STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of:	
PAMELA BLUM,	
Petitioner,	
	DOCKET NO. PR 08-111
To review under Section 101 of the New York State Labor Law: Two Orders to Comply with Article 6 dated June 19, 2008 and An Order to Comply with Article 19, dated June 19, 2008,	RESOLUTION OF DECISION
- against -	
THE COMMISSIONER OF LABOR,	
Respondent.	

APPEARANCES

Brian Alan Eisen, Esq., for Petitioner.

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

WITNESSES

Pamela Blum, Edith Blum, a named Claimant, and Senior Labor Standards Investigator, Linda Smarra.

WHEREAS:

On July 8, 2008, Petitioner Pamela Blum (Blum) filed a Petition with the New York State Industrial Board of Appeals (Board) pursuant to Labor Law § 101 and Part 66 of the Board's Rules of Procedure and Practice (Rules) (12 NYCRR part 66), seeking review of three orders that the Commissioner of Labor (Commissioner or Respondent) issued against her on June 19, 2008. The first order is an Order to Comply with Article 6 of the Labor Law (Wage Order) which finds that Petitioner failed to pay wages earned by a named Claimant and demands payment of $1,440.00 in wages for the period December 5, 2006 to April 9, 2007, interest at the rate of 16% calculated to the date of the Order in the amount of $275.00, and a

100% civil penalty in the amount of $1,440.00, for a total amount due of $3,155.85.[1] The second order (Deductions Order) finds that the Petitioner made unlawful deductions from wages earned by the Claimant in violation of Article 6 of the Labor Law, and demands payment of $2,860.00 in unlawful deductions from wages for the period from December 5, 2006 to April 9, 2007, interest at the rate of 16% calculated to the date of the Order in the amount of $547.87 and a 100% civil penalty in the amount of $2,860.00, for a total amount due of $6,267.87. The third order (Penalty Order) finds that the Petitioner failed to keep and/or furnish accurate payroll records for the period from December 5, 2006 through April 9, 2007, in violation of Article 19 of the Labor Law and demands payment of $500.00.

Upon notice to the parties, the Board held a hearing in White Plains, New York on May 5, 2009 before Board Member Jean Grumet, the designated hearing officer in this case. Each party was afforded a full opportunity to present documentary evidence, examine and cross-examine witnesses, and raise relevant arguments.

SUMMARY OF EVIDENCE

On April 11, 2007, Claimant filed a sworn claim with the DOL stating that she worked for Petitioner from December 5, 2006 to April 9, 2007 but was not paid for the weeks ending February 3 and March 6, 2007. The claim stated, "The Employer inform[ed] me I was working for $12.00 hr., 12 hours a day for five day[s] which is $720 dollar[s].... [and] my pay would be 500 weekly and the other 220 dollar was for SS tax, [she] was paying for me." Claimant alleged she was owed a total of $1,000.00 in wages for the two weeks. The claim further alleged that no taxes were ever paid on her behalf, and that she was therefore owed $3,300.00 for taxes which were withheld but not paid.

Thereafter, in an undated letter to Laura Donlan, a DOL investigator, Claimant asserted that she was actually claiming unpaid wages for the week December 18 – December 22, 2006 and for the week ending April 13, 2007, for which she "did not get paid or receive two weeks notice prior to termination." Claimant's letter stated, "I accept that I made a mistake calculating the hours" and went on to say that when she was hired, Petitioner "offered me $12.00 per hour and at the end of the week and every Friday thereafter, paid me in the sum of $500 (five hundred dollars) in cash."

