STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of: MELISSA L. DEWEY A/K/A MELISSA L. FULLER, TIMOTHY M. DEWEY, AND TMD CONTRACTING LLC, Petitioners, 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 April 10, 2014, - against - THE COMMISSIONER OF LABOR, Respondent.	DOCKET NO. PR 14-099 RESOLUTION OF DECISION

APPEARANCES

Melissa L. Dewey, petitioner pro se, and for Timothy M. Dewey and TMD Contracting, LLC.

Pico Ben-Amotz, General Counsel, NYS Department of Labor (Benjamin T. Garry of counsel), for respondent.

WITNESSES

Melissa L. Dewey, for petitioners.

Lauren Ackroyd and Joseph Ryan, Senior Labor Standards Investigator, for respondent.

WHEREAS:

On May 16, 2014, petitioners Melissa L. Dewey a/k/a Melissa L. Fuller, Timothy M. Dewey, and TMD Contracting LLC filed a petition with the Industrial Board of Appeals (Board) seeking review of two orders issued by the Commissioner of Labor (Commissioner) on April 10, 2014. The Commissioner filed an answer on October 3, 2014. Petitioners filed amended petitions on July 10 and December 4, 2014.

Upon notice to the parties, a hearing was held in Rochester, New York on December 22, 2014 before Board member and designated hearing officer J. Christopher Meagher, Esq. Each

party was afforded the opportunity to present documentary evidence, examine and cross-examine witnesses, and make statements relevant to the issues.

The first order (wage order) directs petitioners to comply with Article 6 of the Labor Law and pay the Commissioner wages due and owing to claimant employee Lauren Ackroyd in the amount of $2,205.00 for the period from December 30, 2012 to March 15, 2013, interest continuing thereon at the rate of 16% to the date of the order in the amount of $377.93, liquidated damages in the amount of $551.25, and a civil penalty in the amount of $ 2,205.00. The total amount due is $5,339.18.

The second order (penalty order) under Article 19 of the Labor Law directs petitioners to pay a civil penalty of $1,000.00 for failure to maintain and/or furnish true and accurate payroll records for each employee during the period from December 30, 2012 to March 15, 2013.

The amended petition alleges that: (1) claimant was an independent contractor and not an employee; and (2) the Commissioner's calculation of wages is in error because claimant did not work the hours stated in her claim and was fully paid for the services she performed.

SUMMARY OF EVIDENCE

The Wage Claim

On June 9, 2013, claimant Lauren Ackroyd filed a claim with the Department of Labor (DOL) stating that she was employed by petitioners as an "accounting clerk" for their home construction business and was owed $2,205.00 in unpaid wages for the period from December 30, 2012 through March 15, 2013.

Petitioners' Evidence

Petitioner Melissa L. Dewey and her husband, Timothy M. Dewey, operate a construction business known as TMD Contracting LLC in Spencerport, New York that builds residential homes. Timothy M. Dewey is the contractor and owner of the company. Petitioner Melissa L. Dewey runs the office and does its bookkeeping. During the period from December 2012 to March 2013, TMD employed some six to eight other employees at various building sites in the Rochester area to perform the company's construction work.

Petitioner testified that she was a personal friend of the claimant's son. At a visit to claimant's home sometime before Christmas in December 2012 she learned that claimant worked in an office for a trucking company and was familiar with a software program for small businesses known as "QuickBooks." Petitioner was preparing TMD's 2011 taxes at the time and had recently purchased the program so she could create a balance sheet of income and expenses for the year and give it to her accountant to prepare the return. As she did not know how to use the program and was behind in getting the work done, she proposed that claimant help her learn QuickBooks and she would pay claimant for her services. Claimant accepted the proposal but they did not agree on an amount. Petitioner asserted that she did not hire claimant, did not take her social security number or payroll information, and did not offer her health insurance. In contrast, when petitioner hires a regular employee to work for the company she always has them

fill out a W-4 tax form, as she did earlier that year when she hired someone to perform clerical tasks in the office.

