

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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In the Matter of the Petition of: :

MARTIN GOONETILLEKE A/K/A SHAWN :
GOONETILLEKE A/K/A SHANTHIPA :
GOONETILLEKE AND EXTRAORDINARY DVD :
VIDEO CORP. (T/A EXTRAORDINARY DVD & :
VIDEO), :

DOCKET NO. PR 10-012

Petitioners, :

RESOLUTION OF DECISION

To Review Under Section 101 of the Labor Law: :
An Order to Comply with Article 19 of the Labor :
Law, and an Order Under Articles 6 and 19 of the :
Labor Law, both dated November 19, 2009, :

- against - :

THE COMMISSIONER OF LABOR, :

Respondent. :

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APPEARANCES

Alan B. Pearl & Associates, P.C. (Alan B. Pearl of counsel), for petitioners.

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

WITNESSES

For the petitioners: Martin Goonetilleke, Daniel Knecht, Rafael Angulo Carillo, Mohamed Packeer, Dibo Hafif, Philip Perera, Wendy Dilone, Don Gunawardena, and Noel Perera.

For the respondent: Indika Hettige and Labor Standards Investigator Micaela Angel.

WHEREAS:

The petition in this matter was filed with the Industrial Board of Appeals (Board) on January 19, 2010, and seeks review of two orders issued by the Commissioner of Labor (Commissioner or respondent) against petitioners Martin Goonetilleke and Extraordinary DVD Video Corp. (T/A Extraordinary DVD & Video) on November 19, 2009. Upon notice

to the parties a hearing was held on January 12 and March 24, 2012, in New York, New York, before Devin A. Rice, the Board's Associate 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 Martin Goonetilleke is the owner of petitioner Extraordinary DVD Video Corp. They operate a dvd store at 148 West 14th Street, New York; New York, trading as Extraordinary DVD. 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 petitioners on November 19, 2009. The wage order directs compliance with Article 19 and payment to the Commissioner for wages due and owing to Indika Hettige in the amount of \$14,259.08 for the time period from October 1, 2006 through April 16, 2008, with interest continuing thereon at the rate of 16% calculated to the date of the order, in the amount of \$3,637.82, and assesses a civil penalty in the amount of \$14,259.08, for a total amount due of \$32,155.98.

Petitioners' evidence

Between 2006 and 2008, Petitioner Martin Goonetilleke owned five stores selling dvds, videos and clothing to the public -- DVD Depot located on 8th Avenue, DVD Playground at 150 West 14th Street, Extraordinary DVD at 148 West 14th Street, Exquisite DVD on East 14th Street, and Unique DVD in Brooklyn. All five stores were open in 2006. Exquisite DVD was no longer open in 2007, and only DVD Depot and Extraordinary DVD were still open in 2008. Extraordinary DVD's business hours from 2006 to 2008 were 10:00 a.m. to midnight. On Friday and Saturday the store stayed open until 3:00 a.m. if it was busy.

Goonetilleke worked at Extraordinary DVD along with his wife, Marie Goonetilleke, and from 2008, Rafael Angulo Carillo worked as a cashier at Extraordinary DVD from 10:00 a.m. to 5:00 p.m. Monday to Friday. Goonetilleke's brother-in-law, Wilfred Ponnthrai, sometimes opened the store for Carillo in the mornings and occasionally helped at the store for a few hours. Goonetilleke, his wife, and Carillo were the only supervisors or managers at Extraordinary DVD.

Goonetilleke worked at Extraordinary DVD during the hours Carillo was not working. Wilfred Ponnthrai and Goonetilleke's brother, Joseph Goonetilleke, covered the other stores, although Goonetilleke could not recall specifically which stores Ponnthrai and

Joseph Goonetilleke worked at during which time periods. Another employee, Marion Perera, worked at Exquisite DVD.