At the hearing, the Petitioner testified that she is a stagehand, works irregular hours, and resides with her mother, Dr. Edith Blum (Dr. Blum), and her daughter, M., who was five and a half years old in November 2006, when Claimant was hired as a babysitter. Petitioner stated that Dr. Blum, a podiatrist, helps her with child care, but is unavailable on Tuesdays, Thursdays, and Saturdays, when Dr. Blum sees patients in her office. Petitioner testified that she needed child care for the days that she and Dr. Blum were both working. She responded to Claimant's Craigslist advertisement for a position as a nanny, and after interviewing her, Claimant agreed to work at the Blum house on Tuesdays and Thursdays from 7:00 a.m. to

[1] Labor Standards Supervisor Linda Smarra testified that both the Wage and Deductions Orders listed the correct amounts due for wages, interest, and civil penalty, but the Wage Order civil penalty of $1440.00 was inadvertently added to the Deductions Order and subtracted from the Wage Order, and therefore the total amounts of each of these Orders was incorrect, even though the sum of both Orders was correct. The Orders were amended accordingly.

9:00 p.m., and on weekends when Petitioner and her mother were working. On weekends, Blum would drive M. to Claimant's house on Friday night, and would pick her up either Saturday afternoon or Sunday morning. Petitioner paid Claimant $500.00 in cash each week. Blum testified that although she wanted to pay Claimant by check so that she would have a record of payments in order to deduct child care costs from her taxes, Claimant told Petitioner that she did not have a bank account and asked to be paid in cash. Petitioner testified that she requested Claimant's social security number, but Claimant never provided a social security number or a tax ID number. Petitioner testified that she did not recall any discussion of withholding taxes, and there was no discussion of an hourly wage or benefits such as sick pay, vacation pay or personal time, and Claimant never made a demand for any of these benefits.

According to Petitioner, Claimant's duties were to feed M. breakfast, make sure she was properly dressed for school and that her hair was combed, walk M. to her school bus, meet the bus after school at 3:30 p.m., go over homework and help with reading, provide an afternoon snack, and make sure that M. was bathed in the evening. The Petitioner testified that Claimant was required to clean M.'s room and the upstairs bathroom, and do M.'s laundry. Petitioner testified that there was no requirement that Claimant remain on the premises between 7:30 a.m. and 3:30 p.m. Dr. Blum returned home from work between 5 and 6 p.m., but Claimant was to continue working until 9 p.m., making sure that M. ate dinner, took a bath, and read before going to bed. Petitioner testified that Claimant was not allowed to bring other people into the Blum house to help with babysitting. Blum provided the food and cleaning supplies that Claimant used in her home.

Blum admitted that she failed to maintain legally required payroll records, but furnished her bank statements for the period of Claimant's employment, in order to prove that she withdrew $500.00 each week from her bank account in order to pay Claimant in cash.[2] Blum testified that if she did not receive her own paycheck by the end of the week, she would have to pay Claimant late, but Claimant was always paid in full by the following week. The bank statements show that for all but three of the weeks that Claimant worked, exactly $500.00 was withdrawn either on a Friday or the following Monday or Tuesday. Petitioner testified that on January 2, January 8 and March 2, 2007, she withdrew additional cash for herself along with $500.00 that she withdrew to pay the Claimant.[3]

Petitioner testified that she withdrew $500.00 from her account on December 22, 2006 and that she used the withdrawal to pay Claimant her wages for that week. Blum's bank statement for December, 2006 indicates that Blum withdrew $500.00 on Friday, December 1; Monday, December 11; Monday December 18, and Friday, December 22, 2006. Blum further testified that Claimant's last day of employment was March 20, 2007.

Claimant testified that when she was hired, she and Petitioner agreed to a salary of $500.00 per week to work in Petitioner's home from 7 a.m. to 9 p.m. on Mondays, Tuesdays, Thursdays and Fridays. Claimant testified that Saturday was a "make up day" because she did not work on Wednesday, when Dr. Blum was available to take care of M.. Claimant

[2] It is undisputed that Claimant was paid $500.00 in cash per week for every week of her employment, except for one week in December, 2006, and the week ending April 9, 2007, which are at issue in the instant case.

