STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of: ELHANNON, LLC (D/B/A ELHANNON, LLC WHOLESALE TREE NURSERY) Petitioner, To Review Under Section 101 of the Labor Law: An Order to Comply with Article 19 of the Labor Law, and an Order to Comply With Article 6 of the Labor Law, and an Order Under Articles 19 and 19-A of the Labor Law, each dated January 16, 2009, - against - THE COMMISSIONER OF LABOR, Respondent.	DOCKET NO. PR 09-050 RESOLUTION OF DECISION

APPEARANCES

D. James Sutton, designated non-attorney representative, for petitioner.

Pico Ben-Amotz, Acting Counsel, NYS Department of Labor (Benjamin A. Shaw of counsel), for the respondent.

WITNESSES

For the petitioner: Senior Labor Standards Investigator Elizabeth Ares; Anthony Guetti; Douglas Squires; and D. James Sutton.

For the respondent: None called.

WHEREAS:

The petition in this matter was filed with the Industrial Board of Appeals (Board) on March 12, 2009, which was subsequently amended on April 21, 2009, and seeks review of three orders issued by the Commissioner of Labor (Commissioner or respondent) against petitioner Elhannon, LLC (D/B/A Elhannon, LLC Wholesale Tree Nursery) on January 16, 2009. Upon notice to the parties a hearing was held in this matter on April 13 and August 10, 2010, in Albany, New York, before Sandra M. Nathan, then the Board's

Deputy Counsel, 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, make statements relevant to the issues, and file post-hearing briefs.

Parties

Petitioner Elhannon, LLC (D/B/A Elhannon, LLC Wholesale Tree Nursery) is a tree nursery located in Petersburgh, New York that also does landscaping on customers' private land. Respondent Commissioner of Labor is the head of the Department of Labor (DOL) (Labor Law § 10), and is authorized to enforce the Labor Law and issue orders (Labor Law § 21).

EVIDENCE

Wage Order

The order to comply with Article 19 (wage order) under review was issued by the respondent Commissioner of Labor against the petitioner on January 16, 2009. The wage order directs compliance with Article 19 and payment to the Commissioner for wages due and owing to several named claimants in the amount of $13,272.83 for the time period from October 28, 2006 through October 19, 2007, with interest continuing thereon at the rate of 16% calculated to the date of the order, in the amount of $3,925.94, and assesses a civil penalty in the amount of $26,545.00, for a total amount due of $43,743.77.

Anthony Guetti filed a claim against the petitioner on September 15, 2006, alleging the petitioner owed him three weeks wages, and that he was not paid overtime for any weeks he worked over 40 hours. Senior Labor Standards Investigator Elizabeth Ares testified that Labor Standards Investigator LaMountain, who no longer works for DOL, was originally assigned to investigate the petitioner under the supervision of Supervising Labor Standards Investigator James Gerow. LaMountain handled all of the "field investigation" prior to February 19, 2008, and determined that no significant overtime was due. On or about February 2008, the investigation was reassigned to Ares to complete. Ares testified that she did not agree with LaMountain's findings and conclusions, and determined that the Minimum Wage Order for farms, which includes plant nurseries, excludes from overtime the work done on a farm; but work performed which is not farm work, as defined by that Wage Order, is subject to overtime pay. Ares explained that:

> "The wage orders have us looking at individual weeks, as opposed to the company, whether the company is a farm. We looked at individual weeks, and where evidence was produced showing that a specific worker, during a specific week, worked solely in the nursery, we did not compute overtime for that week. Where evidence existed in [petitioner's records] showing that any portion of that week the worker performed work other than farm work, as defined by the wage order, that week is, therefore, subject under the miscellaneous wage order to time and a half over 40, and that would be inclusive of all hours worked during the week, regardless of how it was proportioned. If there was a week where

> any work was performed which did not fall under the definition of farm work, then it's time and a half over 40."

The records Ares reviewed to determine whether overtime was owed included transcriptions made by LaMountain of records kept by the petitioner for 2006. The records indicated whether an employee worked in the nursery or at another location during a given week. Ares used these records to determine the amount of overtime due. She computed the overtime due for 2006 and 2007 based on the presumption that the amount of non-farm work performed according to the records for 2006 was about the same as for 2007. She testified that:

> "For example, for 2006, [petitioner's] records frequently showed non-farm work. For 2007 [petitioner] provided no time sheets. [Sutton] told Mr. LaMountain, according to his report, that there was no landscaping work in 2007 . . . . In the absence of any kind of documentation provided by the company whatsoever that there was no landscaping work done in 2007, I proceeded with the audit as though landscaping work has been done for non-farm work in 2007 and computed overtime for hours worked over 40 in 2006 and 2007. That is how the findings came to be what they are . . . In the absence of records or evidence showing exclusively farm work for any given week, I went with the requirements of the miscellaneous or non-farm work wage order and computed overtime after 40."

