

**BARBARA L. PURCELL AND JOHN PURCELL AND
CUSTOM RESCUE VEHICLES & EQUIPMENT, INC.**

Docket No. PR 08-045

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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 In the Matter of the Petition of: :
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 BARBARA L. PURCELL AND JOHN PURCELL :
 AND CUSTOM RESCUE VEHICLES & :
 EQUIPMENT, INC., :
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 Petitioners, :
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 To Review Under Section 101 of the Labor Law: :
 An Order to Comply with Article 6 of the Labor :
 Law, dated February 8, 2008, :
 :
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 - against - :
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 :
 THE COMMISSIONER OF LABOR, :
 :
 :
 Respondent. :
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DOCKET NO. PR 08-045

RESOLUTION OF DECISION

APPEARANCES

John Purcell, *pro se*, for Petitioners.

Maria L. Colavito, Counsel, NYS Department of Labor, Benjamin T. Garry of Counsel, for Respondent.

WITNESSES

John Purcell, for Petitioners; Brian Batease, Kelle Batease, and Frank King, Senior Labor Standards Investigator, for Respondent.

WHEREAS:

The Petition for review in the above-captioned case was filed with the Industrial Board of Appeals (Board) on April 3, 2008. An Answer was filed on August 28, 2008. Upon notice to the parties, a hearing was held on February 10, 2009 and continued on September 2, 2009 in Garden City, New York.

The Order to Comply with Article 6 of the Labor Law, under review herein, was issued on February 8, 2008 pursuant to Labor Law § 191(1) (failure to pay wages) and directs

payment to the Commissioner of Labor (Commissioner) wages due and owing to Petitioners' former employee, Brian Batease (Batease or Claimant), for the period July 6, 2006 to December 12, 2006 in the amount of \$113,016.82, with continuing interest thereon at the rate of 16% calculated to the date of the Order in the amount of \$20,956.10, and assesses a civil penalty in the amount of \$56,508.00, or 50% of the unpaid wages, for a total due of \$190,480.92.

The Board having given due consideration to the pleadings, the testimony, the hearing exhibits, and all of the papers filed herein, makes the following findings of fact and law pursuant to the provisions of Board Rule § 65.39 (12 NYCRR § 65.39).

SUMMARY OF THE EVIDENCE

Petitioners Barbara Purcell, John Purcell and Custom Rescue Vehicles & Equipment, Inc. (collectively Petitioner) are in the business of selling ambulances. Petitioner employed Claimant as a salesperson from November 2005 until December 2006. In January 2007, Claimant filed a claim for unpaid commissions with the Department of Labor (DOL), alleging that he was owed commissions on three sales that he completed: (1) Northampton Ambulance; (2) Dryden Ambulance; and (3) Stanley Hall Gorham Ambulance. Claimant maintained that his commission agreement with Petitioner provided that he was due 33% of the sales price of each ambulance that he sold. Based on the above three sales, he claimed \$116,552.17 in unpaid commission.

John Purcell (Purcell) testified that the commission agreement provided that Claimant was to receive 33% of the profit on the sale of each ambulance that he sold, and, if Petitioner gave a buyer credit for a trade-in ambulance, Claimant would also receive 33% of the profit on the resale of the used ambulance. Commissions were payable when Petitioner was paid. Purcell introduced two letters from Claimant in which Claimant requested his commissions. In the first letter, dated January 1, 2007, Claimant requested \$16,947.00 total in commissions and wrote: "you stated I would be paid 33% of the profits from the three ambulances taken in on trade." In the second letter, dated July 27, 2007, Claimant stated that \$22,406.00 total was owed in commissions. Purcell also testified that the commission agreement could not have been for 33% of the sale price because that did not take into account the price that Petitioner had to pay for the ambulance. For example, the Northampton Ambulance sold for \$137,489.00 but cost Petitioner \$111,092.00 to buy, in addition to other costs. Claimant is claiming \$45,371.37 as commission for Northampton but Petitioner cleared less than \$30,000.00 for the sale. Claimant testified that that was what Purcell told him was the agreement.

Purcell provided a sheet reconciling the sale of the Northampton Ambulance. After the deduction for costs and the addition of the price obtained for the trade-in, it showed that Petitioner made a profit of \$13,606.05 on the sale, including the trade-in, and Claimant was due \$4,535.35 in commission. On March 14, 2007, Purcell sent a check to DOL for Claimant in the amount of \$3,535.35 which represented the total commission due on the Northampton Ambulance minus \$1,000.00 which had been advanced to Claimant. Included with the

reconciliation sheet at hearing were the invoices to back up the numbers used by Purcell. Purcell testified that no commission was currently due on the Northampton sale. Claimant reviewed the reconciliation sheet and estimated that the items deducted constituted the approximate costs of the deal. The evidence included an invoice for the sale of the trade-in for \$30,000.00 which was used in calculating the amount owed to Claimant. Claimant also testified that there was no discussion concerning what costs were to be deducted in determining the profit from the sale, and Claimant believed that bank costs and costs of delivery should not have been included.