Goonetilleke testified that he knows the claimant, Indika Hettige. Goonetilleke met Hettige in 2004 or 2005 when Hettige was “hanging around with the Sri Lankans on 8th Avenue.” Goonetilleke testified that Hettige never worked at Extraordinary DVD. Goonetilleke denied the statement on Hettige’s complaint that Extraordinary DVD employed 25 to 30 people. Goonetilleke also denied writing a letter for Hettige verifying that he worked for the petitioners, and testified that it was not his signature on the letter and observed that his name was spelled incorrectly.

Goonetilleke testified that a letter from a UPS driver stating that the claimant worked for the petitioners is not true. The same driver gave Goonetilleke a letter the day before the hearing stating that Hettige did not work for the petitioners, but just “hanged around” in the store with his friends. The driver told Goonetilleke that the claimant was hanging around the store and asked him “many, many times” for a letter confirming his employment for the petitioners.

Rafael Angulo Carillo testified that he has worked at Extraordinary DVD since December 2007. He works as a cashier Monday to Friday from 10:00 a.m. to 5:00 p.m. He testified that he does not know Hettige and had never seen him prior to the day of the hearing. He further testified that he has never seen Hettige at Extraordinary DVD. Carillo testified that he worked as a cashier and did other work if needed. According to Carillo, Goonetilleke stocked the shelves. On cross-examination, Carillo testified again that he never worked with Hettige and had never seen him before; however, when confronted with photos from a Christmas party both attended, Carillo admitted that he had seen him before. Carillo further testified that he has seen Hettige hanging around the store “on [Hettige’s] way to other jobs where he used to work.” However, further contradicting himself, Carillo also testified that he had not seen Hettige before the day of the hearing although Hettige may have seen him.

Daniel Knecht testified that he is a self-employed merchandise distributor. He has known Goonetilleke for ten years, and has made deliveries to Extraordinary DVD since 2001 or 2002. Knecht testified that in 2006, 2007, and 2008 he made weekly deliveries to Extraordinary DVD. The deliveries were not on a fixed schedule and could be anytime from 10:00 a.m. to 10:00 p.m., although the deliveries were typically made from 3:00 p.m. to 6:00 p.m. Knecht normally left his deliveries with an employee behind the counter, who was either Goonetilleke, his wife, or “Joe¹”. Knecht further indicated that he recognized Rafael Carillo as an employee of Extraordinary DVD. He believes Carillo started working at Extraordinary DVD in 2007. Knecht testified that he had never seen claimant Indika Hettige prior to the hearing.

¹ This is presumably petitioner Goonetilleke’s brother, Joseph Goonetilleke.

Respondent's evidence

Labor Standards Investigator Micaela Angel testified that DOL's investigation of the petitioners was conducted by Labor Standards Investigator Peter Benjaminson. Benjaminson retired from DOL prior to hearing; however, Angel, testified that she was familiar with the contents of the investigative file and the parties stipulated numerous documents into evidence.

On April 29, 2008, claimant Indika Hettige filed a "minimum wage/overtime complaint" with DOL. The complaint alleges that Hettige was employed by petitioners Extraordinary DVD and Martin Goonetilleke from October 1, 2006 to April 16, 2008. The complaint states that Hettige worked 9:00 a.m. to 9:00 p.m. Monday to Saturday with a 15 minute break each day. The claimant's pay rate is listed as \$6.00 per hour with no additional pay for overtime hours. Finally, the complaint alleges that the petitioners paid the claimant in cash and did not provide him a wage statement.

A letter dated January 5, 2007, is attached to the complaint. The letter is on DVD Depot letterhead and states that the claimant is employed by DVD Depot and receives a weekly salary of \$400.00. The letter appears to be signed by "Roshantha Fanseka" for "Martin Goonathilaka [sic]." Also attached to the complaint is a letter dated August 6, 2008 from a UPS driver named Y. Sylvester, stating that Hettige was an employee of Extraordinary DVD who had signed for packages at the store. A memo in DOL's investigative file notes that Investigator Peter Benjaminson reached Sylvester by telephone at a UPS facility and confirmed the information in the letter.

A business card from Extraordinary DVD, which Goonetilleke recognized and explained was left near the cash register, states that the store is open "24 hours, 7 days."

