearing was held on March 10, 2009 in Garden City, 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 Order under review in this proceeding was issued by the Commissioner on April 29, 2008 and directs compliance with Article 6 of the Labor Law. The Order

directs payment to the Commissioner for deductions from wages due and owing to Terrence Gallagher in the amount of $7,126.45, with interest continuing thereon at the rate of 16% calculated to the date of the Order, in the amount of $718.50, and assesses a civil penalty in the amount of $7,126.00, for a total amount due of $14,970.95.

SUMMARY OF EVIDENCE

On August 30, 2009 Claimant Terrence Gallagher filed a claim with the Department of Labor (DOL) against Petitioner Abdul A. Sadaat alleging that Sadaat employed him as livery driver from July 23, 2004 to September 11, 2007, and that during that time period Saadat charged him $21.95 per week for mandatory workers' compensation, $5.25 per week for uniform rental, and required him to pay for a cell phone which cost $74.25 per month.

DOL issued a "notice of claim" letter to Saadat on October 10, 2007. The letter was signed by Phil Pisani, Supervisor, for the Director of the Division of Labor Standards, and advises that the Claimant made a claim for "unpaid wages" in the amount of $7,126.45 and further states that:

> "This Department, in accordance with the New York State Labor Law, has been authorized to collect the amounts due and shown for the employee(s) as listed above.
>
> If these claims are correct, please remit within ten (10) days by check or money order, made payable to the Commissioner of Labor, and forward payment to the office specified above. Payment should be in the amount due after legal deductions, and deductions should be itemized to show differences between the gross amounts claimed and the net pay.
>
> If, however, you do not agree that these amounts are due and payable to the claimant(s), we would appreciate a full statement from you giving your reasons. You should include a copy of any payroll record, benefit policy, contract, commission agreement, etc. to substantiate your position. Your federal employer identification number (FEIN) must be shown on all payments and correspondence submitted to this office.
>
> We trust that we can count on your cooperation in this matter. Please reply in writing within ten (10) days of the date of this letter."

Saadat contested DOL's determination by letter dated October 19, 2007, which stated that the Claimant quit working as a subcontractor for Saadat when Saadat refused to raise his commission rate, and that the Claimant was paid in full. The letter additionally states that there were no payroll records, and that the commission agreement was oral.

By letter dated October 24, 2007, the Petitioner's then Attorney Scott D. Middleton advised DOL that he had been retained by Saadat and requested a copy of any "claim letters,

documents or filings made by" the Claimant, and affirmed Saadat's position that the Claimant was paid in full.

On November 23, 2007, Senior Labor Standards Investigator Annemarie Culberson wrote Mr. Middleton (with a copy to Sadaat's current attorney Mr. Campolo) that DOL was upholding the Claimant's claim because no evidence had been presented that the Claimant was a subcontractor of Saadat. Culberson's letter warns that failure to respond will result in the issuance of an Order to Comply that will automatically add 16% interest to the amount due and carry up to 200% in civil penalties.

Mr. Campolo objected to DOL's determination in a letter dated December 13, 2007, and on January 22, 2008 Culberson recommended that an Order be issued for $7,126.45 in unpaid wages plus interest and a 100% civil penalty.

Saadat testified that he drove for and leased vans from Classic International Franchise Corp., and that although the Clainant drove one of the vans that Sadaat leased, Sadaat and the Claimant both worked for Classic. Saadat explained that Gallagher was leasing a van from Classic but could not afford the lease fee because he was driving only part time, so Classic asked Saadat if the Claimant could drive one of Saadat's vans. Saadat and the Claimant agreed that the Claimant would receive 35% of all fares. That was the only agreement that Saadat ever made with the Claimant and was the same agreement that he had with other drivers who drove the three or four vans that Sadaat was leasing from Classic at the time.

Saadat testified that the Claimant was driving for Classic, and that all of the work was done through Classic. The only requirement that the Claimant had to satisfy in order to drive the van that Saadat leased from Classic was to have a Commercial Driver License (CDL), sign an "Independent Contractor Agreement" with Classic, and pass a background check performed by Classic. Additionally, the Claimant was required to have a phone or two way radio which he could lease from Classic for $32.00 per month, a uniform which was required by the Port Authority of New York and New Jersey (Port Authority) to make pick-ups and drop-offs at JFK, LaGuardia, and Newark Airports, and workers' compensation insurance.