On the Dryden Ambulance sale, DOL introduced an email received by Claimant from Purcell in December 2006 which stated that the sale price was \$100,600.00, costs at that time added up to \$88,479.00, profit would be approximately \$11,000.00 based upon a trade-in return of \$15,000.00 and that Claimant's commission would be approximately \$3,300.00 minus a \$1,000.00 advance or \$2,300.00. On August 14, 2008, Purcell sent a check for \$2,400.00 to DOL for Claimant for commission on the Dryden sale along with a reconciliation sheet for the trade-in which lists the sale price of the trade-in as \$13,500.00. In his closing brief, Petitioner conceded that an additional \$449.35 is due to Claimant on the Dryden sale.

DOL introduced a reconciliation sheet that Purcell emailed to Claimant stating that Claimant was due \$2,771.00 in commission on the Stanley Gorham sale which "does not include trade in which you are entitled to 33% of whatever vehicle is sold for." Claimant testified that the trade-in was listed for sale at \$23,500.00. In his closing brief, Purcell stated that the ambulance sold for \$16,000.00, although he attached an invoice which was for \$20,000.00. Since this was produced after the hearing was closed, was never authenticated, and the parties were notified that no new evidence would be considered, the Board will not consider this evidence.

On the second day of hearing, the Claimant recalculated his claim based on a commission agreement that provided for compensation in the amount of 33% of the profit on the sale of the ambulances and not the sale price. Changing his position, Claimant testified that his commission agreement was for 33% of the profit on the sale of the ambulance and if there was a trade-in which was deducted from the sale price, Claimant would then get an additional 33% of the sale price of the trade-in. Purcell testified that the commission was based on 33% of the profit on the sale of the ambulance as well as 33% of the profit on the sale of the trade-in. The commission agreement was never reduced to writing.

The parties were given the opportunity to submit closing briefs but were informed that no new evidence could be introduced after the hearing record was closed.

STANDARD OF REVIEW

The Board reviews the validity and reasonableness of an Order of Compliance made by the Commissioner upon the filing of a Petition for review. The Petition must specify the order "proposed to be reviewed and in what respects it is claimed to be invalid or

unreasonable. Any objections ...not raised in the [Petition] shall be deemed waived.” Labor Law § 101.

When reviewing an Order of Compliance issued by the Commissioner, the Board shall presume that the Order is valid. Labor Law § 103.1 provides, in relevant part:

“Every provision of this chapter and of the rules and regulations made in pursuance thereof, and every order directing compliance therewith, shall be valid unless declared invalid in a proceeding brought under the provisions of this chapter.”

Pursuant to Board Rule § 65.30: “The burden of proof of every allegation in a proceeding shall be upon the person asserting it.” Therefore, the burden is on the Petitioner to prove that the Order under review is not valid or reasonable.

PAYMENT OF COMMISSIONS

Article 6 of the Labor Law includes commissions within the definition of wages (Labor Law § 190 [1]) and requires that:

“a commission salesman shall be paid the wages, salary, drawing account, commissions and all other monies earned or payable in accordance with the agreed terms of employment, but not less frequently than once in each month and not later than the last day of the month following the month in which they are earned; provided, however, that if monthly or more frequent payment of wages, salary, drawing accounts or commissions are substantial, then additional compensation earned, including but not limited to extra or incentive earnings, bonuses and special payments, may be made less frequently than once in each month, but in no event later than the time provided in the employment agreement or compensation plan. The employer shall furnish a commission salesman, upon written request, a statement of earnings paid or due and unpaid.”

(former Labor Law § 191 [1] [c]).¹ Labor Law §191-a(b) defines “earned commission” as:

“a commission due for services of merchandise which is due according to the terms of an applicable contract or, when there is no applicable contractual provision, a commission due for merchandise which has actually been delivered to, accepted by, and paid for by the customer, notwithstanding that the sales representative’s services may have been terminated.”

¹ This section of the Labor Law was significantly rewritten in 2007.

