

**DAE LEE AND AMEN LEE'S CORPORATION
(T/A TIP TOP CAR WASH)**

Docket No. PR 09-009

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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In the Matter of the Petition of:

DAE LEE AND AMEN LEE'S CORPORATION
(T/A TIP TOP CAR WASH),

Petitioners,

DOCKET NO. PR 09-009

To Review Under Section 101 of the Labor Law:
An Order to Comply with Article 19 of the Labor
Law, dated November 17, 2008,

RESOLUTION OF DECISION

- against -

THE COMMISSIONER OF LABOR,

Respondent.
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APPEARANCES

Seth Wapnick¹ for Petitioners.

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

WITNESSES

Hazeline Hudson, Roger Bentick, and Dae S. Lee for the Petitioners; Labor Standards Investigator Jose Luis Mendez and Senior Labor Standards Investigator Vincent Hammond for the Respondent.

WHEREAS:

The Petition for review in the above-captioned case was filed with the Industrial Board of Appeals (Board) on January 15, 2009. Upon notice to the parties a hearing was held on October 28, 2009 in New York, New York, before Anne P. Stevason, Esq., Chairperson of the Board and the designated Hearing Officer in this proceeding. Each party was afforded a full opportunity to present documentary evidence, to examine and cross-examine witnesses, to make statements relevant to the issues, and to file post-hearing briefs.

¹ Mr. Wapnick is not an attorney nor is he a Certified Public Accountant. The Petitioners filed a Designation of Representation form authorizing Mr. Wapnick to represent them in this proceeding.

The Order to Comply with Article 19 (Wage Order) under review was issued by the Respondent Commissioner of Labor (Commissioner) on November 17, 2008 against the Petitioners and directs compliance with Article 19 and payment to the Commissioner for wages due and owing to several employees in the amount of \$46,676.42 for the time period from October 29, 2006 to March 16, 2008, interest continuing thereon at the rate of 16% calculated to the date of the Order, in the amount of \$5,033.39, and assesses a civil penalty in the amount of \$46,676.00, for a total amount due of \$98,385.81. A Penalty Order Under Article 19 was also issued charging the Petitioners with various recordkeeping violations. The Petitioners, although they attached this Order to their Petition, did not raise any objections to it, and therefore it is affirmed.

SUMMARY OF EVIDENCE

Petitioners Dae S. Lee and Amen Lee's Corporation operate a car wash in Brooklyn, New York, trading as Tip Top Car Wash. Lee became the owner and president of Tip Top in 2006. Lee testified that the car wash's employees were paid in cash on a weekly basis and that they also received daily tips. The employees received their wages in an envelope marked with their names and the amount of wages paid. The payroll was processed by the car wash's manager, Hazeline Hudson, who used employee time cards to calculate the amount of wages to pay each employee. Lee testified that he kept each week's time cards for only a few months before discarding them. The Petitioners never produced any time cards to the Department of Labor (DOL).

Lee testified that the car wash's employees received tips left by customers in two "tip pans" located at the front and back of the car wash. At the end of each work day the tips were pooled and divided evenly among the employees. Additionally, some employees, particularly those working in the front, sometimes received tips directly from customers that may not have been shared with the other workers. Lee testified that because he believed the workers in the front of the car wash received more direct tips from customers, he started to give an additional \$20.00 "bonus" to those who worked in the back on busy days. He eventually included the front employees in this practice after they complained that it was unfair. Lee testified that the manager, Ms. Hudson, kept records of the tips received by employees, but conceded he did not produce such records to DOL because "nobody asked for it." Lee did not keep records of the bonuses he periodically paid to his employees.

Hazeline Hudson testified that she has been the manager of Tip Car Wash since 2002. She stated that there are two tip pans at the car wash and that all the tips are pooled at the end of each work day and divided evenly with the employees.

Hudson prepared the "wage book" in which she recorded the weekly hours worked by each employee and the wages paid. She used the daily hours listed on the employee time cards to determine the weekly hours she then recorded in the wage book for each employee, and gave the time cards to Lee each week after completing the payroll.

Hudson testified that in 2009 she also prepared a book at the behest of the Petitioners' representative that included the information from the wage book plus the amount of daily tips each employee received. Hudson explained that this book was made by compiling the daily

tip records that she kept; however she testified that the daily tip records could not be produced at hearing because they had been stolen. Seven to eleven employees worked each day, some of them working only part-time. She estimated that a total of \$100.00 to \$200.00 in tips was left in the tip pans each day, and that each employee received between \$12.00 and \$15.00 per day in tips. Additionally, Hudson testified that Lee sometimes gave each employee an additional \$20.00.