Saadat testified that he had no involvement with the Claimant's daily work. All of the calls were dispatched from Classic directly to the Claimant.

Saadat testified as follows regarding the manner in which he paid the Claimant:

> "Q: As far as withholding money for [the Claimant's] uniform or for workers' compensation or for telephones, did you withhold anything?
>
> "A: Not me. Classic was holding from the whole cab, and then I was deducting from him, but that was Classic was taking everything.
>
> "Q: So Classic would just give you a gross number?
>
> "A: Exactly.
>
> "Q: Of what [the Claimant] collected?
>
> "A: Yes.

"Q: And then he would get paid 35% of that?

"A: Yes sir."

Saadat further testified "I had a contract with Classic, and Classic would give [the Claimant] all the work, and they would tell me at the end of the week how much [the Claimant] grossed, and I was giving [him] 35 percent of that." Additionally, Saadat testified that Classic gave him a sheet at the end of each week that listed the gross fares for the Claimant and the deductions. The print out did not tell Saadat how much he could take from the gross fares because "that was between all the drivers. The driver is getting 35 percent, and the one leasing was getting 25 percent."

Sadaat, when confronted with several checks that he issued to the Claimant, testified that the checks represented "35 percent of the gross that [the Claimant] booked," and that he made no deductions from those checks.

Saadat testified that the Claimant stopped working for him after Saadat refused to raise his commission rate from 35% to 40%.

Christine Robstello was the Reservations Supervisor for Classic during the relevant time period. Her duties included overseeing the reservations agents and handling customer complaints.

When a call came in to make a reservation for a ride to or from the airport, a reservation agent would take the call and then dispatch the call to the next available driver. The dispatchers knew which drivers were available because they were on a list based on the order in which they arrived at the holding lot at the airports. After the driver finished a particular drop off, the driver would call Classic to let it know when he or she would be available to drive another customer.

The drivers were not required to work any particular days or shifts; but that she did ask them to give her a schedule a week in advance of their availability. Classic used the availability schedules in order to plan each day's work. If there were not enough drivers on a particular day, Robustello would call other drivers and ask if they could work that day. If they were unavailable, she would move on to the next driver on the list. There were no repercussions to the drivers for not showing up when called. Classic did not prevent any drivers from working on days when they wanted to work, nor did Classic require drivers to work on specific days or at specific times.

Robustello testified that Classic required drivers to maintain "trip sheets" of:

> "what they did for the day, their fares for the day, whether it was cash, credit card . . . . it is a kind of reimbursement reconciliation sheet used for accounting. They would turn it into the reservation agent. They would take the money, they would sign a receipt slip saying how much money they turned it."

Robustello testified that Classic required all drivers, including those subleasing vans from other Classic drivers, to sign an "independent contractor agreement" and review and

sign Classic's safety manual. Drivers were required to wear a uniform in order to work at the airports. Robustello testified that this was not a requirement of Classic, but was a Port Authority rule. Drivers were also required to have a cell phone or two-way radio. Robustello testified that the Claimant used his own phone.

Kevin Keefe testified that he was the Vice President of Operations for Classic during the relevant time period and that the Claimant leased a van directly from Classic for a brief period of time prior to subleasing from Saadat. Keefe testified that all drivers of leased vehicles were paid 60% of the gross bookings. Pay for drivers who did not lease directly from Classic was "up to the independent contractor that he works for." Keefe further testified that subleasing was done all the time and was allowed "as long as they had the proper licensing and signed an independent contractor agreement" and passed the DMV physical.