Ares testified that she did not contact any of the petitioner's employees and did not know whether LaMountain contacted any of them. Ares did not recall ever interviewing or speaking to the claimant. DOL looked at the work performed by the petitioner's employees and made a determination whether the specific work performed was farm work. No determination of the "primary business" of the employer was ever made. Ares testified that DOL found that the petitioner was a tree nursery that provided landscaping services off site to its customers and clients. Ares believed that the off site landscaping services used trees grown by the petitioner, but did not know whether the petitioner exclusively used trees grown at its nursery. DOL made no determination whether the trees grown in the nursery were used exclusively on landscape projects, and the petitioner did not provide DOL with a breakdown of what materials were used for the various landscaping jobs.

Douglas Squires testified he worked for the petitioner as a project manager, foreman, and laborer. He supervised the claimant on some landscaping jobs. The landscape projects mostly involved tree and shrub installation, but the petitioner also installed irrigation systems, retaining walls and patios. Squires testified that trees and some shrubs grown at the nursery were used on landscape jobs, but most of the shrubs were purchased from outside.

Claimant Anthony Guetti testified that he worked for the petitioner as a heavy equipment operator. He estimated that 90% of his work was off site on landscaping projects. His work also included transporting trees grown at the nursery to landscaping jobs. He further testified that the petitioner failed to pay him for three weeks.

D. James Sutton testified that the petitioner is a nursery that grew trees, sold trees, and installed their own trees on landscape projects. Most of the petitioner's landscape projects were in Colorado, Vermont, and Massachusetts. Sutton testified that in 2007, the petitioner had "virtually no projects in New York." He recalled that two employees – Bushley and Smiglowski – worked in Colorado for all of 2007, and that the "majority of the rest of the employees" worked in Stratton Mountain or Arlington, Vermont, or in the nursery in 2007.

Supplements Order

The order to comply with article 6 (supplements order) was issued by the respondent Commissioner of Labor on January 16, 2009, and finds the petitioner violated Labor Law § 198-c by failing to pay wage supplements (expenses) to Anthony Guetti from June 24, 2006 to September 5. 2006, and directs compliance with Article 6 and payment to the Commissioner for such unpaid expenses in the amount of $136.21, with interest continuing thereon at the rate of 16% calculated to the date of the order, in the amount of $49.56, and assesses a civil penalty in the amount of $272.00, for a total amount due of $457.77.

Claimant Anthony Guetti filed a claim with DOL alleging that the petitioner's had a policy of reimbursing him for work-related expenses. Specifically, Guetti alleged that the petitioner's had failed to reimburse him for gasoline purchases in the amount of $136.21. Ares testified that Guetti provided the receipts to DOL and provided other receipts that had been paid to show that the petitioner did have a policy of reimbursing Guetti for expenses.

ANALYSIS

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

Burden of Proof

The petitioners' burden of proof in this matter was to establish by a preponderance of the evidence that the orders issued by the Commissioner are invalid or unreasonable (State Administrative Procedure Act § 306 [1]; Labor Law §§ 101, 103; 12 NYCRR 65.30).

Wage Order

The wage order finds that the petitioner violated Article 19 of the Labor Law by failing to pay overtime wages to several employees for the time period from October 28, 2006 through October 19, 2007. The petitioner argues that it is not required to pay overtime, because the employees in question performed agricultural work.

Article 19 of the Labor Law, known as the Minimum Wage Act, requires every employer to pay each of its employees in accordance with the minimum wage orders promulgated by the Commissioner (Labor Law § 652). The Minimum Wage Order for Miscellaneous Industries and Occupations, 12 NYCRR Part 142, requires an employer to pay a non-residential employee for overtime at a rate of 1 ½ times the employee's regular rate of pay for hours worked over 40 in a week (12 NYCRR 142-2.2). Farm employees are

not covered by the Miscellaneous Wage Order. The Minimum Wage Order for Farm Workers, 12 NYCRR Part 190, covers agricultural workers, and consistent with the federal Fair Labor Standards Act (FLSA), exempts such workers from overtime coverage (*compare* 29 USC § 213 [a] [6]).

