STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of:	:	
TOMASZ WOJTOWICZ AND TOMMY TRANSPORTATION, INC.,	:	
Petitioners,	:	DOCKET NO. PR 10-102
To Review Under Section 101 of the Labor Law: An Order to Comply with Article 6, and an Order Under Article 19 of the Labor Law, both dated February 25, 2010,	:	RESOLUTION OF DECISION
- against -	:	
THE COMMISSIONER OF LABOR,	:	
Respondent.	:	

APPEARANCES

Tomasz Wojtowicz, petitioner *pro se*.

Pico Ben-Amotz, Acting Counsel, NYS Department of Labor (Larissa C. Bates, of Counsel), for respondent.

WITNESSES

Tomasz Wojtowicz, for petitioners.

Slawomir Muzal and Leo Lewkowitz, Labor Standards Investigator, for respondent.

WHEREAS:

The petition filed with the Industrial Board of Appeals (Board) in this matter seeks review of two orders issued by respondent Commissioner of Labor (Commissioner) against petitioners Tomasz Wojtowicz and Tommy Transportation, Inc. on February 25, 2010.

Upon notice to the parties, a hearing was held on March 27, 2012 in New York, New York before J. Christopher Meagher, Member of the Board and the Board's designated Hearing Officer in this proceeding. Each party was afforded a full opportunity to present documentary evidence, examine and cross-examine witnesses, and make statements relevant to the issues.

The first order (wage order) directs that petitioners pay wages owed claimant employees Slawomir Muzal and Janusz Jarecki in the amount of $4,643.64, together with interest continuing thereon at the rate of 16% to the date of the order in the amount of $550.62, and a civil penalty of $4,643.64. The total amount due is $9,837.90. The second order (penalty order) directs that petitioners pay a civil penalty of $500.00 for failure to keep and/or furnish true and accurate payroll records for their employees for the period April 21, 2009 through June 2, 2009.

The petition asserts that the wages, interest, and penalties should be removed because claimant[s]: (1) were independent contractors and not employees; (2) Muzal was fully paid for the delivery he made, and; (3) Jarecki is owed no further wages because he failed to submit a bill of lading, receipts, and other paperwork for his contracted work, damaged the company's truck, and improperly performed his delivery.

For the following reasons, we find petitioners failed to meet their burden of proof to establish that claimants were independent contractors and not owed the wages, interest, and penalties to be paid under the wage and penalty orders. The orders are affirmed as valid and reasonable in all respects.

SUMMARY OF EVIDENCE

The Wage Claims

On May 27, 2009, claimant Slawomir Muzal (Muzal) filed a claim for unpaid wages with the Department of Labor (DOL) stating that he was employed by petitioners as a driver at the rate of $.32 per mile during the period April 21 to May 27, 2009. In a supplemental statement filed on June 23, 2009, Muzal claimed he had driven 20,381 miles and accrued $6,521.82 in wages over a five week trip delivering freight, received partial payments of $4,200, and was owed a balance of $2,321.82 in wages for the period of the claim.

On November 21, 2009, claimant Janusz Jarecki (Jarecki) filed a claim with DOL stating that he was employed by petitioners as a driver at the rate of $.32 per mile during the period May 18 to June 3, 2009 and was owed $2,760.64 in wages for work performed during the period of the claim.

Petitioners' Evidence That Claimants Were Contractors

Petitioner Tomasz Wojtowicz (Wojtowicz) testified that he owns and operates Tommy Transportation, Inc., a trucking business located in Bronx, New York that provides freight delivery to destinations throughout the United States. Drivers contact the company seeking to deliver freight to a particular destination and agree to be paid a certain rate per mile in consideration for use of a company truck to make that delivery. Petitioner asserts that claimants are contractors because he simply provides a truck and a contract to deliver freight and the driver takes the truck and delivers goods to the customer under that contract. Drivers are provided company credit cards to pay for service to the truck and may use it to pay for fuel, food, or even personal clothing or bills at home while on the road. However, all charges unrelated to service and repairs will be deducted from their compensation. "[I]f he doesn't have the money, he can buy this fuel from us or just simply borrow the money if he wanted. By the way we are doing it,

he is buying the fuel from us using our credit card." In some cases, drivers receive their total compensation in the form of money advanced by the company with the credit card. As further evidence of contractor status, petitioner asserted that drivers are issued 1099 forms at the end of each year.