UPS records subpoenaed by the respondent's counsel for deliveries made from October 2, 2006 to December 20, 2007 at 148 West 14th Street, the location of Extraordinary DVD, indicate that packages were received during that time period by the following individuals:

Ajith
Roshan
RA
Nihal/Nhil/Nihu/Nihao
Rollins
Asencio
Steese
Megha
Hetti
Phansico/Fonseka/Fonsek/Fonce/Fany
Kane
Isaacs/Izzacs
Synstelien

Latimer
Singh
Evans
Alfonse
Kain
Naset
Indika/Indik
Chandra
Luis
Sigar/Sillar
Rollins
Helal
Nice
William.

An additional letter in evidence from Y. Sylvester, dated January 11, 2012, produced by the respondents, states that the claimant did not work at Extraordinary DVD, but was "just hanging out with his friends."

A "field interim report" in DOL's investigative file indicates that a DOL investigator interviewed Emmanuel Fernando and Waduge Fernando, two employees of Exquisite DVD, on August 1, 2007.

Claimant Indika Hettige testified that he first met Martin Goonetilleke in 2005 when Goonetilleke hired him to work at DVD Depot. Hettige worked six months in 2005 as a night shift cashier prior to returning to Sri Lanka. Goonetilleke rehired Hettige to work at DVD Depot shortly after his return to New York in August 2006. Hettige worked night shifts Monday to Saturday from 9:00 p.m. to 9:00 a.m. as a cashier and as a security guard starting in October 2006. He worked at DVD Depot from October 1, 2006 to January 31, 2007, and then worked "virtually" all of the time at Extraordinary DVD from February 2007 to December 2007. Goonetilleke paid him \$6.00 an hour.

Hettige testified that during the time he worked for Goonetilleke, he started at DVD Depot, moved to Extraordinary DVD when the cashier there was fired, and also worked at Exquisite DVD. Hettige explained that Goonetilleke rotated employees among the stores he operated:

"... he is always rotating us. We are not scheduled for one store. If someone not available in the other store, he's telling me: can you go and work for that store today. And that's how he is rotating us If I'm working at Extraordinary DVD, if there is too many people, he is sending one guy to work. If someone is absent, he is taking me to the other store. Then the next day I'm coming back to the same store. If something happen again in the other store, if absent

someone else – it's not only me, everybody is doing the same way, he's rotating the people."

Hettige testified that Goonetilleke told him by telephone where to work each day. Hettige worked with Carillo from 2006 to 2008. Hettige testified that he "changed" shifts with Carillo, which Hettige explained means "If I am doing the day shift, he's coming to replace me at the night shift. So after one week, again he's changing our schedule. I'm doing the day shift, so this guy is doing the night shift. So 9 to 9 we changing." Hettige testified that he worked with Carillo in that manner for six months starting in June 2007, and they sometimes worked the same shift together. Hettige testified that he had never seen Daniel Knecht prior to the hearing.

Hettige testified that throughout the time he worked for Goonetilleke, he worked 6 days a week, 12 hours a day. His pay rate was \$6.00 an hour for all hours worked. Goonetilleke paid him in cash. Hettige further testified that other employees of Extraordinary DVD included Fonseka, Carillo, Diaz, Karipperma, Mega Malapama, Nihal, Marion Perera and Evan.

Hettige explained that a letter entered into evidence on DVD Depot letterhead stating he was an employee was prepared by "Roshantha²" on Goonetilleke's instruction so that Hettige could apply for health insurance for his son.

Hettige testified that when he worked at Extraordinary DVD, he sometimes signed for UPS packages. UPS records subpoenaed by the Commissioner show that "Indika" signed for 11 packages between October 2, 2006 and April 16, 2008, and "Hetti" signed for 7 during the same time period." Moreover, Hettige identified other names from the UPS records as employees of Extraordinary DVD. Hettige testified that Ajith was a cashier, Roshan Phansico (Roshantha Fanseka) was a supervisor who operated the computer system and performed inventory, Nihal and Mejha stocked the videos, Luis stocked and performed maintenance work, and Evan Isaacs was a supervisor who prepared the payroll. Hettige did not know Ali or Asencio, whose names also appear in the UPS records.