At claimant's request, the parties agreed to do the training in claimant's home and on her own time. Petitioner provided claimant with a laptop computer and a box of the company's invoices, payroll records, and bank statements showing its 2011 income and expenses so claimant could work on them and show petitioner how to use the program. Petitioner made repeated efforts to go to claimant's house for training sessions but claimant gave her excuses why she was unavailable, all the while assuring her that she was working on the materials she had been given. On the few occasions when they met, very little training or business got done. After some three months, claimant told petitioner that she was almost done with the work that petitioner had given her and needed additional bank statements from petitioners' personal accounts to complete it. Out of frustration with the amount of time that had elapsed and what little work had been produced, petitioner asked claimant for her materials back, "I said, you know, I need to get this stuff done. If you could finish this for me that would be great but I -- have to get this done or I need to do it myself to finish because it's been three months and my accountant needs it and it doesn't take three months to input stuff into QuickBooks for one year." Petitioner then went to claimant's house, picked up her materials from claimant's son, and took the information to her accountant. The accountant told her that claimant had entered all of the data incorrectly and he could not use any of it for the return. He showed her some basics about how to operate the program and petitioner ended up redoing all the work herself.

Petitioner acknowledged that claimant performed work by inputting data from the business into her QuickBooks program and that she had no problem paying claimant for it. Petitioner also paid claimant $300.00 in cash as full payment for the services. However, petitioner argued that claimant exaggerated the hours she worked and as proof submitted an Excel spreadsheet prepared by petitioners' accountant showing the times claimant had logged on and off the program. The spreadsheet shows entries made on December 25, 2012 and on some 31 days between January 22 and March 2, 2013. Petitioner asserted that the time periods claimant logged on to the program are far less than the total hours she listed in her claim.

Petitioner argued that the penalties assessed by the Commissioner are unreasonable because the company keeps time records for its employees and had resolved an earlier wage claim with DOL by paying the employee promptly. Petitioner added that claimant told her she had a previous accounting and tax business experience. However, she did not know whether claimant operated any outside business at the time of their agreement.

Claimant's Testimony

Claimant Lauren Ackroyd testified that she is retired, receives social security retirement benefits, and works part-time as an accounting clerk at a company that does excavations for residential homes. She does not operate her own business, advertise with business cards, or have her own workers compensation or disability insurance. During the time period that she was employed by petitioners she was working three days a week and four hours a day at the excavation company's office doing banking and inputting financial information into its QuickBooks program.

On December 28, 2012, claimant met petitioner Melissa Dewey in her own home. Petitioner explained that she and her husband operated a residential construction business and that she had recently terminated an employee who helped her out in the office. Petitioner stated that she needed someone to input the company's financial information for the 2011 year into its QuickBooks program and offered to pay claimant $18.00 per hour for the work. As claimant was experienced in QuickBooks for a small business, she accepted the offer.

The parties met at petitioner's home for five hours on December 30, 2012 where they reviewed the work to be done and petitioner took her social security number and payroll deductions. Petitioner asked if she wanted the company's health insurance but claimant declined it because she had coverage from Medicare and her other employer. The work included organizing the company's invoices, bank statements, and other financial information for the 2011 year and inputting it into QuickBooks by the following April so petitioners' accountant could prepare the company's tax return. As claimant had another job and petitioners' office was in petitioners Mr. and Mrs. Dewey's home where there were many distractions, the parties agreed that claimant could do the work in her own home on her own time at the lesser rate of $15.00 per hour. Petitioner provided claimant with a computer and several boxes of financial information to perform the work.

Claimant authenticated her claim form and testified that it accurately reflects the hours she worked based on time records she kept during the period of her claim. Claimant worked 146 hours over ten weeks from December 30, 2012 to March 15, 2013, including the first day on December 30th at the agreed rate of $18.00 per hour where she met with petitioner at petitioners' home office, collected, and sorted through the relevant financial information. The work involved more than simply inputting data into a computer program because she had to review and organize the company's credit card statements, invoices, checks, and bank statements for input into QuickBooks and the bank statements had to be reconciled month by month for accuracy. The reconciliations took additional time because petitioners' accounts intermingled personal with business transactions. Petitioner called someone when they met in her office on December 30th for advice on the problem and claimant was told to record the personal transactions as a "draw" by the owners. The company had several different bank accounts and claimant frequently had to ask petitioner to obtain additional statements from her bank, particularly during the first few weeks after she started the project and found a lot of them were missing.