Keefe testified that Classic required all drivers to carry workers' compensation insurance. This was specified in the Independent Contractor Agreement. Classic deducted $21.95 per week from drivers' wages for workers' compensation insurance unless a driver carried his or her own insurance. Keefe further testified that the drivers were required to have a phone and that Classic offered each driver a two-way radio, but that the Claimant chose to use his own phone. Keefe testified that additionally, because the Port Authority required drivers to have a uniform to work from Port Authority properties such as the airports, Classic provided the drivers with rental uniforms and deducted the cost from the drivers' wages. Additionally, Keefe testified that the Port Authority as well as the New York State Department of Transportation (DOT) had specific rules about the decals that were required for livery vans and other rules related to insurance. The vans Classic leased to its drivers conformed with Port Authority and DOT rules and any driver who purchased his or her own van had to present it to Classic for approval.

Keefe testified that once the Claimant started driving for Saadat, Saadat was responsible for setting the pay rate for the Claimant, and Classic did not place any limitation on the amount that Saadat could pay the Claimant.

The Claimant, Terrence Gallagher, testified that he worked for Saadat and drove a Classic limousine van, that Saadat deducted $21.95 from his weekly wages for workers' compensation insurance and $5.25 for uniforms, that he was not reimbursed for the $74.25 per month he paid for a cell phone that he used for work, and that he and other drivers had to use their own phones because at some point Classic stopped offering the drivers a company owned two-way radio.

The Claimant testified that he paid for gas that he used while he was driving the van, but that Saadat paid for inspections, insurance and maintenance. Customers paid by cash or credit card, and there was a machine in the van for processing credit card payments. All cash was handed in to Classic at its offices at the end of the shift when the van was returned to Classic's offices in Bohemia. The Claimant did not have his own business cards, but did have Classic's business cards to give to customers.

The Claimant and another driver shared the same van; the Claimant worked the day shift, and the other driver worked the night shift. A third driver used the van on weekends. The Claimant knew what time to end his shift because either the night driver, Saadat, or

somebody from Classic would call each day to let him know what time he had to bring the van back for the night shift driver.

The Claimant testified that he knew deductions were taken from his wages because his "pay was short" since he not actually receive 35% of his gross fares as agreed with Sadaat. The Claimant testified that he asked Sadaat for a statement of deductions, but that Sadaat never gave it to him as requested.

Senior Labor Standards Investigator John Sarsfield was produced on behalf of the Respondent. He was the last witness at hearing, testified that he did not investigate the Claimant's claim against Saadat, and was not involved in deciding whether to issue the Order. Senior Labor Standards Investigator Annemarie Culberson of the Albany DOL office was the investigator assigned to the case, and she is a current DOL employee.

Answering questions about the civil penalty portion of the Order, a matter only first raised in the proceeding during the direct examination of Sarsfield, he testified that he had nothing to do with calculating the civil penalty. Sarsfield's testimony was based solely on a two-hour review of the DOL's investigative file prior to the hearing, and he testified that prior to the hearing he had not discussed the case with any investigator who had personal knowledge of it.

Reporting on boxes checked on a Respondent exhibit in evidence entitled "Background Information – Imposition of Civil Penalty," Sarsfield said that the exhibit showed that Sadaat had not been in business less than three years and that under a section entitled "Good Faith of Employer," Sadaat was "not generally cooperative" because "[t]he employer made a number of illegal deductions and classifies the employee," but Sarsfield could not read the remainder of the sentence and testified that "[i]t doesn't make any sense." Continuing to testify from the exhibit, Sarsfield stated that it showed that one employee is owed over $1,000; that the total due is $7,126.45; that there were "no records in compliance with state law . . . received," "no wage statements," "no prior history of this particular employer," and there were "illegal deductions." In addition, Sarsfield testified that the file reflected at least three letters to DOL from counsel for Sadaat during the investigative phase. Sarsfiled testified that he could not tell, based on his review of the file, why a 100% civil penalty was imposed.

On cross-examination, Sarsfield confirmed that because he was not the investigator in this matter, he would be unaware of documents that were not in the file or telephone conversations that were not recorded in the file's log. He also testified that based on his review of the file and the testimony that he had heard during the hearing that it was a "toss-up" as to whether DOL had made the correct determination in this case and that he "wouldn't have taken the claim." When asked for an explanation said:

> "I don't know that enough questions were asked of the Claimant beforehand. I couldn't see it in the record.
>
> "A lot of the burden was put on the plaintiff, and that is implying certain things that in this instance, after hearing everything, I am not so sure it should have happened."