AMOUNT OF COMMISSIONS DUE

Both parties agree that commissions are due to Claimant; the amount of unpaid wages listed on the Order to Comply is incorrect and Claimant is due significantly less than the amount found due in the Order. The parties also agree that Claimant is due 33% of the profit on the sale of the new ambulance. There was no articulated agreement as to what costs could be deducted to determine profit, however. In addition, the parties disagree on whether Claimant is to receive 33% of the sale price of the trade-in ambulance or whether he is to receive 33% of the profit. There is evidence in support of each position. Although Claimant requested a statement of commissions due and documentation supporting the sales, Petitioner supplied incomplete information. However, given the Claimant's initial claim that he was due 33% of the sales price of the ambulance and not the profit on the sales price, and his characterization of the commissions in two emails as based on the profit of the resale of the trade-in, we find that the agreement provided that Claimant was to receive 33% of the profit of the trade-in price. Petitioner is in control of the information regarding the sales and the costs, and his calculations as to what is due to Claimant has changed many times. Calculations of commissions owed will be based on the evidence presented at the hearing.

1. Northampton Ambulance:

Total Commission Due:	\$4353.35
Total Commission Paid	<u>\$4353.35</u>
Commission still due:	\$ 0.00

DOL maintains that Claimant is still owed a commission on the sale of the trade-in ambulance. However, the reconciliation sheet for this sale includes the \$30,000 that Petitioner received for the sale of the trade-in. Therefore, that amount was already calculated into the commission and Claimant is not owed any commission on this sale.

2. Dryden Ambulance:

Total Commission Due:	\$7,602.68
Commission Paid:	<u>- 2,400.00</u>
Commission still due:	\$5,202.68

Based on the evidence presented at the hearing, the Dryden ambulance was sold for \$100,600. The costs added up to \$88,479.00, not including floor plan charges which were never set forth at the hearing. Based on a commission of 33% of the profit, Claimant was due \$4,000.92 or 33% of \$12,124.00 which is the difference between \$100,600.00 and \$88,479.00. The trade-in was then sold for \$13,500.00, subtracted from this price are the costs of repairs which equal \$2,585.59. Additional costs listed by Petitioner were not sufficiently established by Petitioner to be credited. Therefore, Claimant was due a total commission of \$7,602.68 on the Dryden sale of which \$2,400.00 was paid. He is still owed \$5,202.68. This is based on the evidence presented at the hearing and does not take into

account other costs and expenses that Petitioner added on to the sheet in his closing brief. The records supporting each of the transactions were within Petitioner's control and two days of hearing were held, six months apart, which gave Petitioner sufficient opportunity to present all relevant evidence.

3. Gorham Ambulance:

Total Commission Due:	\$10,525.00
Commission Paid:	- <u>0.00</u>

Commission still due: \$10,525.00

Petitioner sent Claimant an email reconciliation on the Gorham sale indicating that Claimant was due \$2,771.00 in commission on the sale plus 33% of whatever the trade-in vehicle is sold for. Petitioner presented no evidence as to the sale price of the trade-in vehicle. Some documents were presented with Petitioner's closing brief but, as stated before, these documents were not admitted into evidence. The record does show that the trade-in was listed for sale at \$23,500.00. Given the fact that Petitioner has the burden of proof and had sufficient opportunity to present evidence of the sale price, we will use the best available evidence, which is the list price of the trade-in to determine the proper commission. Thirty-three percent (33%) of \$23,500.00 equals \$7,755.00. Therefore, the total commission due on this sale is \$10,525.00

Total Due

The total amount of unpaid commissions due to Claimant equals \$5,202.68 plus \$10,525.00 or \$15,727.68.

CIVIL PENALTIES FOR FAILURE TO PAY WAGES

The Order of Compliance assesses an additional 50% of the total unpaid wages due in civil penalties. Since the amount of unpaid wages has been reduced to \$15,727.68, the amount of civil penalty is likewise reduced to 50% of \$15,727.68 or \$7,863.84. The Board finds that the considerations and computations required to be made by the Commissioner in connection with the imposition of the civil penalty amount set forth in the Order are proper and reasonable in all respects. Petitioner failed to supply all documents necessary to do an accounting to determine what wages were due to Claimant. Although he admitted to owing the Claimant wages when first contacted in early 2007, not all wages have been paid.

INTEREST

Labor Law § 219 provides that when the Commissioner determines that wages are due then the order directing payment shall include "interest at the rate of interest then in effect as prescribed by the superintendent of banks pursuant to 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.”

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The Order to Comply with Article 6 is affirmed as modified: Wages are due in the amount of \$15,727.68, interest on those wages at the rate of 16% (to be computed by the Department of Labor) and a civil penalty in the amount of 50% of the wages or \$7,863.84; and
2. The Petition for review is otherwise hereby denied.



Anne P. Stevason, Chairman



J. Christopher Meagher, Member



Jean Grumet, Member



LaMarr J. Jackson, Member

Dated and signed in the Office
of the Industrial Board of Appeals
at New York, New York, on
April 21, 2010.