Claimant testified that she had weekly conferences with petitioner on the phone where she went over the progress of her work and requested any further information she needed. Asked whether petitioner gave her any directives to change what she was doing or whether she approved of her work, claimant replied, "As far as I know, [she] approved of it. I was doing the same thing I do at work for the last, probably, 12 years that I was employed -- well, I am still employed." The work was almost finished when petitioner came to claimant's house in early March 2013 and retrieved her computer, stating that she needed it to prepare a financial statement for a bank. Petitioner promised to return it so claimant could complete the project by April. When claimant did not hear from her again she requested to be paid for her work up to date. In April 2013, petitioner came to claimant's house and gave her a check for $200.00. Petitioner collected the company's papers and promised to pay her the rest after business picked up. Payment of the check was stopped, however, and after several more requests for payment were to no avail, claimant filed her claim with DOL. A cash payment of $200.00 received in February 2013 was deducted from the claim.

Reviewing the spreadsheet petitioner submitted, claimant testified that she had not even met her as of the first date listed on the document, December 25, 2012. She questioned its accuracy because "you can change anything in QuickBooks." Moreover, the alleged log-on times do not accurately reflect the hours she worked because a large part of the work involved organizing and reconciling the financial data to be input into the program. Responding to petitioner's contention that she was supposed to teach her how to operate QuickBooks so she could use the program on her own, claimant maintained that petitioner made it the priority to input all of the 2011 financial information into the program so that her accountant could prepare the return. As to any training, claimant testified "[s]he came over a few times and I know she had said I had excuses but I said I was going to work on my own time not -- and I had plans or things -- I couldn't do it when she wanted me to do it. But I did show her when she was over there, what I was doing and how to do it but you can't teach -- you can't teach anybody QuickBooks in 30 minutes."

DOL's Investigation

Senior Labor Standards Investigator Joseph Ryan testified that in response to the claim he issued petitioners a collection notice on August 20, 2013 advising them of the details and requesting that they remit payment or submit a statement why the amount was not due, including contemporaneous time cards, payroll journals, and cancelled checks for the period of her employment. Petitioners' accountant responded on August 20, 2013 that claimant was hired by petitioners as a "subcontractor." Because her work was unsatisfactory, she was not paid for her services "just like [their] other construction clients."

By letter of September 10, 2013, Ryan requested that petitioners support their contentions with a copy of a contract with the claimant and proof of her liability and Workers Compensation coverage. When no response was received, a third collection letter was issued requesting that petitioners remit payment within 10 days or the matter would be referred to Orders to Comply, entailing additional interest and penalties. Petitioner responded by letter of October 10, 2013 describing her version of the events and stating that she had never hired the claimant or put her on the books. On November 19, 2013, Ryan issued petitioners a final notice stating that since petitioners had suffered and permitted claimant to work and kept no record of the hours she worked, DOL would be compelled to rely on claimant's statements and would issue Orders to Comply unless payment was remitted. Petitioner submitted another letter on December 3, 2013 reiterating her allegations but did not submit payroll records or further proof of claimant's contractor status.

In the absence of accurate payroll records demonstrating that claimant was paid the wages due, DOL issued the orders under review on April 10, 2014. Ryan testified that he concluded that an employment relationship existed between petitioners and claimant because they had suffered and permitted her to work from home, provided her with company records and a computer to perform that work, and failed to submit proof that she operated another business and had liability and Workers Compensation insurance. As to the civil penalty assessed in the wage order, Ryan testified that a 100% penalty was the standard penalty for failure to pay wages and provide payroll records regarding claimant's employment. Likewise, the $1,000.00 penalty in the penalty order was the normal penalty DOL imposes for a records violation given the size of the business, the amount of the claim, and petitioners' failure to keep payroll records for the claimant. No other testimony was submitted explaining how the penalties were arrived at.

