STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of:	
DR. SABRINA SHUE AND DR. JOSEPH HO AND ADVANCED SOLUTIONS PAIN MANAGEMENT PLLC,	
Petitioners,	DOCKET NO. PR 09-117
To Review Under Section 101 of the Labor Law: an Order to Comply with Article 6 and an Order Under Article 6 of the Labor Law, both dated March 20, 2009,	RESOLUTION OF DECISION
- against -	
THE COMMISSIONER OF LABOR,	
Respondent.	

APPEARANCES

Min Ding, Esq., for Petitioners.

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

WHEREAS:

On May 18, 2009, Dr. Sabrina Shue, Dr. Joseph Ho and Advanced Solutions Pain Management PLLC (Petitioners) filed a Petition with the New York State Industrial Board of Appeals (Board), pursuant to Labor Law § 101 and Part 66 of the Board's Rules of Procedure and Practice (Board Rules) (12 NYCRR Part 66) seeking review of two Orders to Comply with Article 6 of the New York State Labor Law that the Commissioner of Labor (Commissioner, Respondent or DOL) issued on March 20, 2009. The first Order (Wage Order) states that Petitioners unlawfully deducted $1,320.00 from wages earned by Miriam Herrera (Claimant) for the period June 1, 2008 to July 16, 2008, and requires payment of $1,320.00 in unlawful deductions, interest at 16% computed at $142.92 through the date of the Wage Order, and a 100% civil penalty of $1,320.00, for a total due as of the date of the Wage Order of $2,782.92. The second Order (Penalty Order) imposes a further civil penalty of $500.00 for making prohibited deductions from an employee's wages.

On May 21, 2010 Petitioners filed an Amended Petition alleging that the Orders were invalid and unreasonable because Claimant was always fully paid, Claimant owes Petitioners money advanced to her beyond her wages, Claimant requested and voluntarily repaid salary advances and did not have money deducted from her wages, and the DOL incorrectly asserted that a June 16, 2008 paycheck was "recovered" by Petitioners when it was actually cashed by Claimant. The Petitioners also challenged the civil penalties in the Orders. Respondent filed an Answer on June 7, 2010.

Upon notice to the parties, a hearing was held on October 4, 2011 in White Plains, New York before Jean Grumet, Esq., Member of 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 make closing arguments. Both the Petitioner and the Respondent filed post-hearing briefs.

I. SUMMARY OF FACTS

The material facts in this case are undisputed. While no one testified, the parties stipulated to documentary evidence. Petitioners operate a small medical clinic that their counsel stated opened in 2008[1] (unless otherwise specified, all dates below were also in 2008). On April 7, Claimant began work as a receptionist/secretary at a rate of $12.00 per hour. Petitioners paid Claimant her earned wages on April 15 and April 30. On May 1, they paid her $527.00 as an advance against her wages for the period May 1-15; on May 16, Claimant signed back to Dr. Shue her $527.00 paycheck for that period.[2]

On June 5, Petitioners paid Claimant her earned wages of $483.00 for the period May 16-31, and an additional $483.00 stated to be an advance against her wages for the period June 1-15. On June 12, Petitioners paid Claimant an additional $1,000.00 as an advance against wages. On June 16, Petitioners paid Claimant her earned wages of $483.00 for the period June 1-15. On June 30, Claimant as "Borrower," Dr. Shue as "Lender" and Dr. Ho as "Witness" also signed a document stating:

> "I, Miriam Herrera, owes [sic] Sabrina Shue money in the amount of $1483.00. I will return the amount in full before the date of 7/31/08. Otherwise, an interest at the rate of 10% will start accumulating right away."

And, also on June 30, Petitioners paid Claimant her earned wages of $365.96 for the period June 16-30; Claimant signed this paycheck too back to Dr. Shue – according to Petitioners, in partial repayment of previous advances. Claimant similarly signed back to Dr. Shue a July 15 paycheck in the amount of $483.00 for the period July 1-15. On July 16, Petitioners remitted withholdings from Claimant's pay to tax authorities.

