STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of:	:	
ALON HEN AND INTEGRITY COLLISION & TOWING, INC.,	:	
Petitioners,	:	DOCKET NO. PR 08-094
To Review Under Section 101 of the Labor Law: An Order to Comply with Article 6 and an Order to Comply with Article 19 of the Labor Law, both dated April 29, 2008,	:	RESOLUTION OF DECISION
- against -	:	
THE COMMISSIONER OF LABOR,	:	
Respondent.	:	

APPEARANCES

David C. Wims, Esq., for Petitioners.

Maria L. Colavito, Counsel to the New York State Department of Labor, Mary McManus of Counsel, for Respondent.

WITNESSES

Alon Hen for Petitioners; Maura McCann and Danny L. for the Respondent.

WHEREAS:

The Petition for review in the above-captioned case was timely filed with the Industrial Board of Appeals (Board) on June 27, 2008. Upon notice to the parties a hearing was held on January 13, 2009 in New York, New York, before Devin A. Rice, Associate Counsel to the Board 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, to make statements relevant to the issues, and to file post-hearing briefs.

The Orders under review in this proceeding were issued by the Commissioner on April 29, 2008 and direct compliance with Articles 6 and 19 of the Labor Law. The Order

to Comply with Article 6 of the Labor Law (Wage Order) directs payment to the Commissioner for wages due and owing to one named claimant in the amount of $14,683.20, with interest continuing thereon at the rate of 16% calculated to the date of the Order, in the amount of $1,641.30, and assesses a civil penalty in the amount of $29,366.00, for a total amount due of $45,690.50. The Order to Comply with Article 19 of the Labor Law (Penalty Order) assesses a civil penalty against the Petitioners in the amount of $500.00 for failing to keep and/or furnish true and accurate payroll records for each employee.

SUMMARY OF EVIDENCE

Alon Hen is the sole owner of Integrity Collision & Towing, Inc., a company located in Jamaica, New York that provides towing services, tire changes and jump starts primarily for customers of auto clubs such as AAA and Geico. In 2001, Hen and the claimant, Danny L. worked together as tow truck drivers at the same company for approximately one year.

Alon Hen testified that he started his own business, Integrity Collision & Towing in 2004. He further testified that at some time after starting Integrity, he ran into the claimant who at that time had his own company called Quick Tow. The two discussed how they operated their respective businesses. Hen testified that eventually, in April 2007, he and the claimant made a deal where the claimant would use Hen's tow truck from Midnight to 7:00 a.m. when Integrity was not operating. Hen stated that this arrangement lasted from April 19, 2007 to August 16, 2007 at which point he ended the agreement because the business was growing and he wanted to use the truck full-time.

Hen stated that by the terms of the agreement between himself and the claimant, the claimant was to receive a 40% commission for any jobs he did from midnight to 7:00 a.m., and that the claimant was responsible to return the truck with the same amount of fuel as when he picked it up. There was no agreement for a salary or any other compensation. If the claimant returned the truck not properly fueled, Hen would deduct the cost of gas from the 40% commission, although Hen was not sure whether that in fact ever happened. Hen paid for the insurance and the maintenance of the truck, and the medallion[1] was in Integrity's name. If a tow truck operates without a medallion, the New York City Department of Consumer Affairs can impound the truck.

Hen testified that the claimant operated his own business from Midnight to 7:00 a.m. using Integrity's truck. Hen did not supervise the claimant, did not provide a uniform to him and did not require that he take any specific service calls. Hen testified that if a call came in for Integrity during the night, he would contact the claimant with a two-way radio to see if he wanted the job. The claimant was free to take or decline the call. Hen further testified that although he gave the claimant t-shirts with the Integrity name and phone number, he did not require him to wear them. Hen explained that the claimant called every day to see whether the truck was available. When it was available, the claimant picked it up from Hen's house at midnight and returned it at 7:00 a.m. Hen also testified that he kept records of all the commissions due and paid to the claimant and also of all of the service calls that were made between Midnight and 7:00 a.m.