[3] The bank statements show that Blum withdrew $800.00 on January 2, $660.00 on January 8, and $540.00 on March 2, 2007.

stated that on two or three weekends a month, Blum would drop M. off at her house on Friday night and would pick up M. on Saturday morning or Sunday. Claimant's college-aged daughter would help her take care of M. during these weekends. Claimant testified that she was paid in cash because on one occasion, Claimant wanted to pay her with a post-dated check. Claimant stated that she did not have a bank account in which to deposit a post-dated check, and therefore asked to be paid in cash.

Claimant testified that when she was hired, she gave Petitioner her tax ID number and Petitioner told her that she wanted to pay taxes for Claimant:

> "So I said, well, I don't have a problem with that, how much will you take off... She tell me I'm going to pay X amount but I will give you $500....She told me she would just give me $500 and she would put the balance toward taxes for her record at the end of the year because she wants that money back.
>
> Q. Did she tell you what that balance would be that she would be putting toward that?
>
> A. No, we never got that far."

When Claimant was later asked why her claim form stated that she worked five days a week for $720, she stated, "[Petitioner] would want to pay my taxes so she can get this money back at the end of the year for the W-2 form. So she told me...she would pay me $500 in cash and then she would pay my W2, which was $250 for her safety...That was our verbal agreement."

Claimant testified that she did not see Blum in person very often, but she would see her when M. was dropped off at her house on Friday night and when Blum came to pick up M. on Saturday or Sunday. Claimant stated that she was in frequent telephone contact with Blum, and called her to let her know she arrived in the morning, and to tell her that she was leaving once M. got to sleep in the evenings. Claimant stated that she was required to be in the home from the time M. left in the morning until M. returned from school. Claimant testified that she followed Blum's instructions and did everything Blum asked "the way she wanted it done." Claimant testified that she cleaned the entire house, including the two upstairs bedrooms, the upstairs and downstairs bathrooms, the kitchen and the living room. She did both Petitioner's laundry as well as M.'s. She stated that she vacuumed three times a day because Petitioner had two big dogs in the house and Dr. Blum is asthmatic. Claimant was responsible for the dogs and let them out in the yard and fed them.

Claimant testified that when Blum left for Florida to celebrate the holidays, Blum did not have the money to pay her for the week ending December 22, and promised to pay her when she returned but never did pay her. She also testified that she worked during the week of April 9-13 and was not paid for the week. She could not remember the date that she was terminated, but recalled that she had just returned from the emergency room, and received a call from Petitioner asking her to come to her car which was parked outside Claimant's house. Claimant stated that she was too ill to go out, so she sent her daughter, who returned with an envelope containing cash. Petitioner then called Claimant to tell her that she was fired.

On cross-examination, Claimant testified that during her job interview with Blum, Claimant asked for $500 per week for her services, and Petitioner agreed:

> "I said, well what about taxes? She said I will pay you $500 cash and I will withhold X amount for [sic] at the end of the year so I can claim it back and I'll give you a W2 form."
>
> "Q. X amount was discussed or not discussed?"
>
> "A. I cannot be sure. She told me about 150 or 250 or something like that. She said she want this money back at the end of the year."

At another point during cross-examination, Claimant testified that Blum told her that she would withhold "I think it was 225 or 250." Claimant testified that only a weekly salary was mentioned, [n]ever, ever a daily or hourly."

Claimant testified that she was told that she would be paid vacation pay for the week that Petitioner was in Florida:

> "Well, because I was hired so close to the season and she told me she may...have plans to go to Florida to see some family members of hers and then I would be paid, you know, don't worry about it and stuff like that....She was saying that she was going to [sic] holidays and I would be paid for the time she was gone, which I never got paid for because she said she never received a check on time."

Other than Christmas, Claimant testified that there was no discussion of vacation pay, sick days, or personal days.