---

[1] The DOL's "Issuance of Order to Comply Cover Sheet" referred to below also states that the employer had "[n]o prior history – new establishment."

[2] Amounts stated as paid to Claimant are net figures shown by canceled checks.

Claimant did not work after July 15, and was terminated July 28, when Petitioners emailed Claimant that in view of her work performance

> "and in particular, considering that you repeatedly failed to show up to work without any notification to us, we have decided to terminate your employment....
>
> In addition, as you are aware that you currently owe Dr. Sabrina Shue in the amount of $634.40. In the event that you don't make the payment by July 31st, 2008, we will refer any outstanding amount to the collection agent. We also reserve the rights to pursue other necessary actions against you, and you will be responsible for any expenses incurred for such actions.
>
> "Finally, we recently received a letter from the Department of Social Services of the State of Connecticut, requesting information regarding your most recent income information.
>
> "You will obtain the copy of the payroll information when you come return your keys and the money you owe Dr. Sabrina Shue."[3]

On July 30, Claimant emailed Dr. Shue:

> "Just wanted to let you know that I got your Email. When I Signed over the last check to you, you said you had been advised not to give it to me you said many things, one of them was you did not care if I lost my apartment or not & the second you told me if I did not like it I could leave, So I do not understand how you tell me that my job has terminated when you told me to leave in anger. I went in on the 7/16 only because I was going to try & understand that you were in a bad mood, & you had a lot of patients that day. I could not take the humiliation. So I did not return you had told me to leave anyway....
>
> "Also I was Advised to call the Department of Labor regarding you taking my full pay for 2 pay periods even if it was a personal loan you were to take 10 percent every pay period until the debt was paid that is against the law, like I said I will pay you what I owe you I know I owe it & helped me when I needed it, but I am not working now. Labor Dept will Contact You via mail. I did not want to go this route but you do not want to let me get ahead by not sending the DSS the letter they need it will only take longer for me. I do not know what I did to you that was so wrong for you to act this way."

[3] Neither her termination, the quality of her work performance, nor her reasons for seeking advances against wages are material to the present case. Petitioners stated that Claimant requested advances to pay her rent stating that her bank card was stolen and her bank account frozen; that after an initial few weeks of satisfactory work, she began coming to work late and also missed three days of work from June 25 to 27 without notifying the clinic; and that she was terminated for failing to show up for work beginning July 16, 2008.

On July 31, Claimant filed a Claim for Unpaid Wages, which she affirmed to be true, with the DOL. In the Claim, Claimant stated that her last day of work was July 16 and that she was owed $1320.00 for the period June 1 to July 16, which Dr. Shue refused to pay when Claimant requested her wages on July 15. The Claim stated that Petitioners kept three paychecks, and that:

> "Dr. Shue gave me a personal loan of $1000.00 to be paid biwkly, something towards the debt, then she decided to change her mind & every pay period for 3 periods she gave me my check to sign over to her leaving me w/ nothing for a month ½. She said.... I could leave if I did not like her decision. I'm not refusing to pay back but that was not the agreement we made...."

In subsequent correspondence between the DOL and Petitioners, the latter related many of the facts summarized above, and stated on September 10 that "A[t] this time, the Clinic is in the process of initiating legal action against Ms. Herrera, seeking return of all unearned salary advance, and seeking recovery of all the damages caused by Ms. Herrera."

In a December 2 letter to Petitioners, the DOL stated that while it is "allowable" for wages to be advanced and then recovered by the employer "for the same or next pay period," Labor Law §§ 193 and 195 prohibit actions including recoupment from Claimant's wages of the $1,000.00 advanced to her on June 12.

> "Per her signed agreement she agreed to repay you by 7/31/08. In her signed document, there was no authorization to allow any money to be deducted from her pay. You would also be limited to ten percent of the gross aggregate should she have authorized any repayment from wages.... Also I must advise you, that any deductions for a loan that is authorized in writing by an employee must be interest free in order to be allowed. Since the loan was interest bearing after 7/31/08, deductions from wages would not be allowed."