Petitioner testified that in 2009 he contracted with Muzal and Jarecki to perform long distance freight deliveries. Muzal signed a written contract with the company, while Jarecki's was verbal. Petitioner did not know whether Jarecki had an outside business at the time. Every driver is subject to rules contained in a "Driver Information Packet" provided him at time of hire: (1) drivers must carry and submit a log book, trip and vehicle inspection report, and all receipts and bills of lading with each trip; (2) every log book and driving without proper documents violation will result in a "penalty", including a warning for first violation, $200 fine for second, and "$500/Dismissal" for third; (3) drivers must report their activities to the company at 8 AM and 8 PM each day; (4) drivers must immediately report problems on the road, including any delay in making timely delivery; (5) company credit cards are to be used "for fuel and agreed transactions only and unauthorized transactions will result in pay deduction and a report to authorities"; (6) a "$1,000 deductible" will be kept as a deposit for any damages caused by the driver and will be returned at time of termination, and; (7) two weeks' notice is advised before termination of service. Petitioner asserted that the requirement to submit bills of lading, fuel receipts, and other paperwork is required of carriers by the federal Department of Transportation (DOT).

The packet also includes a written agreement drafted by petitioner that identifies the driver as an independent contractor, provides the contractor the right to drive the company truck in consideration for payment on a per mile/per trip basis, and waives any claims for workers compensation or accident disability. The agreement was signed by Muzal in a space marked for the "Employee's name". Muzal also signed an "Employee Receipt" acknowledging that he had received a copy of the company's Alcohol and Drug Testing Policy and agreed to comply with it.

Petitioner's Evidence of Payment

Petitioner testified that Muzal was paid all monies owed by credit card payments, electronic checks called "Comcheks", and cash. He did not submit proof of the credit card payments. Copies of the check payments were submitted to DOL during its investigation. As evidence of the cash payment, petitioner submitted a copy of an agreement signed by the parties on June 4, 2009 stating that claimant received $600 cash "as a settlement payment" for work "before [sic] missing paperwork, bills, [and] statements". Claimant provided the bill of lading and other paperwork from his trip and the pay dispute was fully settled.

Pursuant to company practice, a $1,000 deposit was also withheld from Muzal's initial pay as a deductible to cover potential damage to the truck and protection for unauthorized use of the credit card. The deposit was later returned in claimant's final compensation. No proof of reimbursement was submitted.

Petitioner submitted a small claims judgment from the Civil Court of the City of New York, Small Claims Part, Bronx County dated November 11, 2010 dismissing a claim by Muzal for nonpayment of wages and argued that it precludes enforcement of the wage order in a second

action. In addition, petitioner testified that the small claims case was dismissed after claimant stated that petitioner did not owe him any more money.

Petitioner testified that Jarecki drove a truck from petitioner's warehouse in New Jersey to Seattle, Washington and back but caused numerous problems on the trip that cost the company time and money. Jarecki made an unnecessary service stop on the first day, lost time at a vehicle inspection because he was unable to communicate with the police officer, and could not find the customer's warehouse once he arrived in Seattle. Claimant eventually made the delivery and the freight was unloaded. Concerned that claimant was unreliable, petitioner told him his services were no longer necessary and that petitioner would fly to Seattle and drive the truck back himself. Jarecki insisted on driving back with a return load, however, and threatened to abscond with the truck, log book, and bill of lading if he wasn't permitted to do so. Petitioner decided not to call the police but instead directed claimant to another warehouse to pick up a second load and claimant returned with it to New Jersey. However, claimant had loaded only half the freight and the company was never paid. Petitioner requested that Jarecki meet with him to submit the bill of lading for the Seattle delivery and the other paperwork for his trip but claimant refused unless he was paid $2,300 for his services. Petitioner sued claimant to obtain the bill but the matter is still unresolved and petitioner has not been paid for that delivery either. Claimant also caused an accident on the trip costing the company over $1,500 in damages to the truck.