The Farm Wage Order defines employee, in relevant part, as "any individual engaged or permitted by an employer to work on a farm, except . . . for that part of the working time covered by the provisions of another minimum wage order promulgated by the Commissioner" (12 NYCRR 190-1.3 [b] [4]). "Employed on a farm" is defined, in relevant part, as:

> ". . . the services performed by an employee on a farm in the employ of the owner, lessee or operator of a farm in connection with
> "(1) cultivating the soil;
> "(2) raising or harvesting any agricultural or horticultural commodity;
> ". . . .
> "(4) the operation, management, conservation, improvement or maintenance of a farm and its tools and equipment;
> ". . . .
> "(6) the handling, planting, drying, packing, packaging, processing, freezing, grading, storing or delivering to market or to a carrier for transportation to market, of any agricultural or horticultural commodity raised on the employer's farm" (12 NYCRR 190-1.3 [g]).

The regulations further make clear that "employed on a farm does not include services performed in connection with . . . grading or processing of any agricultural or horticultural commodity not raised on the employer's farm" (12 NYCRR 190-1.3 [h]).

The respondent determined that the employees named in the wage order are owed overtime, because they were not exclusively performing covered agricultural work during the weeks in question, and were therefore subject to the Miscellaneous Wage Order during those weeks (*see* 12 NYCRR 190-1.3 [b] [4]). Specifically, the respondent determined that in weeks where the petitioner's employees were performing landscaping work at job sites outside the nursery, such work was not exempt from overtime as agricultural work, and any such work during a given week removed the employee from the agricultural exemption and entitled the employee to overtime if he or she worked more than 40 hours in that week irrespective of the proportion of hours spent in agricultural versus non-agricultural work (*see e.g.* 29 CFR § 780.11 [where an employee in the same workweek performs exempt and non-exempt work, the entire week is non-exempt]; *Marshall v Gulf and Western Industries, Inc.*, 552 F2d 124 [5th Cir 1977] [same]). The respondent also determined, incorrectly, that the nursery's office workers were non-exempt (*see* 12 NYCRR 190-1.3 [g] [4] [farm work includes the operation and management of a farm]).

We note, and the respondent appears to concede, that landscaping work outside the nursery at customers' homes is agricultural work exempt from overtime coverage if the

products being used in such work were grown on the nursery (*see e.g.* 29 CFR § 780.206; *accord* 12 NYCRR 190-1.3 [h]).

The issue, therefore, is whether the respondent's determination that the outside landscaping work was not farm work is valid and reasonable. The petitioner, as explained above, bears the burden of proving that such determination was invalid or unreasonable. In order for the petitioner to prevail, it had to produce evidence that the outside landscape work was farm work subject to the Farm Wage Order. The petitioner failed to meet its burden, because there was credible testimony from Squires that on some landscaping jobs, shrubs were used that were not grown at the petitioner's nursery (*see* 29 CFR § 780.206 [b] [planting of trees and bushes done by a employees of an employer who has not grown the trees or bushes is not overtime exempt]; *see also* 12 NYCRR 190-1.3 [h]). Sutton's general testimony that the petitioner was a nursery that used its own trees on landscaping jobs was not sufficient to meet this burden. We find it dispositive that the petitioner did not produce any records to show which landscaping jobs exclusively used materials grown on its nursery, and which did not, although Sutton testified that such records existed. Furthermore, the petitioner did not produce records showing the percentage of outside materials used on landscaping jobs where outside materials were used, so that we could do an accounting. It was the petitioner's burden to prove it was entitled to the agricultural exemption (*Corning Glass Works v Brennan*, 417 US 188, 196-97 [1974]), which it failed to do despite possessing the records necessary to do so, and despite repeated explanations by the hearing officer of the petitioner's burden of proof in this matter.