Claimant stated that she did not get paid for the week of April 9-13 because Petitioner did not get paid for that week. She testified that she called Petitioner to ask about the two weeks of pay she was owed, and Petitioner hung up on her. Claimant testified that she left several messages, including one telling Blum that she was going to write to the Labor Department, but Blum never returned the calls. Claimant testified that she went to Jackson Hewitt, a tax preparer, gave them her tax ID number, and was told that no taxes had been paid on her behalf.

The DOL introduced its investigatory file through Senior Labor Standards Investigator Linda Smarra, and the parties stipulated the documents into the record. Ms. Smarra testified that the Wage and Deductions Orders listed the correct amounts due for wages, interest and civil penalty, but the Wage Order civil penalty of $1440.00 was mistakenly added to the Deductions Order and subtracted from the Wage Order.

On rebuttal, Blum played a tape recording of a message from Claimant which was left on her answering machine on Thursday, March 29 at 9:16 a.m. from (914) XXX-XXXX. Claimant admitted that this was her phone number. In the message, a voice sounding identical to the Claimant stated that she informed a lawyer and the Labor Department that she

was not paid two weeks' wages and did not receive two weeks notice and that her taxes were never paid. The voice in the message announced that she would see Blum in court. Claimant did not deny leaving this message on Petitioner's answering machine.

Dr. Edith Blum, Petitioner's mother, testified that she has been a doctor of podiatry for 50 years, and has office hours on Tuesdays and Thursdays from 8:00 a.m. to 4:00 or 5:00 p.m., and half days on Saturdays. During the period from November, 2006 to April, 2007, Dr. Blum was home and took care of M. on Mondays, Wednesdays, and Fridays. Dr. Blum stated that Claimant never worked in the home on any of the days that she was home from work. Dr. Blum testified that she has owned the house for 35 years, and has always done her own housekeeping. Petitioner and M. live in the two upstairs bedrooms, and the lower half of the house, consisting of two bedrooms, a living room, a kitchen and dining area, and a bathroom are hers. Dr. Blum stated that Claimant never cleaned her side of the house. Dr. Blum testified that on Tuesdays and Thursdays, when Claimant was employed at the Blum residence, Dr. Blum would come home from work and make dinner. Claimant would stay until M. went to sleep, and Petitioner would often drive Claimant home.

Claimant was asked by the Hearing Officer whether her claim for a week in December was for vacation pay or for the week prior to the vacation, and Claimant testified that it was for the week prior to the vacation.

Claimant testified that she accompanied her daughter and M. on those occasions when her daughter took M. to the mall. Claimant's daughters would watch M. when Claimant went shopping on weekends when M. was staying in her house.

Petitioner testified that she never received a social security number or tax ID number from Claimant, and that she did not withhold taxes or provide tax documentation to Claimant. Blum stated that she wanted Claimant's social security number because she wanted to obtain a child care credit on her income taxes and so that Claimant could file taxes on the money she earned.

Standard of Review and Burden of Proof

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 the Board's Rules of Procedure and Practice 65.30 [12 NYCRR 65.30]; *Angello v Natl. Fin. Corp.,* 1 AD3d 850, 854 (3d Dept 2003): "The burden of proof of every allegation in a proceeding shall be on the person asserting it." Therefore, the burden is on the Petitioner to prove that the Order under review is not valid or reasonable.

If the Petitioner meets its burden and establishes by credible evidence that the order is invalid or unreasonable, the burden then shifts to the Commissioner to rebut the Petitioner's testimony and establish that the orders under review are reasonable and valid (*In the Matter of Richard Delldone,* Board Docket No. PR 08-145 [July 22, 2009]).

FINDINGS

The Board having given due consideration to the pleadings, hearing, testimony, arguments, and documentary evidence, makes the following findings of fact and law pursuant to the provisions of Board Rule 65.39 (12 NYCRR 65.39).

Definition of Employer

Petitioner has the burden of proof to establish that she was not an "employer" under Articles 6 and 19 of the Labor Law, and thus not liable for the wages, interest and civil penalties set forth in the Orders. Petitioner alleged that she was not an employer and that Claimant was exempt from the Labor Law.