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).

A. Claimant was an employee not an independent contractor

The Petitioner in this proceeding bore the burden of proving that the Commissioner's determination that he was an employer under Article 6 was invalid or unreasonable (*see* Labor Law § 101; Board Rules 65.30, 12 NYCRR 65.30). He did not meet this burden.

The Petitioner argued that the Claimant, Terrence Gallagher, was an independent contractor. As we have explained in prior decisions, the ultimate inquiry into whether an individual is an employee or an independent contractor is whether the individual depends upon someone else's business or is in business for himself (*Van Patten Enterprises*, PR 08-090 [July 22, 2009] [*appeal pending*]; *Alon Hen*, PR 08-094 [May 20, 2009]). This was perhaps best summarized by a Massachusetts judge who recently opined that "judges must consider whether an individual is wearing the hat of an employee or the hat of independent enterprise" (*Boston Bicycle Couriers, Inc. v Division of Employment & Training*, 778 NE2d 964 [Mass. App. Ct. 2002]).

Terrence Gallagher was not in business for himself and was not wearing the hat of independent enterprise. He was, instead, dependent on others, including the Petitioner, for everything related to his work other than deciding which days to work. Gallagher did not own a livery van, carry his own insurance, solicit customers, set fares, or have his own permit to work at Port Authority properties. He was entirely dependent upon the Petitioner and Classic in all areas of his work as a livery van driver except with respect to making his own schedule, and even in that instance, he was not able to use the livery van when one of the Petitioner's other drivers was scheduled to use it.

Classic's primary line of business was providing ride shares to New York City area airports. This was accomplished by contracting with the Port Authority for permission to operate a livery service on Port Authority property, and by leasing livery vans to drivers who were dispatched from Classic's customer support center to pick up and drop off Classic's customers.

Petitioner's primary line of business, although he was also a driver for Classic, was to lease vans from Classic and sublease them for a fee to other drivers such as Claimant Terrence Gallagher. The Petitioner hired the Claimant, set the terms of his compensation, leased, insured and maintained the livery van the Claimant drove, and limited the Claimant's use of the van to hours when no other driver was using it. Furthermore, the Claimant was not required to make any investment other than to pay for the gas that he used and to hold a CDL free of violations.

Additionally, we find that the Petitioner required the Claimant to sign Classic's "independent contractor" agreement in order to drive for him because the evidence

demonstrates that there was no way to drive a Classic van without signing an "independent contractor" agreement, and the Petitioner did not offer the Claimant the opportunity to drive the van without signing the agreement. We conclude that the above facts demonstrate sufficient control by the Petitioner over the Claimant to support the Commissioner's determination that the Petitioner was Terrence Gallagher's employer. We note that the fact that Classic may also have been Gallagher's employer does not mean that the Petitioner was not properly named as an employer because it is well established that an employee may have more than one employer (*Ansoumana v Gristedes*, 255 FSupp2d 184, 195 [SDNY 2003]; *Franbilt*, PR 07-019 [July 30, 2008]; *Frank Bova*, PR 06-024 [November 28, 2007]).

B. Illegal deductions from wages

Labor Law § 193 states in relevant part that:

> "1. No employer shall make any deduction from the wages of an employee, except deductions which:
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> "a. are made in accordance with the provisions of any law or any rule or regulation issued by any governmental agency; or
>
> "b. are expressly authorized in writing by the employee and are for the benefit of the employee; provided that such authorization is kept on file on the employer's premises. Such authorized deductions shall be limited to payments for insurance premiums, pension or health and welfare benefits, contributions to charitable organizations, payments for United States bonds, payments for dues or assessments to a labor organization, and similar payments for the benefit of the employee.
>
> "2. No employer shall make any charge against wages, or require an employee to make any payment by separate transaction unless such charge or payment is permitted as a deduction from wages under the provisions of subdivision one of this section."