However, we do find that the petitioner proved that the respondent's method of determining overtime due for 2007 was unreasonable. The petitioner produced records of the hours its employees worked in 2006 along with daily job sheets indicating whether a particular employee worked at the nursery or on an outside landscaping job. The respondent utilized these records to determine which employees worked more than 40 hours in a week, and whether any of that work was done on outside landscaping jobs. If any landscaping work was done, the respondent determined that overtime was due for that week because performance of any non-agricultural work in a week meant that the agricultural exemption was not applicable (29 CFR § 780.11; *Marshall v Gulf and Western Industries, Inc.*, 552 F2d 124). For 2007, the petitioner produced records of the hours employees worked, but no job sheets. The respondent, therefore, determined that the employees performed the same percentage of landscaping work as in 2006 and extrapolated the amount of overtime due and owing for 2007. We find this method of extrapolating overtime was unreasonable, because the respondent had no evidence that the petitioner's employees worked outside the nursery on landscaping jobs within New York in 2007. The respondent had no employee statements or claims indicating how the nursery operated in 2007. In fact, the only statement the respondent obtained was from Sutton, who informed the investigator that the petitioner did no landscaping work in New York in 2007. Furthermore, Sutton credibly testified that there were "virtually no New York [landscaping] projects in 2007" with most of the landscaping work performed in Vermont, Massachusetts, and Colorado. Sutton also credibly testified that Bushley and Smiglowski worked exclusively in Colorado in 2007, and the majority of the other employees worked at the nursery or at projects in Stratton Mountain and Arlington, Vermont. This testimony was not rebutted. Accordingly, we modify the wage order to strike the overtime wages due and owing for 2007, as well as the overtime due to office

workers, who, has discussed above, were exempt from overtime under the Farm Wage Order.

DOL also determined, based on Guetti's claim form, that the petitioner had failed to pay three weeks' wages to Guetti. The petitioner produced no records to show that the wages had been paid. In the absence of any proof from the petitioner that the wages were paid, we affirm that portion of the wage order finding the petitioner owes Guetti three weeks' wages (*see* Labor Law § 196-a; *Angello v Natl. fin. Corp.*, 1 AD3d 818, 821 [3d Dept 1989]; *Garcia v Heady*, 46 AD3d 1088 [3d Dept 2007]).

Civil Penalty

The wage order assesses a civil penalty in the amount of 200% of the wages found due and owing (*see* Labor Law § 218 [1]). The petitioner did not object to the civil penalty in its petition. The civil penalty is therefore affirmed (Labor Law § 101[2]), but reduced in proportion to the reduction in wages set forth above.

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."

Supplements Order

The supplements order finds the petitioner violated Labor Law § 198-c by failing to pay expenses to Anthony Guetti from June 24, 2006 to September 5. 2006. On or about September 14, 2006, Guetti filed a claim with DOL alleging that the petitioner owed him $136.21 for unreimbursed gas receipts for the time period from August 25, 2006 to September 8, 2006. Labor Law § 191(1) (a) (i) provides that manual workers shall be paid their wages weekly, and not more than seven calendar days after the end of the week in which the wages were earned. "Wages" include benefits and wage supplements (Labor Law § 190 [1]). "Wage supplements" include reimbursement for expenses (Labor Law § 198-c [2]). Guetti provided DOL with proof that the petitioner had a practice of, and in fact had, reimbursed him for expenses. Guetti also provided DOL with copies of receipts for gas that he alleged he had not been reimbursed for. Reimbursement to manual laborers for expenses such as gas is clearly covered by the Labor Law, and the petitioner, who had the burden of proof, presented no evidence that no policy to reimburse expenses existed, that Guetti was not entitled to reimbursement for the expenses in question, or that such reimbursement had already been made. Accordingly, we affirm the supplements order.

Civil Penalty

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Interest

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Penalty Order

The order under Articles 19 and 19-a of the Labor Law (penalty order), dated January 16, 2009, imposes a $1,000.00 civil penalty against the petitioner for violating Labor Law § 661 by failing to keep and/or furnish true and accurate payroll records for each employer for the period from on or about April 1, 2006 through December 31, 2007, and imposes a $1,000.00 civil penalty for violating Labor Law § 673 (2) by failing to keep and/or furnish true and accurate payroll records for each employer for the period from on or about April 1, 2006 through December 31, 2007, for a total amount due of $2,000.00. Because the petitioner did not object to the penalty order in its petition, it is affirmed (Labor Law § 101[2] [objections not raised are deemed waived].

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The wage order is modified to revoke the wages due and owing for 2007, to revoke the wages due and owing for office employees for 2006 and 2007, and the civil penalty and interest is to be reduced proportionately; and the respondent shall issue and serve an amended wage order consistent with this decision; and

2. The supplements order is affirmed in its entirety; and

3. The penalty order is affirmed in its entirety; and

4. The petition for review be, and the same hereby is, granted in part and denied in part.

Anne P. Stevason, Chairperson

J. Christopher Meagher, Member

Jean Grumet, Member

LaMarr J. Jackson, Member

Jeffrey R. Cassidy, Member

Dated and signed in the Office
of the Industrial Board of Appeals
at New York, New York, on
July 16, 2012.