GOVERNING LAW

Standard of Review and Burden of Proof

Petitioners have the burden to prove by a preponderance of evidence that the orders under review are invalid or unreasonable (State Administrative Procedure Act § 306 [1]; Labor Law § 101 [1]; 12 NYCRR 65.30; *Matter of Ram Hotels, Inc.*, PR 08-078 at 24 [October 1, 2011]).

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

An "employer" is defined in Article 6 of the Labor Law 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]). 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.*, 255 F Supp2d 184, 189 [SDNY 2003]).

Several factors are relevant in determining whether an individual is an employee under the Labor Law, or an independent contractor outside its wage and hour protections, and are known as the "economic reality test." They include: (1) the degree of control exercised by the employer over the worker; (2) the worker's opportunity for profit or loss and his investment in the business; (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 (*Brock v Superior Care, Inc.*, 840 F2d 1054, 1058-59 [2nd Cir 1988]; *Matter of Maria Lasso and Exceed Contracting Corp.*, PR 10-182 at 5 [April 29, 2013] [citing *Brock* factors as test to determine independent contractor status under the Labor Law], *aff'd. sub nom. Matter of Exceed Contracting Corp. v IBA*, 126 AD3d 575 [1st Dept 2015]).

The test is based on the totality of circumstances and no one factor is dispositive; "[t]he 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 at 1059).

The existence and degree of each of these factors is a question of fact, and the legal conclusion to be drawn from these facts is a question of law (*Brock v Superior Care, Inc.*, 840 F2d at 1059). In applying the 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 (citation omitted)" (*Herman v RSR Security Services, Ltd.*, 172 F3d 132, 139 [2d Cir 1999]).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Board makes the following findings of fact and conclusions of law pursuant to the provisions of Board Rule 65.39 (12 NYCRR 65.39).

Claimant Was an "Employee" of Petitioners and not an Independent Contractor

We find that claimant was petitioners' employee and not an independent contractor as a "matter of economic reality" under the applicable five-part test.

As to the first factor, we credit claimant's testimony that she was hired by petitioner to input financial information into a computer software program maintained by petitioner's company for its 2011 year, initially at the rate of $18.00 per hour and then at $15.00 per hour after it was agreed that claimant would perform the work in her own home on her own time. Claimant's testimony as to the circumstances and terms of her hiring was clear, specific and credible. Although petitioner denied that she hired claimant at an hourly rate, she submitted no proof of an estimate for the job by the claimant or any contract between the parties. Petitioner further asserted that they did not even agree on an amount for the job. We find this testimony implausible, as independent contractors typically set a fixed price for their work and the parties would have agreed on an amount that claimant would be paid if she was truly a subcontractor (*Matter of Krista Shultz and RKJ Interests, LLC*, PR 10-188 at 7 [December 9, 2015]). Petitioner further argued that claimant was a contractor because she was never placed on payroll, as the company does when it hires a regular employee. However, it is well settled that "an employer's self serving label of workers as independent contractors is not controlling" (*Brock v Superior Care, Inc.*, 840 F2d at 1059).

Claimant testified, without contradiction from petitioner, that she performed work from her home organizing the financial information she had been provided, reconciling the company's bank statements for accuracy, and then inputting the data into petitioners' QuickBooks program. On the day claimant met with petitioner at her office, petitioner provided her with guidance as to how to perform the reconciliations. Claimant had weekly conferences with petitioner on the phone where she went over the progress of her work and requested any further information she needed. Petitioner did not give her any directives to change what she was doing or indicate disapproval. We credit claimant's testimony and find it establishes that petitioners hired the claimant, set the wages, hours, and location for her work, and monitored the work that she performed. Such control is evidence of her status as an employee (*Brock v Superior Care, Inc.*, 840 F2d at 1060 [employer setting of wages, hours, and monitoring of work performance are indicia of supervision and control consistent with employment]. The fact that claimant did not perform the work at petitioner's office but worked out of her own home with flexible hours does not establish contractor status, as an employer "does not need to look over his workers' shoulders every day in order to exercise control" (*Id.* at 1060 [*citing Donovan v DialAmerica Marketing, Inc.*, 757 F2d 1376, 1384 [3d Cir 1985] [fact that home research workers control their own hours and have little direct supervision is typical of that industry and does not weigh in favor of independent contractor status]).