The DOL requested that Petitioners remit "the final two checks signed over to you," which "were not for advances but for a loan repayment" prohibited by the Labor Law, in the total net amount of $848.96. The DOL stated that failure to respond within ten days would result in issuance of an Order to Comply including interest at 16% from the date of violation and "a fine of up to 200% above the amount found to be due."

Petitioners responded that they did not believe Labor Law §§ 193 and 195 prohibited Claimant's signing back to Dr. Shue of paychecks, as distinguished from "deductions" from her wages; and that "the Clinic and physicians went out of their ways to help Ms. Herrera, providing her employment opportunity and also providing her salary advances on multiple occasions after hearing that she was having financial difficulties (as she claimed)." In an Issuance of Order to Comply Cover Sheet form dated February 20, 2009 and included in the DOL's investigative file (which the DOL provided to Petitioners and which was introduced in evidence in its entirety by stipulation), a DOL Labor Standards Investigator recommended

issuance of an Order to Comply and imposition of a 100% penalty, based on the employer's having been "[n]ot generally cooperative" in that it "[m]ade loans to claimant and then had her sign over checks to them. Refuses to pay when ordered to do so."

II. STANDARD OF REVIEW AND BURDEN OF PROOF

When a petition is filed, the Board reviews whether the Commissioner's order is "valid and reasonable" (Labor Law § 101][1]). 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" (§ 101[2]). The Board is required to presume that an order of the Commissioner is valid (§ 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" (Labor Law § 101[3]).

Pursuant to the Board Rules (12 NYCRR § 65.30), "The burden of proof of every allegation in a proceeding shall be upon the person asserting it." Therefore, the petitioners' burden of proof in this matter is to establish by a preponderance of the evidence that the orders issued by the Commissioner are invalid or unreasonable (State Administrative Procedure Act § 306 [1]; Labor Law §§ 101, 103; 12 NYCRR 65.30).

III. CONCLUSIONS OF LAW

The Board makes the following conclusions of law pursuant to Board Rule 65.39 (12 NYCRR § 65.39). As stated above, the material facts are undisputed.

Labor Law § 193 (2009) states in pertinent part[4]:

> "1. No employer shall make any deduction from the wages of an employee, except deductions which:...
>
> "b. are expressly authorized in writing by the employee and are for the benefit of the employee.... Such authorized deductions shall be limited to payments for insurance premiums, pension or health and welfare benefits, contributions to charitable organizations, payments for United States bonds, payments for dues or assessments to a labor organization, and similar payments for the benefit of the employee.
> "2. No employer shall make any charge against wages, or require an employee to make any payment by separate transaction unless such

[4] Labor Law § 195, cited in the DOL's December 2, 2008 letter to Petitioners and in the February 20, 2009 Issuance of Order to Comply Cover Sheet, further requires, among other things, that employees be furnished with every payment of wages with a statement listing gross wages, deductions and net wages, and that employers establish, maintain and preserve for not less than payroll records showing each employee's hours worked, gross wages, deductions and net wages. While there is no record evidence that Petitioners complied with these requirements, there is also no evidence that the DOL investigated such compliance, nor does either the Wage Order or the Penalty Order refer to § 195's requirements.

> charge or payment is permitted as a deduction from wages under the provisions of subdivision one of this section."

The Court of Appeals found in *Angello v Labor Ready, Inc.*, 7 NY3d 579 [2006], that while § 193[1][b] lets an employee "authorize an employer to take away or subtract wages, the clear language of this subdivision limits the types of deductions to those enumerated and to 'similar payments,'" and that "convenience" to a worker "is not a 'benefit' covered by the statute" (*Id* at 584). Furthermore, § 193[2]

> "was added to the statute in 1974 to 'prohibit wage deductions by indirect means where direct deduction would violate the statute' (Mem in Support, Bill Jacket, L 1974, ch 160). The Legislature sought to end the subterfuge of an employer's paying full wages but then seeking payment at another time."