"Employer" means "any person, corporation or association employing any individual in any occupation, industry, trade, business or service" (Labor Law § 190 [3]; *see also* Labor Law § 651 [6]). "Employed" means "permitted or suffered to work" (Labor Law § 2 [7]). "Employee" means any person employed for hire by an employer in any employment (Labor Law § 190 [2]).

The federal Fair Labor Standards Act, like the New York Labor Law defines "employ" to include "suffer or permit to work" (29 USC § 203 [g]), and "the test for determining whether an entity or person is an 'employer' under the New York Labor Law is the same test . . . for analyzing employer status under the Fair Labor Standards Act" (*Chu Chung v The New Silver Palace Rest., Inc.*, 272 F Supp 2d 314, 319 n6 [SDNY 2003]). Because the statutory language is the same, the New York Labor Law and the FLSA follow the same test to determine the existence of an employment relationship (S*ee e.g. Ansoumana v Gristedes 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 F2d 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).

We find that the Petitioner did not meet its burden to show that the Claimant was an independent contractor and we agree with the Commissioner that the Claimant is an employee within the meaning of the Labor Law. There is no evidence in the record that Claimant exercised independent initiative or that she was hired to do so. Nor is there any evidence in the record that Claimant ran an independent babysitting service which Petitioner hired. The evidence demonstrates that Blum controlled the hours that Claimant worked, set specific requirements of how work was to be performed, and supplied and paid for cleaning supplies and food used by Claimant in her duties.

Claimant was not a "casual" or "part time" babysitter

The Petition also alleges that Claimant was a babysitter, not an employee, and therefore exempt from the Labor Law. We find that Petitioner did not meet her burden of proof on this issue. Labor Law § 651.5 defines "employee" as including any individual employed or permitted to work by an employer in any occupation" but it excludes "any individual who is employed or permitted to work...in service as a part time babysitter in the home of the employer . . ." (*See* 12 NYCRR § 142.2.14 [c] [1]). While the New York Labor Law does not define "part time babysitter," the FLSA contains an equivalent "casual baby sitter" exception (29 CFR § 552.104 and 29 CFR § 552.5). Because there is general support for giving the FLSA and the New York Labor Law consistent interpretations, and "[b]ecause New York Labor Law and the FLSA embody similar standards" with respect to the status of babysitters, it is appropriate to consider the FLSA "casual babysitter" exception when construing the New York Labor Law (*Pusha Topo v Ashwin Dhir and Nisha Dhir*, 2004 US Dist LEXIS 4134 at *10 [SDNY 2003]).

The "casual babysitter" exception is meant to apply to teenagers or others who have other sources of income and "are usually not dependent upon the income from rendering such services for their livelihood" (29 CFR § 552.104 [a]). The regulations define "casual" as employment that does not exceed 20 hours per week. Employment in excess of 20 hours may still be on a "casual basis" if the excessive hours are without regularity or are for irregular or intermittent periods (29 CFR § 552.104 [b]; 29 CFR § 552.5), or "if the employment is not performed by an individual whose vocation is babysitting" (29 CFR § 552.5). "Individuals who engage in babysitting as a full time occupation are not employed on a "casual basis" (29 CFR § 552.104 [d]).

Claimant was not a teenager or adult who occasionally took a babysitting opportunity on a casual basis: her vocation was babysitting. Claimant placed a Craigslist ad for a position as a nanny, noting her CPR certification and ability to work with special needs children, supplied references from other families for whom she had been a full time babysitter in the past, and agreed to work for Petitioner in her home for at least 28 hours per week as a babysitter on a regular schedule. The undisputed facts establish that Claimant's employment was well in excess of 20 hours and the hours of employment were neither irregular nor intermittent. While the Petitioner and the Claimant differ on the number of days Claimant worked, it is undisputed that Claimant worked in Petitioner's home at least 28 hours per week -- from 7 a.m. to 9 p.m. on Tuesdays and Thursdays -- well in excess of the 20 hour limit set for casual babysitters. We find that Petitioner did not meet her burden of proving that Claimant was a casual or part time babysitter, and that Claimant is not exempt from the Labor Law.

