

On February 2, 2006, Petitioner filed an amended petition, alleging that McBride was timely compensated for all hours that he worked and that the Petitioner did not employ the Claimant during the period covered by the Order. The Commissioner filed an answer on April 6, 2006, denying the material allegations of the amended petition and interposing as affirmative defenses that the amended petition did not conform with the Rules § 66. 3 (a) and (d) in that it did not contain a proper caption and asserted conclusory allegations.

A hearing scheduled for September 21, 2006 was postponed at Petitioner's request. Upon amended notice to the parties dated October 20, 2006, a hearing was held on December 12, 2006 in Garden City before Gregory A. Monteleone, Esq., Member of the Board and the designated Hearing Officer. At hearing, Petitioner failed to appear; the Commissioner was represented by Benjamin T. Garry, Esq., and was afforded full opportunity to present documentary evidence, and to make statements relevant to the issues.

At the outset of the hearing, the Commissioner made an application to amend the Order to add Steve's Custom Rockers and Everything Snow, Inc. as named employers, in addition to SMS Construction, Inc., against whom the Order, if affirmed, might be enforced. The application was made on the ground that an investigation of the Department of Labor (DOL) found that SMS was doing business under the names of Steve's Custom Rockers and Everything Snow, Inc. The Hearing Officer reserved decision on the application.

THE RECORD EVIDENCE

The Commissioner did not produce the Claimant as a witness; her only witness was DOL Senior Labor Standards Investigator John Sarsfield, who described his job duties as overseeing DOL wage claim investigations performed by subordinate investigators, assigning cases, and reviewing case processing.

Sarsfield testified that he was aware of McBride's claim against Petitioner, including the DOL forms and other documents that were part of DOL's investigative file in this matter. This file included a written chronology, as well as the substance, of telephone calls and contacts between DOL and the Claimant and between DOL and the Employer, which according to Sarsfield, it was DOL's practice to maintain.

A claim form dated May 2, 2005 and signed by McBride shows that Petitioner, owned by Steve and Maria Smith, employed the Claimant as a mechanic; that Petitioner was engaged in the construction business; that McBride's agreed-upon wages were \$30 per hour and that he was seeking unpaid wages in the amount of \$1,635.00 for the period April 11, 2005 to April 21, 2005, during which he worked ten days, including 36.5 hours in one week and 18 hours in another week. The claim form also shows as a reason for McBride's discharge that the Employer "wants me to pay for a machine that caught fire while I was working on it."

A DOL notice of McBride's claim sent to Petitioner and dated May 19, 2005 requests payment of \$1,635.00 on behalf of McBride for the period April 11 to April 21, 2005, and among other things, states that "[i]f . . . you do not agree that these amounts are due and payable . . . we would appreciate a full statement from you giving your reasons.

You should include a copy of any payroll record, policy, contract, etc. to substantiate your position.” The notice requests that payment or reply be made within ten days of the notice’s date.

The DOL file indicates that a representative of the Employer telephoned and spoke with a DOL Senior Investigator in June 2005 and explained that the Claimant had destroyed a machine worth more than the amount of wages that were claimed. Sarsfield testified that the file shows that when advised that the Employer must take separate action to recover on its claim against the Claimant because the law prohibits offsets against wages, the Employer representative said that she would advise the Employer to remit payment. Sarsfield continued that the file also shows that there was a subsequent conversation between DOL and another Employer representative and that on August 15, 2005 a DOL investigator called Maria Smith, asked her to remit the wages dues, but that “Smith refused, stating that the damages to the machine exceeded any amount owed to the claimant.”

On August 15, 2005, DOL mailed a form entitled “Recapitulation Sheet -- Preliminary Report,” to the Employer. The form details DOL’s preliminary findings, sustaining the amount of the claim for the period claimed and giving the Employer a 20-day period to either pay the amount of the claim or request a meeting to dispute the claim. Petitioner’s bookkeeper called Sarsfield on August 22, 2005 and according to Sarsfield’s testimony, stated that the Employer’s records showed that Claimant’s last day of employment was April 10, 2005. Sarsfield testified that in response he stated that this was the first time this claim had been made and that in earlier conversations, Petitioner had conceded that Claimant was Petitioner’s employee during the period in question. Sarsfield further testified that Petitioner did not provide DOL with any evidence to substantiate the claim that April 10, 2005 was Claimant’s last day of employment with Petitioner.

Sarsfield also identified a number of pay stubs as part of DOL’s investigative file. Although many of the stubs were duplicates, they show that Claimant received wages in 2005 from Steve’s Custom Rockers and Everything Snow, Inc., and that these two entities shared the same post office address. Because the Order reflects Petitioner’s street address and not a post office address, it is impossible to determine from it whether the Petitioner shared an address with the two other entities. The Board, however, notes that Petitioner’s address on the petition and amended petition is the same address as that on the check stubs from Steve’s Custom Rockers and Everything Snow, Inc.

As to the \$410.00 civil penalty ordered against Petitioner, Sarsfield testified that the assessment of such penalty was justified by the Employer’s actions and that the amount represented 25% of the wages due, a standard calculation for first time offenders.

THE GOVERNING STATUTES AND RULES

1. The Standard of Review.

The Board reviews the validity and reasonableness of an Order to Comply made by the Commissioner upon the filing of a Petition for review. 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.