As proof of payment to Jarecki, petitioner submitted copies of two "Comcheks" he sent claimant at his request, one payable to "Love's" Country Store in the amount of $500 and the second payable to claimant for $200. Drivers cash these electronic checks with vendors on the road and the proceeds may be used for any purpose, business or personal. "If they want to buy a Christmas gift, they can do that. If they want to buy oil, they can do that. We don't ask." The checks are considered wages unless the driver submits receipts to substantiate them as authorized expenses. Claimant did not submit receipts for the payments and petitioner deducted them from his compensation. Petitioner did not know whether claimant used the proceeds for service to the truck, fuel, travel expenses, or personal use.

Pursuant to company practice, petitioner also withheld a $1,000 deposit from Jarecki's initial compensation to cover potential damage to the truck and as protection for unauthorized credit card expenses. No proof of reimbursement was submitted. Petitioner proffered a copy of a repair bill paid by the company for $1,598 in damages to the truck and a credit card bill showing expenses charged by claimant for which he failed to submit receipts. The documents were excluded by the Hearing Officer on the basis of Labor Law § 193.

Petitioner argued that he owes no further wages to Jarecki beyond those already paid because he refused to submit a bill of lading, credit card receipts, and other paperwork for his contracted work, caused damages to the company truck, and failed to properly perform his delivery. "I don't understand the complaint, especially the late fee or the penalties or any other charges, why is it to me? I would say up to today he cannot stand in front of me and say: listen, this is the job I did, can you pay me? He never gave me this chance."

DOL's Evidence

Muzal testified that petitioner assigned him the destination for his trip and provided a company truck and credit card to purchase fuel to make the delivery. The credit card bills were

paid by the company. Claimant did not own his own truck or have an outside business at the time. Petitioner agreed to pay him on a weekly basis for his mileage but failed to make several payments and claimant filed a claim with DOL for unpaid wages upon his return. The parties later met and signed an agreement whereby petitioner agreed to pay him a partial payment of $600 and the balance due after he provided missing paperwork from the trip. Claimant delivered the documents but petitioner still failed to pay him the remaining wages owed.

In response to Muzal's claim, DOL issued petitioners a collection notice on September 22, 2009 advising them that claimant had filed a wage claim against the company, the details of the claim, and that if petitioners agreed they should remit payment within ten days. The notice further advised that if petitioners disagreed, they should respond in writing stating the basis of their dispute and include "any payroll record, policy contract, etc." to substantiate their position. Petitioner responded by asserting that claimant was an independent contractor and not an employee.

By letter dated October 20, 2009, Senior Labor Standards Investigator Mary Coleman (Coleman) advised petitioner that he had failed to submit sufficient evidence substantiating that Muzal was an independent contractor. Coleman reiterated the details of the claim and requested that petitioner remit payment in the amount of $2,321.82 within ten (10) days or the matter would be referred for an order to comply, including additional interest and penalties.

On October 24, 2009, petitioner submitted a copy of a check issued the claimant on May 19, 2009 in the amount of $1,200. Petitioner argued that claimant was an independent contractor because no taxes were withheld from the check and cited various reasons why he had breached his contract with the company. Petitioner further claimed that he had paid claimant all monies owed, the dispute had been settled, and enclosed a copy of the alleged settlement agreement described above.

On November 23, 2009, Coleman advised petitioner that Jarecki had also filed a claim against the company, the details of the claim, and that in order to resolve both claims petitioner should remit payment within ten (10) days or the matters would be referred to an order to comply, including additional interest and penalties. Petitioner did not remit payment or provide further written response to the claims.