Record Keeping Requirements

An employer's obligation to keep adequate employment records is found in the Labor Law at §§195 and 661, as well as in the New York Code of Rules and Regulations (NYCRR). Specifically, 12 NYCRR 142-2.6 provides, in pertinent part:

> " (a) Every employer shall establish, maintain and preserve for not less than six years, weekly payroll records which shall show for each employee...

(4) the number of hours worked daily and weekly...
(6) the amount of gross wages...
(d) Employers...shall make such records...available upon request of the Commissioner at the place of employment."

Section 142-2.7 further provides:

> "Every employer. . . shall furnish to each employee a statement with every payment of wages, listing hours worked, rates paid, gross wages, allowances, if any, claimed as part of the minimum wage, deductions and net wages."

Therefore, it is an employer's responsibility to keep accurate records of the hours worked by its employees and the amount of wages paid and to provide its employees with a wage statement every time the employee is paid. The required recordkeeping provides proof to the employer, the employee, and the Commissioner that the employee has been properly paid.

The Petitioner admits that she did not maintain the legally required payroll records. We agree with the Commissioner that the bank statements furnished by the Petitioner at the hearing are no substitute for legally required payroll records, and find that the Penalty Order is reasonable and valid.

Burden of Proof in the Absence of Adequate Employer Records

Labor Law §196-a provides in relevant part:

> "Failure of an employer to keep adequate records, in addition to exposing such employer to penalties...shall not operate as a bar to filing of a complaint by an employee. In such a case the employer in violation shall bear the burden of proving that the complaining employee was paid the wages, benefits and wage supplements.

The Petitioner admits that she did not maintain payroll records. Having failed to maintain the legally required payroll records, the DOL's calculation of the wages due based on the Claimant's statement must be credited unless the Petitioner meets her burden to prove that Claimant did not work the hours alleged by DOL (*see e.g. Matter of Mid Hudson Pam Corp. v Hartnett*, 156 AD2d 818, 821 [3d Dept 1989] ["When 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."]). Once the Petitioner meets its burden and establishes by credible evidence that the order is invalid and unreasonable, the burden shifts to the Commissioner to rebut the Petitioner's testimony and establish that the orders are reasonable and valid (*In the Matter of Richard Delldone, supra.*).

We find that the Petitioner met her burden of proof by credibly testifying that Claimant was paid for the week of December 22, 2006, that Claimant was not employed

unreasonable. We further find that the Commissioner did not produce evidence sufficient to rebut Petitioner's credible testimony on these issues.

The Claimant was paid for the week of December 18-22, 2006

While we find that Petitioner's bank statements are no substitute for legally required payroll records, the bank statements do corroborate Petitioner's credible testimony that she paid Claimant $500.00 for the week of December 18-22, 2006 (*See, Leah Wilen & Darren Wilen*, Board Docket No. PR 06-048 [June 25, 2008]). The Wage Order was based upon Claimant's sworn claim form and statements she provided to the DOL. At the hearing, Claimant's testimony contradicted her claim and was not credible. We note for example that Claimant initially claimed she was owed wages for the weeks ending February 3 and March 6, 2007. After amending her claim and testifying in DOL's case in chief that she was not paid for the week of December 18-22, on cross examination Claimant testified that she was promised but not paid vacation pay for the following week in December when Petitioner was in Florida rather than the week before vacation. We note that there is no indication in the record that Claimant ever raised the issue of unpaid wages with Petitioner until after she was terminated. We find that Blum met her burden of proving that she paid the Claimant for the week of December 18-22, and the Commissioner did not produce evidence sufficient to rebut Blum's evidence.