(7 NY3d at 585). *Labor Ready* held that even though it was "laudable" for a day labor agency to make cash payments available to temporary laborers on a daily basis, charging them a fee deducted from their wage for this service, even on a strictly voluntary basis, "violates both the letter of the spirit and the protective policy underlying it." The Court further noted that from their earliest codification, § 193 and its predecessor statutes aimed to prohibit the offer to employees by employers "upon credit, of groceries, provisions or clothing, with a view to deducting the amount charged for the same from the weekly payments" of wages, and that "The history of Labor Law § 193 manifests the legislative intent to assure that the unequal bargaining power between an employer and an employee does not result in coercive economic arrangements by which the employer can divert a worker's wages for the employer's benefit" (*Id* at 586 [citations omitted]).

In the present case, the undisputed evidence shows that Petitioners illegally enforced a "charge against wages," or "require[d] an employee to make... payment[s] by separate transaction" when such charge or payment was not permitted as a deduction from wages, in violation of Labor Law § 193. While Petitioners argued that paying Claimant her full earned wages, then requiring her to sign her paycheck back to Dr. Shue to repay moneys previously advanced, is different from making "deductions" from her wages, the statute recognizes no such distinction: that is the whole point of § 193[2]. While Petitioners' willingness to advance Claimant's wages or to lend her money, like Labor Ready's willingness to make cash payments available to temporary laborers on a daily basis, may have been laudable, Claimant did not "expressly authorize" deductions from or charges against her wages to repay the loans; and even if she had, such a purpose would not have been "similar" to those permitted by § 193[1][b]. In addition, as in *Labor Ready*, charging interest to Claimant if her loan was not fully repaid within a month, as Petitioners presumably intended when Claimant signed a note so agreeing on June 30, 2008, could have resulted in profit to the employer and possible diversion of "a worker's wages for the employer's benefit" (7 NY3d at 586).

The facts of the present case, as well as the statutory language and the decision of the Court of Appeals interpreting it in *Labor Ready*, further illustrate that there was nothing invalid or unreasonable in the Wage Order's finding Petitioners in violation of § 193. We find it significant that Petitioner was required to sign over her *entire* paychecks for the pay

periods June 16-30 and July 1-15 – a full month of work. Under CPLR § 5231(b), which regulates garnishment of wages in New York, a judgment creditor with a legally enforceable "income execution" garnishment is limited to 10% of a worker's wages, with additional protections for low-income workers. Similarly under 12 NYCRR § 195.1 entitled "Limitation on wage deductions," even when Labor Law § 193 permits deductions for non-enumerated items that are similar to those enumerated in the statute, the deductions "shall not exceed, in the aggregate, 10 percent of the gross wages due the employee for a payroll period." Even if it was Claimant who requested loans, that Petitioners could expect to extract 100% of her wage until her debt was repaid illustrates the "unequal bargaining power between an employer and an employee" which, as the *Labor Ready* decision recognized, differentiates employers from other service providers and makes protection like that of § 193 a necessity to avoid "coercive economic arrangements" (7 NY3d at 586).

While it is understandable that Petitioners, having loaned money to Claimant, were annoyed at having to also pay her current wages, particularly when they considered her an unsatisfactory employee whom they wished to terminate, the self-help remedy of deducting the debt from her wages, which would not be available to any other lender absent court order, was barred to them as well, by Labor Law § 193. Like other lenders, Petitioners had the options of pursuing legal remedies (as they stated in their September 10, 2008 letter to the DOL they were "in the process of" doing), or writing off the loan.