Labor Standards Investigator Leo Lewkowitz (Lewkowitz) testified that he had reviewed the investigative file in preparation for the hearing. In prior cases he had reviewed, relevant evidence of independent contractor status included proof that the contractor owned the vehicle, was self-insured, or had an outside business. Petitioner failed to submit proof of any of these factors for the claimants during the investigation. Petitioner's evidence of payment did not invalidate Muzal's claim because it failed to show the period covered by the payments or that he had been paid in full for the wages listed in the claim.

Based on DOL's investigation, the Commissioner issued the Orders under review on February 25, 2010.

In support of the 100% penalty assessed in the wage order, Lewkowitz testified that Coleman completed an investigative report titled "Background Investigation – Imposition of Civil Penalty" that set forth factors considered in assessment of the penalty. The penalty was

arrived at by looking at how long the company had been in business, the number of claimants, and the cooperation of the employer. A 100% penalty was recommended because the employer had been in business more than three years and there were two employees' owed back wages. Petitioner had been uncooperative by asserting that claimants were independent contractors, while failing to submit proof of such status, and by refusing to remit payment. Coleman considered petitioner's failure to pay wages willful because she had requested documents concerning a federal court action petitioner brought against one of the claimants and a copy of the contractual agreement between the parties. Petitioner failed to provide the documentation. The penalty in the wage order could have been as high as 200%. A $500 penalty was also assessed for petitioner's failure to submit payroll records. The penalty for the records violation could have been as high as $1,000.

GOVERNING LAW

A. Standard of Review and Burden of Proof

When a petition is filed, the Board reviews whether an order issued by the Commissioner of Labor is "valid and reasonable" (Labor Law § 101[1]). Any objections not raised in the petition shall be deemed waived (*Id.* § 101[2]). The Labor Law provides that an order of the Commissioner shall be presumed "valid" (*Id.* §103 [1]). If the Board finds that the order, or any part thereof, is invalid or unreasonable it shall revoke, amend, or modify the same (*Id.* § 101[3]).

A petition must state "in what respects [the order on review] is claimed to be invalid or unreasonable" (*Id.* § 101[2]). Pursuant to Rule 65.30 of the Board's Rules, "[t]he burden of proof of every allegation in a proceeding shall be upon the person asserting it" (12 NYCRR § 65.30). The burden is by a preponderance of evidence (State Administrative Procedure Act § 306[1]).

It is therefore petitioners' burden in this case to prove the allegations in the petition by a preponderance of evidence.

B. Recordkeeping Requirements

Article 19 of the Labor Law, known as the "Minimum Wage Act," defines "[e]mployee," with certain exceptions not relevant to this appeal, as including "any individual employed or permitted to work in any occupation (Labor Law § 651 [5])." Labor Law § 661 requires employers to maintain payroll records for employees covered by the Act and to make such records available to the Commissioner:

> "Every employer shall keep true and accurate records of hours worked by each employee covered by an hourly minimum wage rate, the wages paid to all employees, and such other information as the commissioner deems material and necessary, and shall, on demand, furnish to the commissioner or [his] duly authorized representative a sworn statement of the same. Every employer shall keep such records open to inspection by the commissioner or [his] duly authorized representative at any reasonable time. . ."

The Commissioner's regulations implementing Article 19 provide at 12 NYCRR § 142-2.6:

"(a) Every employer shall establish, maintain and preserve for not less than six years weekly payroll records which shall show for each employee:
(1) name and address;
(2) social security number;
(3) wage rate;
(4) the number of hours worked daily and weekly, including the time of arrival and departure for each employee working a split shift or spread of hours exceeding 10;
(5) when a piece-rate method of payment is used, the number of units produced daily and weekly;
(6) the amount of gross wages;
(7) deductions from gross wages;
(8) allowances, if any, claimed as part of the minimum wage..."

