

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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In the Matter of the Petition of:	:
	:
SMARTY OF NEW YORK, INC.	:
	:
	:
Petitioner,	:
	:
	DOCKET NO. PR-06-057
To review under Section 101 of the New York State	:
Labor Law: An Order to Comply under Article 12-A	:
of the Labor Law, dated July 14, 2006	:
	:
-against-	:
	:
THE COMMISSIONER OF LABOR,	:
	:
Respondent.	:
-----X	

WHEREAS:

The Petition for review in the above-captioned case was filed with the Industrial Board of Appeals (Board) on August 11, 2006. The answer was filed on October 30, 2006. Upon notice to the parties a hearing was held on January 7, 2008 in New York City before Board Member Susan Sullivan-Bisceglia.

Petitioner Smarty of New York, Inc. (Petitioner) was represented by its accountant, Phillip Gottesman, and officers Mwez Blas and Izak Blas, and Respondent Commissioner of Labor (Commissioner) was represented by Maria Colavito, Counsel to the Department of Labor (DOL), Benjamin T. Garry of counsel. Each party was afforded a full opportunity to present documentary evidence, to examine and cross-examine witnesses and to make statements relevant to the issues.

The Order to Comply under Labor Law Article 12-A under review here was issued on July 14, 2006, finding a violation of: (1) Labor Law §§ 341 and 345 (1) for failure to register as an apparel manufacturer; and (2) Labor Law §§ 341 and 345 (2) for failure to comply with an Order

to Register that was issued against the Petitioner on March 30, 2006. The July 14, 2006 Order assessed civil penalties against Petitioner in the amount of \$400 for each violation, for a total penalty of \$800. In its Petition for review, Petitioner asserted that it was not a manufacturer because it did not manufacture, assemble or create finished garments, but only cut rolls of fabric into smaller sections which were shipped to the actual manufacturer and fabricators of the finished apparel.

The Board having given due consideration to the pleadings, the testimony, the hearing exhibits and the post-hearing submissions makes the following findings of fact and law pursuant to the provisions of the Board's Rules of Procedure and Practice (12 NYCRR 65.39).

SUMMARY OF EVIDENCE

Petitioner is a corporation doing business in the State of New York as an apparel manufacturer as defined by Labor Law § 340 (d).

On March 30, 2006, DOL Senior Labor Standards Investigator Iris Rivera (Rivera) inspected the Petitioner's operations in Brooklyn, NY, where she observed a cutting table but not any actual production. Mwez Blas (Blas) was present and identified himself as the president of the company and stated that Petitioner is a contractor for Jeannette Fashion, which is located in the same building as Petitioner. Blas stated that the company gets material, cuts it and sends it out to contractors. Since Petitioner does contract work in the apparel industry, Rivera advised that it needed to be registered as an apparel manufacturer. As Petitioner was not registered, Rivera issued an Order to Register requiring Petitioner to register within twenty days. She also provided Blas with her business card and a phone number to call DOL if he had any questions.

On May 9, 2006 Sue Chan-Lueng (Chan-Leung), DOL Conference Officer, sent a Notice of Conference notifying Petitioner of a compliance conference scheduled for May 30, 2006. On May 26, 2006, Blas called Chan-Lueng and stated that his accountant had mailed the registration application two weeks earlier. However, after reviewing the application with Blas in detail, Chan-Lueng discovered that a majority of the necessary information was missing and advised Blas of the corrective measures to be taken. Blas stated that the business had changed its name and he had forgotten to renew his registration.

On June 1, 2006, DOL received Petitioner's application for renewal of its registration and a check, dated May 4, 2006. However, the application and check were provided well after the deadline set forth in the March 30, 2006 Order, and required information concerning workers' compensation insurance was missing. Gottesman testified that because Petitioner does not have employees, it believed that workers' compensation insurance was not required. However, Rivera testified that she had explained to Petitioner that even if it does not have employees and is not liable for workers' compensation insurance, it is required to provide such information on the application form.

Rivera and Cheng-Leung testified that Petitioner had a previous violation under Labor Law § 345.1 for failure to register dating back to May 5, 2005, which was resolved by the payment of the stipulated amount of \$275 to DOL.