When reviewing an Order to Comply issued by the Commissioner, the Board shall presume that the Order is valid. Labor Law § 103.1 provides in relevant part:

“Every provision of this chapter and of the rules and regulations made in pursuance thereof, and every order directing compliance therewith, shall be valid unless declared invalid in a proceeding brought under the provisions of this chapter.”

Pursuant to the Rules § 65.30, “[t]he burden of proof of every allegation in a proceeding shall be upon the person asserting it.” Therefore, the burden is on the Petitioner to prove that the Order under review is not valid or reasonable in the respects alleged in its petition for review.

2. An Employer’s Obligation to Pay Wages.

Labor Law section 190.1 defines “wages” as “the earnings of an employee for labor or services rendered.” Labor Law § 191 (1) (a) requires an employer to pay wages to a manual worker “weekly and not later than seven calendar days after the end of the week in which the wages are earned,” subject to exceptions not relevant here. In addition, Labor Law § 652 provides that “[e]very employer shall pay to each of its employees for each hour worked a wage of not less than” the minimum wage set by law. If the Commissioner determines that an employer has violated this provision, she is required to issue a compliance order to the employer, which includes a demand that the employer pay the total amount of wages found to be due and owing. Labor Law § 218 (1). Finally, Labor Law § 193 prohibits an employer from deducting any sum from an employee’s wages, with limited exceptions not present in the instant case.

FINDINGS

The Board having given due consideration to the pleadings, the testimony, the hearing exhibits, and all of the papers filed here, makes the following findings pursuant to the Rules §65.39. (12 N.Y.C.R.R. §65.39)

It is undisputed, and the Board finds, that Petitioner is a private employer doing business in the State of New York as defined by Labor Law, Article 1 and is subject to the jurisdiction of the Commissioner. The Board also finds, and it is undisputed, that Claimant is a manual worker within the meaning of Labor Law § 190.4 and within the protections afforded by Labor Law § 191 (1) (a).

1. The Order’s Direction to the Petitioner to Pay Wages.

The Board holds that the Order for wages is reasonable and valid. Absent from hearing, the Employer has entirely failed to produce any evidence in support of its claim that it did not employ Claimant during the period wages were found owing. Therefore,

Petitioner has failed to meet its burden to prove that the Order is either unreasonable or invalid. Labor Law § 103.1; Rules § 65.30.

Petitioner's claim before DOL, that it was not required to pay Claimant because he damaged equipment in an amount that exceeded his wages, is technically not before us because it was not raised in the petition and was, therefore, waived. Labor Law § 101.2. Nonetheless, were we to reach such claim, it would be rejected because of the general prohibition against an employer making deductions from wages that are not expressly privileged by law. Labor Law § 193. *See also Hudacs v. Celebrity Limousine Serv. Corp.*, 205 AD2d 155 (3d Dept 1994) (illegal to take deductions for clothing, umbrellas, maps, and parking tickets from chauffeurs' wages); *Guepet v. Intl. Tao Sys., Inc.*, 110 Misc 2d 940, 941 (Sup Ct Nassau County 1981) ("Nowhere does [section 191] permit an employer to make contemporaneous deductions from wages because an employee failed to perform properly"); *Maggione v. Bero Constr. Corp.*, 106 Misc 2d 384 (Sup Ct Seneca County 1980) (improper for an employer to withhold money from an employee that may be due employer on a counterclaim).

2. The Order's Assessment of Civil Penalties Against Petitioner for Failure to Pay Wages.

The Order to Comply additionally assessed 25% of the unpaid wages, or \$410.00 in civil penalties. The Board finds 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 Order are proper and reasonable. Labor Law § 218.1. Accordingly, the Order is reasonable and valid as to the civil penalties assessed.

3. The Order's Assessment of Interest Against Petitioner.

Labor Law § 219 provides that when the Commissioner determines that wages are due, the order directing payment shall include "interest at the rate of interest then in effect as prescribed by the superintendent of banks pursuant to fourteen-a of the banking law per annum from the date of the underpayment to the date of payment." Banking Law § 14-A sets the maximum rate of interest" at "sixteen percent per centum per annum." Accordingly, the Order is reasonable and valid as to the interest assessed.

4. The Commissioner's Application to Amend the Order.

The Commissioner's application at hearing to amend the Order to add Steve's Custom Rockers and Everything Snow, Inc., as responsible parties is denied. Neither the Petitioner nor the two additional parties have been given notice of the proposed amendment or an opportunity to be heard on the application. To add these parties in such a manner would be a denial of their due process rights.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

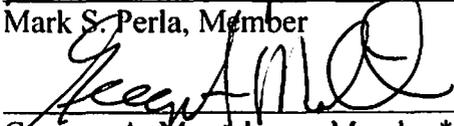
1. The Order to Comply with Article 6 of the Labor Law issued by the Commissioner of Labor on December 2, 2005 against the Petitioner is affirmed in all respects; and
2. The petition for review be, and the same hereby is, denied; and
3. All claims, motions, and objections not otherwise addressed in this Resolution of Decision are deemed denied as without merit.



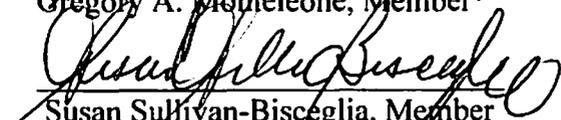
Anne P. Stevason, Chairman



Mark S. Perla, Member



Gregory A. Monteleone, Member*



Susan Sullivan-Bisceglia, Member



J. Christopher Meagher, Member

Dated and Filed in the Office of the
Industrial Board of Appeals,
at Albany, New York,
on October 24, 2007