C. Civil Penalties

Labor Law § 218 provides that once the Commissioner determines that an employer has violated Article 6 or 19 of the Labor Law, he shall issue to the employer an order directing compliance therewith, which shall describe with particularity the nature of the violation. The statute also provides:

> "In addition to directing payment of wages, benefits or wage supplements found to be due, such order, if issued to an employer who previously has been found in violation of those provisions [of the Labor Law], rules or regulations, or to an employer whose violation is willful or egregious, shall direct payment to the commissioner of an additional sum as a civil penalty in an amount equal to double the total amount found to be due. In no case shall the order direct payment of an amount less than the total wages, benefits or wage supplements found by the commissioner to be due, plus the appropriate civil penalty. Where the violation is for a reason other than the employer's failure to pay wages, benefits or wage supplements found to be due, the order shall direct payment to the commissioner of a civil penalty in an amount not to exceed one thousand dollars for a first violation, two thousand dollars for a second violation or three thousand dollars for a third or subsequent violation. In assessing the amount of the penalty, the commissioner shall give due consideration to the size of the employer's business, the good faith of the employer, the gravity of the violation, the history of previous violations and, in the case of wages, benefits or supplements violations, the failure to comply with recordkeeping or other non-wage requirements."

D. Definition of "Employee" Under Article 6 of the Labor Law

Under Article 6 of the Labor Law, "employer" is defined as "any person, corporation, limited liability company, or association employing any individual in any occupation, industry, trade, business or service" (Labor Law § 190[3]). "Employed" is defined as "permitted or

suffered to work" (*Id.* § 2[7]). The federal Fair Labor Standards Act (FLSA) also defines "employ" to include "suffer or permit to work" (29 USC § 203[g]).

The similarity of language in state and federal law is because Congress adopted the definition of "employ" from state child labor laws to protect employees who might have been otherwise unprotected at common law (*Rutherford Food Corp. v McComb*, 331 US 722, 728 and n.7 [1947]). Because the statutory language is identical, the Labor Law and the FLSA follow the same test to determine the existence of an employment relationship (*Ansoumana v Gristede's Operating Corp.*, 225 F Supp2d 184, 189 [SDNY 2003]).

In determining whether an individual is an "employee" covered by the Labor Law "the ultimate concern is whether, as a matter of economic reality the workers depend upon someone else's business for the opportunity to render service or are in business for themselves" (*Brock v. Superior Care Inc.*, 840 F2d 1054, 1059 [2nd Cir 1988]). The factors to be considered in assessing such "economic reality" include: (1) the degree of control exercised by the employer over the workers; (2) the workers' opportunity for profit or loss; (3) the degree of skill and independent initiative required to perform the work; (4) the permanence or duration of the working relationship, and; (5) the extent to which the work is an integral part of the employer's business (*Id.* at 1058-1059). No one factor is dispositive (*Id.* at 1059). In applying these factors, the reviewing court is to be mindful that "the remedial nature of the statute ... warrants an expansive interpretation of its provisions so they will have the widest possible impact in the national economy" (*Herman v RSR Security Services, Ltd.*, 172 F2d 132, 139 [2d Cir 1999]). In discussing the broad definition of "employ" set forth in the FLSA, the Supreme Court has observed "[a] broader or more comprehensive coverage of employees ... would be difficult to frame" (*United States v Rosenwasser*, 323 US 360, 362 [1945]).

FINDINGS

A. Petitioners Failed to Meet Their Burden to Establish That Claimants Were Not Employees

The record amply demonstrates that claimants were "employees" of petitioners as a "matter of economic reality" under the applicable five part test and were not independent contractors.

First, petitioner assigns drivers their destinations and requires them to report their activities to petitioner at 8 AM and 8 PM every day. Drivers must report any problems on the road or in making timely delivery immediately. Petitioner requires drivers to maintain and submit log books, trip, and vehicle inspection reports for each trip and subjects them to fines and dismissal if they do not. Petitioner exercises control over the drivers' compensation by setting the mileage rate and issuing paychecks, electronic checks, and credit cards. Drivers are authorized to use the electronic checks and cards for service, fuel, travel, or personal expenses. Expenditures unrelated to service or repairs will be deducted from their compensation. As demonstrated by the pay dispute with Jarecki, petitioner withholds compensation from drivers if they fail to submit the bill of lading, receipts, and other documents from their trip. Finally, petitioner withholds a $1,000 deposit from drivers to cover damage to the truck and as protection for unauthorized credit card expenditures.