Roger Betnick testified that he worked for the Petitioners from August 2006 to January 2007 and then again from April 2007 on. He described his position as servicing and maintaining the machines, supervising the car wash employees, giving tickets to customers, putting cars on the belts, brushing the cars, sending cars through the car wash, and "making sure everything is ok." Betnick testified that he shares in the tips each day and that some workers receive tips directly from customers and do not put them in the tip box. Lee gives the employees an additional \$20.00 when the car wash is busy.

Betnick testified that he has no fixed hours because the work depends on the weather. He is paid in cash and he signs for his wages in a book.

DOL Labor Standards Investigator (LSI) Jose Luis Mendez testified that he participated in a DOL investigative sweep of Brooklyn car washes. As part of this sweep, he inspected the Petitioners' premises and interviewed their employees. LSI Mendez testified that no records were available for review when he visited the car wash. Notebooks that the Petitioners subsequently provided did not include the daily hours worked by each employee, but did contain what appeared to him as daily wage rates. LSI Mendez prepared an audit of the wages owed to the Petitioners' employees based on employee statements and the notebooks the Petitioners provided. LSI Mendez credited the Petitioners with the hours worked and money paid listed in their records. He also credited \$7.00 in tips per day because the employees stated that they did receive daily tips in that amount. LSI Mendez further testified that after his first audit was completed, he prepared a revised audit because an employee named Nelson was mistakenly left off the first audit.

LSI Mendez conceded during cross examination that errors were made in the calculations that formed the basis for the underpayments listed in the Wage Order. The formula that he used automatically posted regular wages at 40 hours even for employees who worked less than 40 hours. This led to an overstatement of the wages due and owing.

Senior Labor Standards Investigator (SLSI) Vincent Hammond testified that he led a team of investigators that did an investigative sweep of car washes in Brooklyn, New York, including Tip Top Car Wash. He recommended imposing a 100% civil penalty against the Petitioners because the Petitioners' records were inadequate, no wage statements were provided to their employees, and they paid straight time for all hours worked, including overtime hours.

FINDINGS AND CONCLUSIONS OF LAW

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

The Petitioners have the burden to show that the Orders are invalid or unreasonable (Labor Law § 101, 103; 12 NYCRR 65.30).

The Commissioner issued the Orders under review following an investigative sweep of car washes that found violations of the Minimum Wage Act, Article 19 of the Labor Law. The Commissioner based these violations on interviews with employees and the Petitioners' "wage books" which did not indicate the daily hours worked by the Petitioners' employees, or the amount of weekly tips they received.

Article 19 requires every employer to pay each of its covered employees the minimum wage in effect at the time payment is due (*see* Labor Law § 652). The applicable minimum wage in effect in New York during the time period covered by the Wage Order was \$6.75 an hour in 2006; and \$7.15 an hour from January 1, 2007 to March 16, 2008, the last date covered by the Wage Order (12 NYCRR 142-2.1). An employer must also pay every non-residential covered employee overtime at a wage rate of 1 1/2 times the employee's regular rate of pay for all hours worked in excess of 40 in a given work week (12 NYCRR 142-2.2). When an employee is paid on a basis other than an hourly rate, "the regular hourly rate shall be determined by dividing the total hours worked during the week into the employee's total earnings" (12 NYCRR 142-2.16). In addition, each employee shall receive one hour's "spread shift" pay at the basic minimum wage for any day in which an employee's spread of hours exceeds 10 hours (12 NYCRR 142-2.4 [a]).

Employers of employees who receive gratuities or tips, as in this case, may take a "tip allowance" against the minimum wage in specified amounts if certain conditions are met (12 NYCRR 142-2.5). In order to take the tip allowance, the employer must provide "substantial evidence that the employee received in tips at least the amount of the allowance claimed [such as a] statement signed by the employee that he actually received in tips the amount of the allowance claimed" (12 NYCRR 142-2.5 [b] [1] [ii]); and the allowance claimed must be "recorded on a weekly basis as a separate item in the wage record" (12 NYCRR 142-2.5 [b] [1] [iii]).

The tip allowance in 2006 was \$1.05 an hour for an employee whose weekly average of tips received was between \$1.05 and \$1.65 per hour, and \$1.65 an hour for an employee whose weekly average of tips received was \$1.65 an hour or more (12 NYCRR 142-2.5 [b] [2] [i]); and in 2007 and 2008 was \$1.10 an hour for an employee whose weekly average of tips received was between \$1.10 per hour and \$1.75 per hour, and \$1.75 an hour for an employee whose weekly average of tips received was \$1.75 per hour or more (*Id.*). No allowance for tips was permitted in 2006 for an employee whose weekly average of tips received was less than \$1.05 an hour, or in 2007 and 2008 for an employee whose weekly average of tips received was less than \$1.10 an hour (12 NYCRR 142-2.5 [b] [2] [ii]).