Petitioners' rebuttal

Goonetilleke testified in rebuttal that none of the individuals listed in the UPS records were employed by Extraordinary DVD. He explained that Ajith is the owner of a store located at 3rd Avenue and 14th Street who picked packages up from Extraordinary DVD so that he could get movies secretly before the release date. Roshan is a foreign student who works at a dvd store in Brooklyn and picks up packages at Extraordinary DVD. Mejha is a taxi driver. Goonetilleke does not know why Mejha signed for packages at Extraordinary DVD. With respect to the names "Indika" and "Hetti" appearing in the records, Goonetilleke surmised that Indika could be the owner of a store located at 8th Avenue and 24th Street. He acknowledged that Hetti was the claimant and explained that he used to work at a store on 14th Street and 8th Avenue and was probably sent by the owner of

² Other evidence in the record indicates this is Roshantha Fanseka.

that store to collect packages from Extraordinary DVD. Goonetilleke testified that "it could be [the claimant], could be another, there are two Indikas."

When asked to explain how these individuals knew to show up at Extraordinary DVD and wait for the UPS driver, Goonetellike testified that:

"... they get the movie and he put the movies into the shelf, or he rent the movies, or maybe he view the movies through the machines. He get two, three movies from me and then he leave. He get it 7, 8 days before the distributor, the new movies Every time the UPS driver comes that time, they hang around and then they get the movie and then they leave without going through the distributor."

Mohamed Packeer testified that in the years 2006 through 2008 he worked for Yahoo Distributors. During that time period, he delivered movies five days a week to Extraordinary DVD. Packeer usually made these deliveries between 4:40 p.m. and 5:30 p.m., and spent approximately five to ten minutes in the store to deliver the merchandise and collect payments from Goonetilleke. Packeer testified that he recognized Hettige and had seen him before, "but not in that store." Packeer is aware that Goonetilleke owned other stores. He did not think he had ever seen Hettige in Goonetilleke's other stores, but could not be sure.

Dibo Hafif testified that from 2006 to 2007 he owned a jewelry store called Taj Mahal located next door to Extraordinary DVD. He stated that he went into Extraordinary DVD at least once a day. He testified that he often went into the store because it was safe for him to wait there until a friend or family member could pick him up. He further testified that he would go into Extraordinary DVD in the morning:

"When I come and don't see the worker who was working with me to open the store, usually I wait for that person in [Extraordinary DVD] until he comes in Usually we open 9 o'clock. But I be in the store sometimes around 15 to 9, maybe 8:30, it depends on the traffic."

Hafif explained that when was not busy, he would sometimes check whether Extraordinary DVD had any business, and could see the people inside Extraordinary DVD from outside on the sidewalk. Hafif never saw Hettige in the store in 2006 and 2007. Hafif testified, moreover, that he had never seen Hettige "in [his] life."

Phillip Perera testified that from 2006 through 2008, he worked for Prompt Mailers in Staten Island, and was a regular customer at Extraordinary DVD. He normally purchased dvds there once a week between 10:00 a.m. to 1:00 p.m., and stayed inside the store from 10 to 20 minutes each time he visited. Perera testified that the individuals he observed working

at Extraordinary DVD were Goonetilleke and “sometimes a lady.” Perera testified that he had never seen Hettige prior to the hearing.

Wendy Dilone testified that from 2006 to 2008 she worked for a cleaning company and was a regular customer at Extraordinary DVD. She visited the store on her lunch break between noon and 1:00 p.m. once or twice a week to buy dvds for her children. She testified that she never saw Hettige at the store. Goonitilleke typically checked her out when she made purchases, and sometimes “some lady” checked her out. Dilone testified that she saw four or five people working at Extraordinary DVD from 2006 to 2008, but does not know any of their names.