Petitioner's extensive supervision and control over the work performed by claimants and the terms, manner, and means of payment for that work is evidence of their status as employees, not as independent contractors (*Brock v Superior Care Inc.* at 1060 [employer's setting and control of wages and review of work performance are indicia of supervision and control consistent with employment]). While petitioner argues that certain rules are required by the federal Department of Transportation, requirements imposed by government regulation do not diminish the supervision and control of claimants' work by those means and any others taken at the employer's initiative.

Second, petitioner provided the truck, paid for service and repairs, and provided credit cards in order for claimants to make deliveries under contracts held by the company. Muzal testified he did not own his own truck or have an outside business at the time. Petitioner did not know whether Jarecki did. We find claimants had no investment in the business arrangement with petitioner and no opportunity for profit other than their own wages. The sole source of income for the work performed by the claimants was their agreement with petitioner to be paid a certain mileage rate for that work. Claimants were thereby economically dependent on the agreement and had no opportunity for profit or loss outside their own labor. Such return is properly classified as wages from employment (*Brock v Mr. W. Fireworks, Inc.*, 814 F2d 1042, 1051 [5th Cir. 1987]).

Petitioner argued that Muzal and other drivers signed agreements identifying themselves as independent contractors and were issued 1099 forms each year as contractors, not as employees. However, "an employer's self-serving label of workers as independent contractors is not controlling" (*Brock v Superior Care, Inc.*, at 1059 [*quoting Real v Driscoll Strawberry Associates, Inc.* 603 F2d 748, 755 [9th Cir 1979]). Petitioner's designation of claimants as contractors is belied by his own written agreement with the drivers and other payroll documents that also describe them as "Employee[s]".

Third, while claimants no doubt had experience and skill as drivers, petitioner provided the truck, the freight, and the destination for their deliveries and determined what they would be paid for that work. Such dependence on an employer to provide the opportunities for work does not reflect the skill or independent initiative of a person working for himself *(Brock v Superior Care,* at 1060 [where skilled nurses did not use technical skills in any independent way to obtain work opportunities, but instead depended on employer for job assignments that employer controlled the terms and conditions of, economic reality reflects employment]).

Finally, petitioner owns and operates a trucking business that is dependent on the skill and experience of drivers to deliver freight to succeed. It is self evident that claimants' work was essential to petitioner's business.

Based on the totality of circumstances, we find that claimants were as "a matter of economic reality" dependent on the petitioner's business to render service. Accordingly, an employment relationship existed between the parties and petitioners are liable for their unpaid wages under the Labor Law.

B. Petitioner Violated Article 6 of the Labor Law by Failing to Pay Wages Due Muzal

In the absence of accurate records required by the Labor Law, the Commissioner may draw reasonable inferences and calculate unpaid wages based on the "best available evidence" drawn from employee statements. The Appellate Division stated in *Matter of Mid-Hudson Pam Corp. v Hartnett,* 156 AD2d 818, 821 [3d Dept 1989], "When an employer fails to keep accurate records as required by statute, the Commissioner is permitted to calculate back wages due to employees by using the best available evidence and to shift the burden of negating the reasonableness of the Commissioner's calculations to the employer.".

Where an employer claims it has paid an employee wages owed for work performed, it must present sufficient evidence of the "precise wages" paid or evidence to "negative the reasonableness of the inference to be drawn from the employee's evidence" (*Doo Nam Yang v ACBL Corp.*, 427 F. Supp.2d 327, 331 [SDNY 2006] [quoting *Anderson v Mt. Clemens Pottery Co.* at 821]); *Matter of Gattegno,* PR 09-032 [December 15, 2010]).