Article 19 additionally requires employers to maintain payroll records and to keep those records available for inspection by the Commissioner at any reasonable time (Labor Law § 661). DOL regulations at 12 NYCRR 142-2.6 provide that weekly payroll records must be maintained and preserved for six years and shall show, *inter alia*, the name and address; social security number; wage rate; number of hours worked daily and weekly; amount of gross wages; deductions from gross wages; allowances if any claimed as part of minimum wages; and net wages paid for each employee.

The Petitioners' payroll records for the relevant time period are inadequate because they do not show each employee's daily hours worked or, in order to received a tip allowance, the amount of tips each received weekly.

In the absence of adequate payroll records, the Commissioner determined the amount of underpayments based on employee statements and the Petitioners' own records of weekly hours worked and wages paid. We have repeatedly held that where an employer fails to maintain required records, DOL may use the best available evidence to calculate back wages due to the employer's employees, which in this case was the estimate made by DOL (*see e.g. Matter of Abdul Wahid et al.*, PR 08-005 [November 17, 2009]; *Matter of Ricardo J. Ahrens*, PR 07-062 [August 27, 2009]; *Matter of 238 Food Corp.*, PR 05-068 [April 25, 2008]; *see also* Labor Law § 196-a). The Petitioners had the burden to prove that the Commissioner's method of assessing the Petitioners' liability in this case was invalid or unreasonable which, for the reasons discussed below, they failed to do.

Petitioners alleged that the Wage Order was unreasonable because their employees received tips in amounts sufficient to bring the Petitioners into compliance with Minimum Wage. However, the Petitioners provided no accurate evidence of the actual amount of weekly tips received by their employees, and unfortunately, the weekly tip records maintained by Ms. Hudson were stolen before they could be produced to DOL. Absent any credible evidence, DOL reasonably relied on employee statements to estimate the daily tips received by the Petitioners' employees.

Additionally, DOL relied on employee statements and the Petitioners' own records of weekly hours worked and wages paid to determine the amount of wages due and owing to the employees during the relevant time period. The Petitioners offered no evidence specific enough to contradict DOL's determination of the employee's daily hours worked and hourly wage rates, and indeed, Mr. Lee testified that he had destroyed the employees' time cards, the only reliable evidence that existed of the daily hours his employees worked. Accordingly, the Petitioners have failed to meet their burden that the Wage Order was unreasonable.

At hearing the Petitioners asserted for the first time that a mathematical error in the Wage Order led to an overstatement of their liability. The Hearing Officer allowed the Petitioners, over the Respondent's objection, to amend the petition to raise the mathematical errors in the Wage Order. We agree that the Wage Order is based on an incorrect calculation of the underpayment due to employees who worked fewer than 40 hours a week because the formula that DOL used in its computer generated spreadsheet automatically posts 40 hours at minimum wage for all employees in the "regular wages" column. At the Hearing Officer's direction, the Commissioner submitted a corrected spreadsheet after the hearing that reduces the wages due and owing from \$46,676.42 to \$41,224.69. Therefore, the Wage Order must be modified to reflect the corrected amount and the interest and civil penalty reduced in proportion.

Civil Penalty

The Wage Order assesses a 100% civil penalty. The Board finds that the considerations required to be made by the Commissioner in connection with the imposition of a 100% civil penalty were proper and reasonable in all respects.

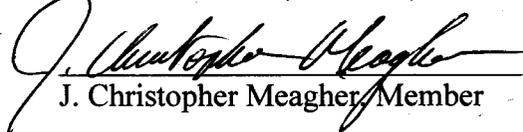
INTEREST

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 Wage Order is modified to change the amount of wages due and owing to \$41,224.69 and to reduce the civil penalty and interest proportionally; and
2. The Wage Order is otherwise affirmed; and
3. The Penalty Order Under Article 19 is affirmed; and
4. The Petition for Review be, and the same hereby is, denied.

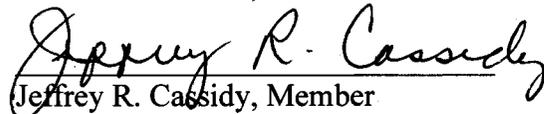


Anne P. Stevason, Chairman

J. Christopher Meagher, Member

Jean Grumet, Member

Absent

LaMarr J. Jackson, Member

Jeffrey R. Cassidy, Member

Dated and signed in the Office of
the Industrial Board of Appeals,
at Albany, New York, on
May 26, 2010.