Empire State Plaza
Agency Building 2, 20th Floor
Albany, New York 12223
Phone: (518) 474-4785 Fax: (518) 473-7533

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of:	
VALLEY EQUIPMENT COMPANY, INC.,	
Petitioner,	
	DOCKET NO. PR-07-033
To review under Section 101 of the New York State Labor Law: An Order to Comply with Article 6 of the Labor Law, dated May 4, 2007	RESOLUTION OF DECISION
-against-	
THE COMMISSIONER OF LABOR,	
Respondent.	

WHEREAS:

The Petition for review in the above-captioned case was filed with the Industrial Board of Appeals (Board) on June 26, 2007. An Answer as well as a Motion to Dismiss was filed by Respondent Commissioner of Labor (Commissioner) on July 6, 2007. Petitioner then filed a Reply to the Answer and an Affirmation in opposition to the Motion to Dismiss on July 23, 2007.

The Petitioner, Valley Equipment Company, Inc. (Petitioner or Valley Equipment) is represented by Hinman, Howard & Kattell, LLP, by John C. Fish, Esq. Respondent Commissioner is represented by Maria Colavito, Counsel to the Department of Labor (DOL), Jeffrey G. Shapiro of counsel.

The Order to Comply under review herein was issued on May 4, 2007 and finds that Petitioner violated section 193 of the New York Labor Law for the period of April 5, 2000 through March 30, 2005 by deducting $30.00 per week from the wages of its employees for personal use of company owned vehicles. The Order demands payment of unpaid wages in the

amount of $118,045.00 as well as $49,437.62 in interest and $29,511.00 in civil penalty for a total of $196,993.62.

In its Motion to Dismiss, Respondent argues, *inter alia*, that the facts set forth in the Petition, even if true, do not provide a legal basis for Petitioner's failure to pay wages to its employees i.e. for its deductions from wages. In opposition, Petitioner argues that the deductions were authorized by Labor Law § 193. On September 28, 2007, the Board set the motion for optional additional briefing as well as for oral argument on November 28, 2007 before the entire Board and asked the parties to address the following two issues:

1. Are the wage deductions at issue in the Order to Comply authorized by Labor Law § 193(1)(b)? and
2. Is a finding on the first issue dispositive of the petition?

On November 16, 2007, the Board received a letter from Petitioner's counsel indicating that he would not submit any additional briefing and waiving oral argument. In response, the Board notified the parties that the oral argument on the matter was cancelled unless Respondent requested it. In response, Respondent filed a transcription of its oral argument and consented to allowing the Petitioner some time in which to respond. Petitioner was then notified that it would have an opportunity to respond but opted to rest on the papers already on file with the Board.

STATEMENT OF FACTS

Beginning in June 2000 and continuing until March 30, 2005, Petitioner deducted $30 per week from the wages of employees who were permitted to use company owned cars for personal use. Use of a company vehicle and the accompanying deduction was at the option of the employee. Petitioner alleges that employees signed a wage deduction authorization prior to the deductions being taken out of their wages. The vehicle could be used by the employee for commuting and personal errands. The only restriction was that the employee could not take a vacation trip with the car. Petitioner paid all expenses concerning the car including insurance, gasoline, service, maintenance, tires, etc.

On November 9, 2006 a Compliance Conference was held at which time the Conference Officer suggested that Petitioner provide affidavits to DOL from employees confirming the existence of wage deduction authorizations. Petitioner alleges that it was then suggested by the Conference Officer that this would provide a framework for resolution of the matter. Thereafter, Respondent issued its Order to Comply. As part of its Petition, Petitioner seeks to have the case remanded to further explore settlement.

GOVERNING LAW

Standard of Review

In general, 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."

In addition, pursuant to Board Rule 65.30: "The burden of proof of every allegation in a proceeding shall be upon the person asserting it" (12 NYCRR 65.30). Therefore, the burden is on the Petitioner to prove that the Order under review is not valid or reasonable.

In ruling on a Motion to Dismiss by Respondent, the Board assumes that the facts alleged in the Petition are true.