As to the second factor, claimant testified that she was employed part-time at another construction company, did not operate a business of her own, did not advertise with business cards, and did not have her own workers compensation or disability policy. Petitioner acknowledged that she knew claimant worked as an office worker at another construction company and submitted no evidence that she operated any outside business at the time. It is undisputed that petitioner provided claimant with a computer and all the financial materials to perform the work she was assigned. We find that claimant was dependent on the wages she earned from her employment and had no opportunity for profit or loss or investment in the

business (*Brock v Mr. W. Fireworks, Inc.*, 814 F2d 1042, 1050-51 [5th Cir 1987], *cert. denied*, 484 US 924 [1987] [where employee's sole opportunity for return is from her own labor, she cannot be said to have the opportunity for profit or loss that exists for an independent contractor]).

As to the third factor, while claimant has experience and skill as an accounting clerk, petitioner simply assigned the work she was to perform and claimant did it. Such dependence on an employer to provide the opportunities for work does not reflect the skill or independent initiative of a bona fide independent contractor *(Brock v Superior Care*, 840 F2d 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]).

As to the factor of whether the project was integral to the business, petitioner acknowledged that she runs the company's office, does its bookkeeping, and purchased the QuickBooks program to prepare a balance sheet of its 2011 income and expenses that was necessary for her accountant to prepare its tax return. While petitioners' primary business may be building residential homes, the financial accounting necessary to operate that business for which claimant was hired to perform work was sufficiently integral to its operations as to be evidence of her status as an employee, not an independent contractor.

Finally, while petitioner argued that claimant failed to properly train her how to use the QuickBooks program, she nonetheless acknowledged that claimant performed work inputting data into the program and her quarrel was over the amount and quality of that work. We find the record establishes that claimant was "permitted or suffered to work" by petitioner at her home throughout the period of her claim and that she was thereby "employed." It is impermissible for an employer to withhold wages based on dissatisfaction over how such work was performed (Labor Law § 193; *Guepet v international TAO Systems, Inc.*, 110 Misc 2d 940, 941 [Sup Ct, Nassau County 1981] ["Nowhere does [Section 193] permit an employer to make . . . deductions from wages because an employee failed to perform properly"]).

Based on the totality of circumstances, we find that claimant was as "a matter of economic reality" dependent on petitioners to render service and that an employment relationship existed between claimant and petitioners. They are thereby liable for any wages owed her under Article 6 of the Labor Law.

The Commissioner's Calculation of Wages Is Affirmed

The Labor Law requires employers to maintain payroll records that include, among other things, its employees' daily and weekly hours worked, wage rate, and gross and net wages paid (Labor Law §§ 195 and 661, 12 NYCRR 142-2.6). Employers are required to keep such records open to inspection by the Commissioner or a designated representative.

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 or other evidence, even though the results may be approximate (*Matter of Mid-Hudson Pam Corp. v Hartnett*, 156 AD2d 818, 820-21 [3d Dept 1989]; *Ramirez v Commissioner of Labor*, 110 AD3d 901 [2d Dept 2013]).

We give little weight to the spreadsheet of log-on times petitioners submitted as proof that claimant exaggerated the hours she worked, as the document was prepared by petitioners' accountant and there was no foundation established as to how it was prepared or that it is a reliable business record (*Matter of Kong Ming Lee*, PR 10-293 at 16-17 [April 10, 2014]). Moreover, claimant testified, without rebuttal from petitioners, that the alleged log-on times do not accurately reflect the hours she worked because a large part of the work involved organizing and reconciling the financial data to be input into the program. Petitioners did not maintain or submit any payroll records establishing the daily or weekly hours that claimant worked. The Commissioner was thereby entitled to use the "best available evidence" drawn from the written claim filed by the claimant in calculating the wages she was due. We affirm that determination as valid and reasonable in all respects.