[1] The Department of Consumer Affairs licenses tow truck companies in New York City. Each licensed company operates under a medallion that costs around $600.00 to $700.00 each year or every other year according to Hen's testimony.

Hen testified that on June 27, 2007 he bought a second tow truck but that at no time was he operating both trucks at the same time because the first truck was broken down. Hen further testified that he had another employee, David, who worked for a salary and was on Integrity's books. David started working for Integrity in August 2007 according to Hen.

Hen testified that the agreement he had with the claimant ended because his business was growing and the Petitioners needed to use the truck full-time for their own company.

The claimant testified that he started working for the Petitioners on April 19, 2007. Hen told the claimant that business was good and invited him to "come on board." The claimant testified that he worked from 7:00 p.m. to 7:00 a.m. six days per week and that there was a verbal agreement that Hen would pay him $10.00 per hour plus 40% commissions. The claimant testified that the salary was necessary because there were not enough calls at night to make a living off of just commissions. The claimant testified that he did not use any of his own equipment, and that the Petitioners supplied the truck, skids, straps, chains, and a two-way radio. The claimant further testified that Hen was the one who refueled the truck and that Hen required him to wear t-shirts with the Integrity logo and phone number while working.

The claimant testified that when he started working for the Petitioners, Hen called the motor clubs to tell them that the Petitioners would be operating 24 hours a day, 7 days per week. The claimant was present when Hen made those calls. The claimant further testified he registered himself at the Department of Consumer Affairs as a driver for the Petitioners.

The claimant testified that he started work each day at 7:00 p.m. and that until 11:00 p.m., Hen dispatched service calls to him by two-way radio. After 11:00 p.m., Hen forwarded the calls directly to the claimant. All of the service calls the claimant took were for the Petitioners. The claimant was not operating his own business. The company he had operated in the past, Quick Tow, was no longer in business by 2007. Additionally, the claimant testified that he did not have his own advertising or business phone, which according to him meant there that was no way for him to take his own customers.

The claimant testified that the Petitioners never paid him $10.00 an hour although he was constantly asking Hen for his wages. The claimant continued to work for the Petitioners despite not receiving his salary because Hen repeatedly told him that there was a problem with the accountant. The claimant also testified that because the Petitioners were just starting to operate at night, he understood that it would take a while before the business increased. The claimant explained there were very few calls during the night shift and described it as a "grave yard."

The claimant testified that his schedule changed to 7:00 a.m. to 7:00 p.m. when the Petitioners bought a second tow truck. At that time, Hen and the claimant each drove a truck during the same shift and divided the work into zones. The claimant observed that the number of calls doubled or even tripled then. The Petitioners stopped operating at night at that point because there were not enough calls during the night shift.

The claimant testified that the day he was terminated, Hen came to meet him and took the truck and then later explained that he had a driver that would work strictly on salary.

Senior Labor Standards Investigator Maura McCann testified that she was the Department of Labor employee assigned to investigate the claimant's claim against the Petitioners. She spoke to the claimant several times in order to clarify the basis of his claim and to determine the actual amount of unpaid wages and commissions. Senior Investigator McCann testified that based on these conversations she was able to determine the correct amount of wages and commissions due.

McCann testified that she contacted the Petitioners to request documents and that the Petitioners then retained counsel.[2] The Petitioners' then attorney, Rodney Scott Zelin, informed Senior Investigator McCann that the claimant was an independent contractor, but the Petitioners never produced documents in support of this assertion, and McCann testified that she was not confident that Mr. Zelin was responding as he should. Indeed, she testified that "he did not seem to act . . . the same way other attorneys in similar positions have acted in my experience." Because the Petitioners never produced any documents or other evidence to dispute the claimant's claim, the Orders were issued by the Commissioner based on Senior Investigator McCann's conversations with the claimant and the computations that she made based on the information she received from those conversations. Senior Investigator McCann believed, based on her experience, that the claim was reasonable, and some of what the claimant stated was corroborated by other evidence. For example, Senior Investigator McCann googled Integrity Collision and Towing and found that they advertise themselves as operating "24/7."