Petitioner did not challenge the mileage driven by Muzal or DOL's calculation of wages that was drawn from his written claim. Petitioner argued that he had paid claimant in full for that work by credit card payments, electronic checks, and cash. No proof of the credit card payments was submitted. As discussed below, deductions from wages for credit advances are prohibited by Labor Law § 193. Petitioner submitted proof of a check paid to claimant for $1,200 and a cash payment to him for $600. As petitioner paid claimant at most $1,800 for the work performed, and claimant credited him with partial payments of $2,400, he failed to overcome DOL's calculation of the remaining wages owed for the period of the claim. In the absence of such proof, the Commissioner's determination based on "the best available evidence" drawn from the written claim filed by the employee is deemed valid and reasonable *(Mid- Hudson Pam Corp. v Hartnett,* 156 AD2d at 821*).*

Petitioner argued that the agreement to pay claimant $600 cash as a "settlement payment" for work "before [sic] missing paperwork, bills, [and] statements" constituted a full settlement of the dispute between the parties and he owes no further wages. Claimant testified that the cash was received as a partial payment and the balance would be paid after he provided the company with paperwork from the trip. Claimant delivered the documents but petitioner still failed to pay him the wages owed. We credit claimant's testimony as it was specific, credible, and consistent with the language of the agreement that the cash was received as a settlement "payment", not as a full settlement of the dispute.

Petitioner argued that a small claims judgment dated November 10, 2010 dismissing Muzal's claim for non-payment of wages precludes enforcement of the wage order in a second action and because the case was dismissed after claimant stated that petitioner did not owe him any more money. The doctrine of *res judicata* precludes a party from re-litigating in a subsequent action or proceeding any claim that was raised, or could have been raised, in the prior proceeding (*Ryan v New York Telephone Company*, 62 NY2d 494, 500 [1984]). Since the wage order in this case was issued on February 25, 2010, some ten months *before* the small claims judgment, it is not a subsequent action or proceeding.[1] Nor could any finding concerning the

[1] As the wage order is not a subsequent action or proceeding, we need not address whether the Commissioner could be said to be in "privity" with the claimant or barred from enforcing the order by *res judicata.*

issue of payment based on claimant's alleged admission in the small claims action have any preclusive effect on the Board in this case. New York City Civil Court Act § 1808-A provides, "A judgment obtained under this article shall not be deemed an adjudication of *any fact or issue* found therein in any other action or court (emphasis added);"

C. Petitioner Violated Article 6 of the Labor Law by Failing to Pay Wages Due Jarecki; Petitioner's Deductions From Claimant's Wages Are Prohibited by Labor Law § 193

At all relevant times, Labor Law § 193 (1) (b) prohibited an employer from deducting monies from the wages of an employee except "as required by law" or as "expressly authorized in writing" by and "for the benefit of the employee" The statute, moreover, specified the deductions that an employee may authorize: "payments for insurance premiums, pension or health and welfare benefits, contributions to charitable organizations, payments for United States bonds, payments for dues and assessments to a labor organization, and similar payments for the benefit of the employee."[2]

Petitioner argued that he owed no further wages to Jarecki because he failed to submit a bill of lading, paperwork, and credit card receipts for his trip, damaged the company truck, and failed to properly perform his delivery. Pursuant to petitioner's rules, drivers must submit the bill, trip documents, and receipts for each trip and any unauthorized credit card transactions will result in pay deduction. A $1,000 deposit is kept for damages caused by the driver and as protection for unauthorized credit card expenses.

Withholding wages from an employee as a penalty for violation of a duty to submit documents and receipts, for damages caused to the employer's property, or for failure to properly perform the job violates Labor Law § 193 because such withholding is neither authorized by any law, rule, or regulation, nor one of the deductions allowed by the statute (*Guepet v International Tao System, Inc.*, 110 Misc. 2d 940, 941 (Sup. Ct. Nassau County, 1981) ["Nowhere does [Section 193] permit an employer to make contemporaneous deductions from wages because an employee failed to perform properly."]; *Matter of William Dictor and Hanlon Auto Transport, Inc.*, PR 09-003 [June 18, 2009] [deductions for breach of duty to company, deposit to cover damages to employer's property, or for damages caused by employee to company vehicle are barred by statute]. The regulations of the Commissioner of Labor also prohibit deductions for spoilage or breakage, cash shortages or losses, or fines or penalties for misconduct committed by the employee (12 NYCRR § 142-2.10).