Don Gunawardena testified that from 2006 to 2008 he operated a Sri Lankan grocery store in Jamaica, New York. Gunawardena knows Goonitilleke from making frequent deliveries of groceries to Extraordinary DVD. Gunawardena testified that in the hundreds of times he made deliveries to Extraordinary DVD, he never saw Hettige at the store. Gunawardena testified that he saw Goonitilleke, his wife, and starting in 2007, a “Spanish guy” working at Extraordinary DVD. As far as Gunawardena knew, there were no other employees.

Noel Perera testified that from 2006 to 2008 he worked for Yashraj Films in Long Island City, New York, and was a customer at Extraordinary DVD. He testified that he never saw Hettige at the store in the hundreds of times he visited to purchase dvds. Perera testified that Goonitilleke was always working at the store when he was there, and that sometimes there was a “lady” working there too. Starting in 2008, Perera also saw a “Spanish guy” working at Extraordinary DVD.

Penalty Order

The first order under Articles 6 and 19 of the Labor Law (penalty order) was issued on November 19, 2008, and imposes a \$1,000.00 civil penalty against the petitioners for violating Labor Law § 661 and 12 NYCRR 142-2.7 by failing to give each employee a complete wage statement with every payment of wages from on or about April 23, 2006 through June 29, 2008, and also imposes a \$1,000.00 civil penalty against the petitioners for violating Labor Law § 661 and 12 NYCRR 142-2.6 by failing to keep and/or furnish true and accurate payroll records for each employee from on or about April 23, 2006 through June 29, 2008, for a total due civil penalty due in the amount of \$2,000.00.

No records or wage statements were produced by the petitioners showing any hours worked by or wages paid to the claimant.

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 petitioners allege that the wage order is unreasonable on the ground that they did not employ the claimant. Therefore, the sole question on this appeal is whether the claimant worked, as claimed in his complaint, for the petitioners. For the reasons set forth below, we find that the petitioners employed the claimant and affirm the wage order in its entirety.

The claimant testified credibly that he was employed by the petitioners. He provided specific testimony concerning the operation of the petitioners' business, identified other employees, and described the layout of Extraordinary DVD including the location of the break room situated in the basement beyond the area visible to customers and the public. The claimant's testimony is supported by the letter of a UPS driver identifying him as working for the petitioners which information was confirmed by telephone by a DOL investigator, and also by a letter confirming his employment signed by Roshantha Fanseka, who was identified by the claimant as a supervisor at Extraordinary DVD and whose name appears repeatedly in the UPS records subpoenaed by the respondent. Moreover, the UPS records show that the claimant and other individuals named by the claimant as employees of the petitioners signed for packages at Extraordinary DVD. The claimant's testimony that he sometimes worked overnight shifts is supported by the business card from Extraordinary DVD that indicates that the store is open "24 hours, 7 days."

The petitioner's testimony, on the other hand, was not credible. Goonetilleke testified that he operated five stores in 2006 with only five employees including himself,³ and that that he operated four stores in 2007 with only four employees including himself.⁴ We do not find it credible that these stores could have been operated with so few employees, particularly as the UPS records for one of the stores, Extraordinary DVD, indicate numerous individuals signed for packages including several who were specifically identified by the claimant as employees or managers of Extraordinary DVD. Goonetilleke's explanation that these individuals did not work for him, but were employees of other stores who received packages at Extraordinary DVD direct from the manufacturer in order to get movies before they were released through a distributor is not convincing. The packages are delivered at different times each day and Goonetilleke failed to coherently account for how these individuals knew when to arrive at his store each day for the packages, and why none of his own employees ever signed for any of the merchandise shipped to Extraordinary DVD. We also do not find it credible that a store such as Extraordinary DVD, which was advertised as open "24 hours, 7 days", could be operated by so few people.

³ Martin and Marie Goonetilleke worked at Extraordinary DVD. Marion Perera worked at Exquisite DVD. Joseph Goonetilleke and Wilfred Ponnthrai covered the other three stores.

⁴ Martin and Marie Goonetilleke worked at Extraordinary DVD. Joseph Goonetilleke and Wilfred Ponnthrai worked at the other three stores.