The DOL's finding that Petitioners violated § 193 is also consistent with prior decisions of the Board. For example, in *Matter of Michael E. Fischer (d/b/a Mefco Builders)*, PR 06-099 [Apr. 25, 2008], the Petitioner stated that he had advanced a Claimant $1,200.00 so that the Claimant could repair his truck, which the Claimant was to "'work off'... over the next two weeks." The Board ruled, however, that it was improper for the Petitioner to

> "not pay Complainant for two weeks of his employment.... Petitioner's deductions from Complainant's wages for repayment of a loan are not permitted by Labor Law § 193. Petitioner is free to avail himself of his normal civil remedies but cannot use salary withholding for such purposes, no matter how benevolent the motive."

Although we thus affirm the DOL's finding in the Wage Order that Petitioners violated § 193 through deductions from or charges against Claimant's earned wages, the evidence does not validly and reasonably support the Wage Order's finding that the amount of such deductions or charges during the period June 1, 2008 to July 16, 2008 was $1,320.00.[5] During that period, Claimant was paid her earned wages of $483.00 for the period June 1-15 on June 16,[6] but was made to return her earned wages of $365.96 for the

[5] The Petition plainly placed the amount as well as the fact of underpayment in issue, disputing the details of the DOL's calculation as well as its overall legal theory.

[6] Claimant was also given a June 5, 2008 payment of $483.00 which was stated to be an advance against her wages for the same period, but there is no evidence that she returned either payment; the record appears to show that she kept both. Indeed, the June 30, 2008 note stating that Claimant owed $1,483.00 apparently referred to the $483.00 advanced on June 5, plus the additional $1,000.00 advanced on June 12.

period June 16-30 and of $483.00 for the period July 1-July 15.[7] The unlawful deductions from or charges against Claimant's wages thus amounted to $848.96 – the figure initially stated by the DOL, in its December 2, 2008 letter – and not to $1,320.00, a figure apparently based on amounts advanced by Petitioners rather than on amounts which they withheld.[8]

Civil Penalty

The Wage Order assessed a civil penalty in the amount of 100% of the wages due. The Board finds that the considerations and computations that the Commissioner was required to make in connection with the imposition of the civil penalty amount are reasonable in all respects.

Interest

Labor Law § 219 [1] provides that when the Commissioner determines that wages are due, then the order directing payment shall include "interest at the rate of interest then in effect as prescribed by the superintendent of banks pursuant to section fourteen-a of the Banking Law." Banking Law 14-A sets the "maximum rate of interest" at "sixteen percent per centum per annum from the date of the underpayment to the date of payment." The Board finds that the considerations required to be made by the Commissioner in connection with the interest set forth in the Order are valid and reasonable in all respects.

The Penalty Order

The penalty order assesses a civil penalty of $500.00 against the petitioners for making prohibited deductions from an employee's wages. The Board finds that the considerations and computations that the Commissioner was required to make in connection with the imposition of the civil penalty in the amount Penalty Order are reasonable in all respects.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT

1. The wage order is modified to reduce the amount of underpayment found from $1,320.00 to $848.96 due and owing, with the interest and civil penalty recalculated based on the new principal amount;

2. The penalty order is affirmed; and

---

[7] Earlier, Claimant had returned a May 16, 2008 $527.00 payment for wages earned May 1-15, having been advanced $527.00 for that period on May 1, 2008. The Wage Order pertains only to payments made after June 1, however, and that payment is not encompassed in the Order.

[8] At the hearing, Respondent's counsel acknowledged that he could not account for the difference between the $848.96 and $1,320.00 figures, but speculated that the explanation might be that the $848.96 referred to net rather than gross wages; he noted the absence of payroll records sufficient to determine gross and net wages. As previously stated, however, the evidence indicates that Petitioners remitted required deductions to tax authorities, and the DOL did not cite Petitioners for any record-keeping violations.

3. The petition for review be, and the same hereby is, denied.

Anne P. Stevason, Chairperson

J. Christopher Meagher, Member

Jean Grumet, Member

LaMarr J. Jackson, Member

Jeffrey R. Cassidy, Member

Dated and signed in the Office
of the Industrial Board of Appeals
at New York, New York, on
July 16, 2012.