Petitioner described the credit card as a means whereby the driver could "borrow" money to pay for fuel, food, travel and personal expenses or "buy" these items from the company. Petitioner is also barred from withholding compensation because loans or credit advances to an employee are neither authorized by law, rule, or regulation nor one of the deductions allowed by the statute (*Matter of Michael Fischer,* PR 06-099 [April 23, 2008] [failure to pay full wages to recoup loan to employee barred by Labor Law § 193]). The advances are not a "similar payment for the benefit of the employee" because the card is provided so that drivers can most easily pay

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[2] The statute was amended effective November 6, 2012 to add additional permitted deductions. Our decision is governed by the statute extant at the time of the Commissioner's order.

the transportation costs of making petitioner's freight deliveries. As such, they are payments primarily for the benefit of the employer, not the employee.

We find that petitioner's reasons for withholding compensation from claimant are prohibited by Labor Law § 193 and affirm the rulings made by the Hearing Officer excluding petitioner's proffered documents on the basis of the statute. Petitioner admits that claimant drove a truck from petitioner's warehouse in New Jersey to Seattle, Washington and back and delivered freight to both destinations at petitioner's behest. Claimant is entitled to be paid wages for that work as required by the Labor Law. Petitioner is not left without recourse for any economic losses he may have suffered but may file a separate civil action to recover those monies or avail himself of whatever civil remedies the law allows (*Huntington Hospital v Huntington Hospital Nurses Association*, 302 F Supp 2d 34 [2004]). He may not unilaterally deduct monies or withhold claimant's wages because the employee failed to submit documents and receipts, damaged the employer's property, received loans or advances, or failed to properly perform the work assigned.

Finally, petitioner did not challenge the mileage driven by Jarecki or DOL's calculation of wages drawn from his written claim form. As evidence of the wages already paid, petitioner submitted proof that he sent claimant two electronic check payments, one payable to "Love's" Country Store in the amount of $500 and the other payable to Jarecki in the amount of $200. The Labor Law defines "[w]ages" as "[t]he earnings of an employee for *labor or services rendered*, regardless of whether the amount of earnings is determined on a time, piece, commission or other basis (Labor Law § 190 [1] [emphasis added])". Petitioner acknowledged that drivers are authorized to use the electronic checks for any purpose and that he did not know whether the proceeds were used to pay for service to the truck, fuel, or other travel expenses. As petitioner failed to demonstrate that the payments were compensation for "labor or services rendered", he failed to establish them as "wages" and they may not be credited towards the wages owed.

In the absence of proof of the precise wages paid the claimant for the period of the claim, the Commissioner's determination based on "the best available evidence" drawn from the written claim filed by the employee is deemed valid and reasonable *(Mid- Hudson Pam Corp. v Hartnett,* 156 AD2d at 821).

D. Interest

Labor Law § 219(1) 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 section 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."

Petitioner did not challenge the assessment of interest made by the wage order. The Board finds that the considerations and computations required to be made by the Commissioner in connection with the interest set forth in the order are valid and reasonable in all respects.

E. Civil Penalties

Petitioner did not submit evidence challenging the 100 % civil penalty assessed in the wage order beyond arguing that the penalties are unreasonable because Jarecki failed to submit the bill of lading and other paperwork to prove his contracted work. The Board finds that the considerations and computations the Commissioner was required to make in connection with the imposition of the civil penalty in the wage order are valid and reasonable in all respects.

Petitioner did not submit evidence challenging the civil penalty assessed for failure to maintain and/or furnish payroll records for their employees for the period April 21, 2009 through June 2, 2009. The Board finds that the considerations and computations the Commissioner was required to make in connection with the imposition of the $500 civil penalty assessed in the penalty order are valid and reasonable in all respects.

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, otherwise denied.

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
June 12, 2013.