Deductions from Wages

Labor Law § 193(1) provides:

> "1. No employer shall make any deduction from the wages of an employee, except deductions which:
>
> 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 deduction 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."

Therefore, the New York Labor Law explicitly prohibits deductions from wages except as required by law or as expressly authorized in writing by and for the benefit of the employee. Moreover, "[w]hile under section 193(1)(b) an employee may authorize an employer to take away or subtract wages, the clear language of the subdivision limits the types of deductions to those enumerated and to 'similar payments'" (*Angello v. Labor Ready, Inc.*, 7 NY3d 579, 584 [2006] [charge for cashing an employee wage voucher was an illegal deduction even though it was voluntary and for the convenience of the employee where the deduction was not a payment similar to the itemized payments in §193(1)(b)]; *see also Marsh v. Prudential Securities Inc.*, 1 NY3d 146 [2003] [deduction for optional investment benefits was lawful since it was expressly

authorized, voluntary and similar to the statutorily enumerated deductions for pensions or bonds]).

In *Labor Ready*, the Court of Appeals traces the legislative history of Labor Law § 193 from its beginnings in 1889 when laws were passed "requiring employers to pay employees in cash, not company scrip that could be used only at the 'company store,' and prohibiting charges for provisions as offsets to wages" (7 NY3d at 586 [citations omitted]). The decision also quotes an 1899 Report of the Attorney General that it was "the intention of the Legislature 'to absolutely prohibit the sale . . . to their employees, upon credit, of groceries, provisions or clothing with a view to deducting the amount charged for the same from the weekly payments required to be made in cash,'" which led to the 1921 amendment which provided that "there could be 'no off-set in behalf of the employer against wages' for provisions, clothing and groceries" (*Id.*).

FINDINGS

Petitioner argues that the $30 per week deduction for personal use of a company car qualifies as a lawful deduction under Labor Law § 193(1) (b) because it is for the benefit of the employee, it is expressly authorized in writing, and it is similar to payments for labor organization dues or health plan premiums, which are enumerated among the statutorily authorized deductions. The employees benefit because they can use the company car to commute and thus avoid the expense or the wear and tear of a personal car. The employer benefits, in a limited way, because an employee may arrive somewhat sooner to assist a customer with an emergency during off hours.

Respondent argues that the deductions are not similar to the ones authorized by statute but are more akin to those deductions which were the specific object of the statute, i.e. those deductions which go to the employer to pay for things purchased by the employee from the employer, an equivalent to the company store. In this case, the employee is paying the employer to purchase the right to use the company owned car for personal use.

The Board finds that the deductions at issue are unlawful under Labor Law § 193(1) (b). The employer is deducting $30 per week from the employees' wages as payment to the employer for the employees' right to use a company owned vehicle for personal use. This deduction is the type which was explicitly rejected by the Court of Appeals in *Labor Ready*. "While Labor Ready's decision to pay the temporary laborers daily is laudable, subtracting from wages a fee that goes directly to the employer or its subsidiary violates both the letter of the statute and the protective policy underlying it" (*Labor* Ready, 7 NY3d at 586). While the deductions at issue are voluntary and benefit the employee, they are deductions for a purchase the employee has made from the employer that is not otherwise authorized by statute and are thus prohibited.

The Petition also states that there was discussion at a DOL Compliance Conference that Petitioner should submit affidavits of employees in support of its assertion that the deductions were authorized by the employees in writing and that such a submission would provide the "framework for a settlement." However, the Petition fails to indicate how this discussion would render the Order to Comply invalid or unreasonable.

The Board finds that there is no issue of fact to resolve and that the deductions were unlawful under Labor Law § 193, as a matter of law. The motion to dismiss the petition, is therefore, granted.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The Order to Comply issued against Valley Equipment Company, Inc., dated May 4, 2007, under review herein, is affirmed; and

2. The Petition for Review is denied.

Anne P. Stevason, Chairman*

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 February 27, 2008.

Filed in the Office of the Industrial
Board of Appeals at Albany, New
York, on February 29, 2008.