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 financial services 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 per centum per annum."

Petitioners did not challenge the interest assessed in the wage order and the issue is thereby waived pursuant to Labor Law § 101 (2) ("Any objections to the . . . order not raised in such appeal shall be deemed waived"). We find that the computations made by the Commissioner in assessing interest in the order are valid and reasonable in all respects.

Liquidated Damages

Labor Law § 198 (1-a) provides that when wages are found to be due, the Commissioner shall assess against the employer the full amount of the underpayment "and an additional amount as liquidated damages, unless the employer proves a good faith basis for believing that its underpayment of wages was in compliance with the law." Such damages shall not exceed 100% of the total amount of wages found to be due.

Petitioners did not challenge the Commissioner's determination to assess liquidated damages in the wage order. The issue is thereby waived pursuant to Labor Law § 101 (2) and we affirm the determination as valid and reasonable in all respects.

The Civil Penalties in the Wage and Penalty Orders Are Revoked

Labor Law § 218 (1) provides that when the Commissioner determines that an employer has violated a provision of Article 6, he must issue an order directing payment of any wages found to be due, "plus the appropriate civil penalty."

If a violation involves a willful or egregious failure to pay wages, or an employer who has previously been found in violation, the penalty "shall" be "in an amount equal to double the total the total amount . . . found to be due" (*Id.*). For all other types of violations, the amount of the penalty is discretionary. Where the violations involve "a reason other than the employer's failure to pay wages," such as a penalty for failure to furnish or maintain payroll records in

violation of Article 19, the amount shall not exceed $1,000.00 for a first violation, $2,000.00 for a second violation, and $3,000.00 for a third or subsequent violation (*Id.*). In applying his discretion to wage and non-wage violations, the statute directs the Commissioner to give:

> "due consideration to the size of the employer's business, the good faith basis of the employer to believe that its conduct was in compliance with the law, 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 record-keeping or other non-wage requirements (*Id.*)."

Petitioner argued that the civil penalties assessed by the Commissioner are unreasonable because the company keeps time records for its regular employees and had resolved an earlier wage claim with DOL by paying the employee promptly. Investigator Ryan testified that the 100% penalty in the wage order was the standard penalty assessed by DOL for failure to pay wages and provide payroll records regarding claimant's employment. Likewise, the $1,000.00 penalty in the penalty order was the standard penalty for a records violation given the size of the business, the amount of the claim, and petitioners' failure to keep payroll records for the claimant. No other testimony was submitted explaining how respondent calculated the penalties. We revoke the penalties in both orders, as the investigator's testimony that 100% is a standard penalty imposed by the Commissioner contradicts the statutory requirement to give due consideration to the factors enumerated in the statute. DOL provided no reasonable explanation of how the factors were considered in this matter (*Matter of David Popermhem and G.T.S. Thai, Inc.*, PR 13-153 at 10-11 [January 20, 2016]).

NOW, THEREFORE IT IS HEREBY RESOLVED THAT:

1. The wages, interest, and liquidated damages in the wage order are affirmed, the civil penalty is revoked, and the order as modified is otherwise affirmed; and
2. The penalty order is revoked; and
3. The petition for review be, and the same hereby is otherwise dismissed.

Vilda Vera Mayuga, Chairperson

J. Christopher Meagher, Member

LaMarr J. Jackson, Member

Michael A. Arcuri, Member

Dated and signed in the Office
of the Industrial Board of Appeals
at New York, New York on
March 2, 2016.

violation of Article 19, the amount shall not exceed $1,000.00 for a first violation, $2,000.00 for a second violation, and $3,000.00 for a third or subsequent violation (*Id.*). In applying his discretion to wage and non-wage violations, the statute directs the Commissioner to give:

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2. The penalty order is revoked; and
3. The petition for review be, and the same hereby is otherwise dismissed.

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Dated and signed in the Office
of the Industrial Board of Appeals
at Albany, New York on
March 2, 2016.