Senior Investigator McCann stated that all overtime hours were computed at $10.73 an hour and not at time and one-half of the regular promised rate of $10.00 an hour, because only time and one-half of the state minimum wage could be enforced ($7.15 x 1 ½) since there was evidence of interstate travel with the tow trucks[3].

Senior Investigator McCann testified that she recommended a 200 % civil penalty in this matter because the Petitioners provided no documentation or other information, and because she believed that the commissions were intentionally and egregiously calculated in a "tricky" way to confuse the claimant.

FINDINGS AND CONCLUSIONS OF LAW

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

Alon Hen testified that the Petitioners never promised an hourly salary to the claimant and that they exercised no control over him. However, Alon Hen's own testimony demonstrates that the Petitioners provided the claimant with a tow truck and a two-way radio, and dispatched service calls to him. We credit the claimant's testimony that he was not operating his own business as alleged by the Petitioners, and note that the claimant's

[2] The Petitioners hired Rodney Scott Zelin, Esq. prior to retaining David C. Wims, Esq. Hen testified that he was frustrated that the process was taking so long and fired Mr. Zelin.

[3] *See* 12 NYCRR 142-2.2 requiring payment of time and one-half of state minimum wage to employees exempted from overtime by the federal motor carrier exemption found at 29 USC § 213 (b) (1).

testimony that he was registered at the Department of Consumer Affairs as a driver for the Petitioners was never rebutted.

We also credit the claimant's testimony that Alon Hen promised to pay him $10.00 an hour. We find this testimony compelling because there is evidence in the record that the industry standard for a tow truck driver is $10.00 an hour and we believe the claimant's testimony that he would not have left his prior job to work only for commissions at a business that had not previously operated an overnight shift. The claimant testified that there were very few service calls during the overnight shift, and the Petitioners' business records support this testimony. We also credit the claimant's testimony that once the Petitioners obtained a second tow truck they operated both trucks during the day shift to maximize profits. This is supported by the fact that a second driver was hired at approximately the same time that the new truck was purchased and the claimant was terminated.

Finally, we credit the claimant's testimony concerning his hours of work. We find that he worked twelve hours per day, six days per week; not seven hours per day as alleged by Alon Hen. The claimant's testimony was clear and specific concerning the number of hours that he worked and the manner in which he worked, and was consistent with other evidence suggesting that the Petitioners advertised themselves as working "24/7."

Definition of "employee" under Article 6 of the New York Labor Law

Under Article 6 of the New York Labor Law, "employer" is defined as "any person, corporation or association employing any individual in any occupation, trade, business or service" (Labor Law § 190[3]). "Employed" is defined as "permitted or suffered to work (Labor Law § 2[7])." The federal Fair Labor Standards Act (FLSA) also defines "employ" to include "suffer or permit to work" (29 U.S.C. § 203[g]). Because the statutory language is identical, the New York Labor Law and the FLSA follow the same test to determine the existence of an employment relationship (*see e.g. Ansoumana v. Gristede's Operating Corp.*, 225 FSupp.2d 184, 189 [SDNY 2003]).

In determining whether an individual is an employee covered by the Labor Law or an independent contractor without wage and hour protections, "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 [2d 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).

Alon Hen testified that the Petitioners exercised no control over the claimant but rather that the Petitioners merely allowed him to use their tow truck to operate his own business during the hours the Petitioners were not working. However, Alon Hen's own testimony demonstrates that the Petitioners provided the claimant with a tow truck and a two-way radio, and dispatched service calls to him. We credit the claimant's testimony that he was not operating his own business but was working for the Petitioners, and note that the Petitioners

did not rebut the claimant's testimony that he was registered at the Department of Consumer Affairs as a driver for the Petitioners.