The July 14, 2006 Order to Comply at issue here finds that Petitioner: (1) was at all relevant times a “manufacturer” as defined in Labor Law § 340(d); (2) failed to register as required by Labor Law §§ 341 and 345 (1); and (3) failed to comply with the twenty day time period for registration as specified in the March 30, 2006 Order and as required by Sections 341 and 345 (2). The Commissioner imposed a penalty on Petitioner of \$400 for failing to register and \$400 for failing to timely comply with an Order to Register.

Cheng-Leung further testified that based on the fact that the Petitioner had a previous violation, that the civil penalties imposed by the current Order could have been as much as \$3,000 for each violation. Therefore, the Order assessing only \$800 was extremely low.

On September 20, 2006, DOL Investigators Erica Castillo and Nancy Gao visited Petitioner’s premises. During this visit, Blas identified Petitioner as a manufacturer of ladies wear and stated that it had not yet registered. Rivera testified that another Order was issued to Petitioner for this failure to register.

FINDINGS

A) Standard of review

In general, 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 shall presume that an order of the Commissioner 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 Board’s Rules of Procedure and Practice 65.30 [12 NYCRR 65.30]: “The 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 Orders under review are not valid or reasonable.

B) Article 12-A of the Labor Law

A manufacturer’s obligation to register is found at Labor Law § 341, which provides, in pertinent part:

“No manufacturer or contractor shall engage in the apparel industry unless he or she registers with the commissioner, in writing on a form provided by the commissioner. . . .”

Section 340(d) of the Labor Law defines the “manufacturer” as follows:

“d) ‘Manufacturer’ shall mean any person who (i) in fulfillment or anticipation of a wholesale purchase contract, contracts with a contractor to perform in New York state the **cutting**, sewing, finishing, assembling, pressing or otherwise producing any men’s, women’s, children’s or infants’ apparel, or a section or component of apparel, designed or intended to be worn by any individual which, pursuant to such contract is to be sold or offered for sale to a retailer or other entity, or (ii) **cuts**, sews, finishes, assembles, presses, or otherwise produces in New York state any men’s women’s, children’s or infants’ apparel, or a section or a component, designed or intended to be worn by any individual which is to be sold or offered for sale; provided, however, that manufacturer shall not mean a production employee employed for wages who does not employ others.” (Emphasis added.)

It is undisputed that Petitioner cuts fabric, then ships it to another manufacturer and fabricator of ladies apparel and then has it shipped back to sell. The definition of manufacturer in Labor Law § 340(d) specifically includes cutting. Since Petitioner is involved in the cutting of large rolls of raw fabric for the purpose of producing women’s apparel, it is a manufacturer within the meaning of the law and must be registered.

C. The Order’s Assessment of Civil Penalties Against Petitioner

Labor Law § 345 (4) provides that if there is a failure to register, the “commissioner may impose a civil penalty upon a manufacturer” of up to \$1,500 for an initial violation and up to \$3,000 for a second or subsequent violation. In this case, the Commissioner imposed a civil penalty of \$400 for failure to register and \$400 for failure to comply with an order to register for a total penalty of \$800. Because of Petitioner’s prior violation, the Commissioner could have assessed a civil penalty of up to \$3,000 for each violation for a total assessment of \$6,000. The \$800 penalty is reasonable.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT

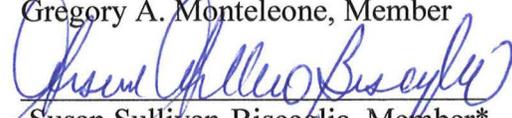
1. The Order to Comply with Article 12-A of the Labor Law, dated July 14, 2006, is affirmed; and
2. The Petition for Review be, and the same hereby is, denied.



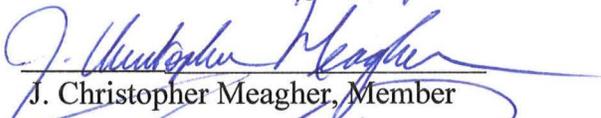
Anne P. Stevason, Chairman

ABSENT

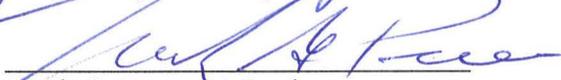
Gregory A. Monteleone, Member



Susan Sullivan-Bisceglia, Member*



J. Christopher Meagher, Member



Mark G. Pearce, Member

Dated and signed in the Office
of the Industrial Board of Appeals
at New York, New York, on
April 23, 2008

Filed in the Office of the
Industrial Board of Appeals
at Albany, New York on
April 25, 2008