The Claimant was not employed during the week of April 9-13, 2007 and is not entitled to wages for that week

Blum credibly testified that Claimant's last day of work was March 20, 2007. Blum's testimony was corroborated by the March 29, 2007 telephone message left by Claimant stating that she had already spoken with a lawyer and with the Labor Department about her termination. Claimant did not deny leaving this message and the Commissioner did not rebut the Petitioner's credible testimony. We find that Petitioner met its burden of proving that Claimant was not employed during the week of April 9-13, 2007.

No illegal deductions were taken from Claimant's wages pursuant to Labor Law § 193

Labor Law § 193 prohibits an employer from making any deduction from the wages of an employee except for deductions that are made in accordance with any law, rule or regulation; or are for the employee's benefit. The statute further provides that "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" (Labor Law § 193[1][b]).

In the instant case, the Deductions Order found that Petitioner illegally deducted a total of $2,860.00 from Claimant's wages, based on Claimant's sworn claim that Petitioner promised to pay Social Security taxes in the amount of $220.00 per week in addition to her $500.00 per week cash wage. At the hearing, however, Claimant was equivocal about the supposed promise, testifying at one point that Petitioner said she was "going to pay X amount" but that "we never got that far" in deciding what balance beyond $500.00 per week would be "put...toward taxes for her record," and at another point that Petitioner said "she

would pay my W2, which was $250 for her safety...that was our verbal agreement." On cross-examination, Claimant testified variously that Petitioner said she would "withhold X amount...I can not be sure. She told me about 150 or 250 or something like that. She said she want this money back at the end of the year," and that Petitioner said she would withhold "I think it was 225 or 250." Claimant's testimony was that Petitioner proposed paying her "X amount but I will give you $500" (with X minus $500.00 to be withheld for taxes), but Claimant "never got that far" to find out what her actual weekly wage would be. Petitioner recalled no discussion of withholding and testified that Claimant never provided a social security number or tax ID number.

It is unreasonable to conclude from all the evidence that Petitioner promised a wage of $720 per week or any other wage beyond the $500.00 per week which was consistently paid each week in cash. Accordingly, it is unreasonable to conclude that Petitioner deducted $220 per week, or any other amount, from Claimant's wages.

While Claimant testified that she went to her tax preparer and was told that no taxes had been paid under her tax ID number, that does not establish that Petitioner illegally deducted money from her wages; on the contrary, it is consistent with no deductions having been made. Even assuming that Petitioner was required to deduct tax payments by federal and state law, which are enforced by agencies other than the Department of Labor and the Board,[4] failure to do so would not violate Labor Law § 193, whose concern is to prohibit unauthorized deductions rather than to assure that required ones are made.

In *Baraschi v Silverwear, Inc. and Powder Blu CDC,* 2002 US Dist Lexis 24515, 29 EBC (BNA) 2311 (SDNY 2002) an employee brought an action under § 193 seeking reimbursement of Social Security and Medicare taxes which her employer failed to pay on her behalf allegedly as required by federal law. The court found that the Internal Revenue Code "provides no private right of action against employers" and more significant for the instant case involving the Commissioner's Order, that far from mandating deductions for Social Security or other employment taxes, Labor Law § 193 "merely bars deductions that are not made in accordance with the provisions of any law or regulation...Baraschi states no cognizable claim" (*Baraschi, supra* at **19-20). We find that Petitioner met her burden to show that the Deductions Order was invalid and unreasonable.

[4] The Internal Revenue Service's Publication 926 "Household Employer's Tax Guide" states at page 6 that "You are not required to withhold federal income tax from wages you pay a household employee."

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT

1. The Orders to Comply with Article 6 of the Labor Law dated June 19, 2008 are hereby revoked; and

2. The Order to Comply with Article 19 of the Labor Law dated June 19, 2008 is hereby affirmed.

Anne P. Stevason, Chairman

J. Christopher Meagher, Member

Mark G. Pearce, 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
December 14, 2009.