Labor Law § 193 prohibits an employer from making any unauthorized deductions from its employees' wages. There is no dispute that deductions for workers' compensation insurance and uniform rentals were taken from the Claimant's wages. Although those deductions may have been authorized by the Claimant when he signed the "Independent Contractor Agreement" with Classic, they are not permitted under Labor Law § 193 as they are not made in accordance with any law, rule or regulation or the type of deduction for the benefit of the employee allowed by the statute (*see* Workers' Compensation Law § 31 [prohibits deductions from employees' wages to pay for workers' compensation insurance premiums]).

The record is clear that the Petitioner set the Claimant's terms of compensation at 35% of his fares, and it is likewise clear that Classic paid the Petitioner who in turn cut checks to the Claimant that were for less than the agreed rate of compensation. The Petitioner testified that he did not make any deductions from the Claimant's

wages; however in the absence of records of the gross wages earned and deductions taken, which the Petitioner stated that he received from Classic yet failed to produce to DOL or as evidence at hearing, we find that the Petitioner has failed to meet his burden of showing that he paid the Claimant in full (*see* Labor Law § 196-a). Accordingly, the Commissioner's determination that the Petitioner deducted $21.95 per week for workers' compensation and $5.25 per week for uniform rental from the Claimant's wages is reasonable.

We are, however, not persuaded that the Commissioner's determination that the Petitioner is liable to reimburse the Claimant for his monthly cell phone bill is reasonable. The evidence shows that Classic offered the Claimant the option to use one of their two-way radios at a cost of $32.00 per month, but the Claimant declined that option and chose instead to use his own cell phone service which cost less. There is no evidence that Sadaat ever required the Claimant to use Classic's cell phone. Indeed, it is clear from the record that the Claimant was free to use his own phone. There is no question that had the Claimant opted to use the phone offered by Classic that any fees associated with that phone that were deducted from the Claimant's wages would have amounted to an illegal deduction from wages. However, Labor Law § 193 has not been violated because the Claimant chose to use his own cell phone. Although Sadaat and Classic required the Claimant to have a cell phone in order to perform his duties, they did not direct him to use any particular cell phone service or vendor. Accordingly, we find that the expenses incurred by Gallagher for cell phone service are in the nature of reimbursements for expenses governed by Labor Law § 198-c, not deductions or required transactions by separate payment under Labor Law § 193.

Civil Penalty

The Commissioner included a 100% civil penalty in the Order, however, no evidence was presented to demonstrate that the considerations and computations required to be made by the Commissioner in connection with the imposition of the civil penalty amount set forth in the Wage Order were reasonable (*see* Labor Law § 218). Accordingly, the civil penalty is revoked.

In a matter that requires the exercise of discretion and judgment, Respondent asks the Board to find as reliable evidence, a form with various options checked and no explanation. Respondent also asks the Board to rely exclusively on this form to determine that the civil penalty here is reasonable. We are unable to find the civil penalty reasonable because of the paucity of evidence in support, which itself is not reliable. More importantly, however, we are troubled that Respondent has prevented Petitioner from conducting any meaningful cross-examination concerning the document supporting the civil penalty by failing to produce any witness who might have personal knowledge of the document, its contents, and the considerations that led to the boxes that were checked and the recommendation made. Further, by failing to produce such a witness, Respondent has also prevented Petitioner from producing evidence that might controvert the reasons that particular boxes were checked and the recommendation to assess the civil penalty. Respondent may not have it both ways; she may not ask for documents to be found reliable evidence while preventing meaningful examination of the documents by failing to produce a witness with personal knowledge of them. We revoke the civil penalty.

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 Order to Comply is modified to provide that Saadat owes $4,596.76 in unlawful deductions plus interest of 16%; and

2. The Order is further modified to annul the civil penalty; and

3. The Petition for Review be, and the same hereby is, denied.

Anne P. Stevason, Chairman

J. Christopher Member

Mark G. Pearce, Member

Jean Grumet, Member

ABSENT
LaMarr J. Jackson, Member

Dated and signed in the Office of
the Industrial Board of Appeals,
at New York, New York, on
October 21, 2009.