Carillo's testimony on behalf of the petitioners was also not credible. He testified variously that he had never seen the claimant prior to the hearing, that he had seen him at a Christmas party, that he had never seen him at Extraordinary DVD, and that he had seen him "hanging around" Extraordinary DVD on his way to other jobs where he used to work. Carillo's contradictory testimony and evasive answers on cross-examination displayed a lack of candor. We do not credit his testimony that the claimant did not work for the petitioners.

Moreover, the testimony of the other witnesses proffered by the petitioners was not specific enough to discharge the petitioners' burden of proof. Several witnesses – Knecht, Hafif⁵, Dilone, Phillip Perera, Noel Perera, and Gunawardena – testified that they frequently visited Extraordinary DVD during the time period in question and had never seen the claimant there. Their visits, frequent though they may have been, were of a limited duration and purpose, and their testimony was not specific enough to be dispositive of whether the claimant was employed by the petitioners in light of the claimant's detailed and credible testimony of his hours of work and conditions of employment at Extraordinary DVD and the other stores owned by Goonetilleke. Indeed, as the claimant testified that he sometimes worked an overnight shift, it is certainly possible that customers visiting the store in the afternoon would not see him. Packeer testified that he visited Extraordinary DVD and many other video stores as part of his work as a distributor and recognized the claimant, but not from Extraordinary DVD. Because Goonetilleke owned four other video stores, it is certainly possible that Packeer saw the claimant in one of those other stores, if not at Extraordinary DVD, considering his concession that all video stores look more or less alike to him.

The Board finds that a preponderance of the credible evidence supports a finding that the petitioner Goonetilleke employed the claimant in that he hired the claimant, determined the claimant's pay rate, supervised the claimant's work, and set his work schedule (*see e.g. Herman v RSR Sec. Servs. Ltd.*, 172 F3d 132, 139 [2d Cir 1999]; *Matter of Steve H. Sabba et al.*, PR 08-079 [March 24, 2010])⁶. We affirm the wages found due and owing by the wage order as such calculations were not challenged by the petitioners.

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

⁵ We note that Hafif's testimony contradicts Goonetilleke's testimony on the business hours of Extraordinary DVD. Goonetilleke testified that the store opened at 10:00 a.m. Hafif, however, testified that his own store opened at 9:00 a.m. and if he arrived before his co-worker, he would wait at Extraordinary DVD for security reasons until his co-worker arrived.

⁶ The claimant credibly testified that Goonetilleke hired him, gave him his work schedule, set his pay rate, and otherwise controlled the conditions of his employment.

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."

Penalty Order

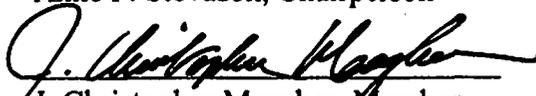
Having found above that the petitioners employed the claimant, the penalty order is affirmed in its entirety because the petitioners were required to maintain employment records relating to the claimant and provide him with a wage statement with each payment of wages.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

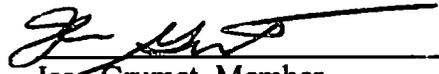
1. The wage order is affirmed;
2. The penalty order is affirmed; and
3. The petition for review be, and the same hereby is, denied.



Anne P. Stevason, Chairperson



J. Christopher Meagher, Member



Jean Grumet, Member

LaMarr J. Jackson, Member

ABSENT

Jeffrey R. Cassidy, Member

Dated and signed in the Office
of the Industrial Board of Appeals
at New York, New York, on
September 10, 2012.

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."

Penalty Order

Having found above that the petitioners employed the claimant, the penalty order is affirmed in its entirety because the petitioners were required to maintain employment records relating to the claimant and provide him with a wage statement with each payment of wages.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The wage order is affirmed;
2. The penalty order is affirmed; and
3. The petition for review be, and the same hereby is, denied.

Anne P. Stevason, Chairperson

J. Christopher Meagher, Member

Jean Grumet, Member



LaMarr J. Jackson, Member

Jeffrey R. Cassidy, Member

Dated and signed by a Member
of the Industrial Board of Appeals
at Rochester, New York, on
September 10, 2012.