The Petitioners exercised sufficient control over the claimant to support the Commissioner's determination of an employment relationship. The Petitioners determined the claimant's work schedule and rate of compensation, and dispatched service calls to him; provided the tow truck, two-way radio, insurance, fuel, and equipment needed to perform the work; and owned the Department of Consumer Affairs medallion that allowed for operation of a towing business. The claimant was a driver who had no investment in the Petitioners' business, but whose work was integral to it.

Failure to pay wages under Article 6 of the Labor Law

As discussed above, we find that the claimant was an employee of the Petitioners. Under Article 6 of the Labor Law an employer must pay wages[4] to its employees (Labor Law § 191).

The Petitioners do not dispute that no written agreement exists memorializing the terms and conditions of the claimant's work for the Petitioners. Alon Hen testified that the agreement between the Petitioners and the claimant was for commissions only; however, we credit the claimant's testimony that Alon Hen promised to pay him $10.00 an hour plus commissions. We believe the claimant's testimony that he would not have left his prior job where he earned a salary plus commission to work only for commissions particularly for a company such as Integrity that had not previously operated at night.

In the absence of employment records, we credit the claimant's testimony concerning his hours of work (*see* Labor Law § 196-a). We find that he worked twelve hours per day, six days per week; not seven hours, six days per week as alleged by Alon Hen. The claimant's testimony was clear and specific concerning the number of hours that he worked, the manner in which he worked, and was consistent with other evidence suggesting that the Petitioners advertised themselves as working "24/7."

Therefore, we find that the claimant worked 72 hours per week and was promised a wage rate of $10.00 an hour plus commissions, and in the absence of any credible evidence presented by the Petitioners to the contrary, uphold the computations made by the Commissioner as reasonable.[5]

Civil Penalty for failure to pay wages

The Wage Order also assessed a 200% civil penalty, in the amount $29,366.00. The Board finds that the considerations and computations required to be made by the

[4] Labor Law § 190 (1) defines "wages" as "the 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."

[5] We do not rule on the sufficiency of the notice of liability for overtime wages contained in the Wage Order because the Petitioners were represented by counsel and did not raise it at any time. Accordingly it was waived (*see* Labor Law § 101). However, we note that the Wage Order was issued generally under Article 6 of the Labor Law which does not appear to us, absent a citation to a specific section of law or regulation, to require the payment of overtime. We believe that due process requires that Orders to Comply seeking the recovery of overtime provide at a minimum a reference to Article 19 and/or 12 NYCRR 142-2.2 or any other applicable legal authority requiring an employer to pay overtime.

Commissioner in connection with the imposition of the civil penalty amount set forth in the Wage Order is proper and reasonable in all respects.

Penalty Order under Article 19 of the Labor Law

The Penalty Order assesses a civil penalty in the amount of $500.00 for failing to keep and/or furnish true and accurate payroll records for each employee as required by 12 NYCRR 142-2.6. There is adequate evidence in the record to uphold the Penalty Order as reasonable.

INTEREST

Labor Law § 219(1) provides that when the Commissioner determines that wages are due, then the order directing payment shall include "interest at the rate of interest then in effect as prescribed by the superintendent of banks pursuant to section fourteen-a of the banking law per annum from the date of the underpayment to the date of payment. Banking Law section 14-A sets the "maximum rate of interest" at "sixteen percent per centum per annum."

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT

1. The Order to Comply with Article 6 of the Labor Law and the Order Under Article 19 of the Labor Law, each dated April 29, 2008, be, and the same hereby are affirmed; and

2. The Petition for Review be, and the same hereby is, denied.

Anne P. Stevason, Chairman

Absent
Susan Sullivan-Biscglia, Member

J. Christopher Meagher, Member

Absent
Mark G. Pearce, Member

Jean Grumet, Member

Dated and signed in the Office of
the Industrial Board of Appeals,
at New York, New York, on
May 20, 2009.