

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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 In the Matter of the Petition of: :
 :
 IRA SUMKIN and M & I HOLDINGS, INC. (T/A :
 MASTER EXTERIOR & DESIGN), :
 :
 Petitioners, :
 :
 To Review Under Section 101 of the Labor Law: :
 An Order to Comply with Article 6 of the Labor Law, :
 dated April 23, 2009, :
 :
 - against - :
 :
 THE COMMISSIONER OF LABOR, :
 :
 Respondent. :
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DOCKET NO. PR 09-154

RESOLUTION OF DECISION

APPEARANCES

William D. Friedman, Esq., for petitioner.

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

WITNESSES

Andrea Buzan for the petitioner; Labor Standards Investigator Frank King and Kenneth J. Acerno for the Respondent.

WHEREAS:

The petition for review in the above-captioned case was filed with the Industrial Board of Appeals (Board) on June 23, 2009. Upon notice to the parties a hearing was held on November 16, 2010 in Old Westbury, 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, and to make statements relevant to the issues.

The Commissioner of Labor (Commissioner or respondent) issued the order to comply with Article 6 under review on April 23, 2009 against petitioners Ira Sumpkin and M & I Holdings, Inc. (T/A Master Exterior and Design) (Master Exterior or petitioner). The order directs compliance with Article 6 and payment to the Commissioner for commissions due and owing to claimant Kenneth J. Acerno in the amount of \$12,464.28 for the time period from February 1, 2007 through September 30, 2007, with interest continuing thereon at the rate of 16% calculated to the date of the order, in the amount of \$3,659.99, and assesses a 50% civil penalty in the amount of \$6,232.00, for a total amount due of \$22,356.27.

SUMMARY OF EVIDENCE

Ira Sumpkin and M & I Holdings, Inc. operated a construction and design firm based in Amityville, New York, that did business from 2003 as Master Exterior and Design. The company is no longer in business. Claimant Kenneth Acerno worked as an outside salesperson based in Master Exterior's Connecticut office from March 13, 2006 until the Connecticut office closed in October or November 2007. His commission agreement, signed July 14, 2006, provided:

“All “par” priced base products will produce a 10% commission; “Commissions will be paid at 50% immediately after cancellation period (3 days) and 50% immediately after installation; “All self generated sales will be paid at 15%; “Any sale 10% below “par” will be paid at 8%; “Any sale 10% above “par” will be paid at 13%.”

Acerno explained that most of his sales were from management generated sales leads, where he received instructions from management to contact potential customers. He also testified that to his knowledge, all of his jobs were “par,” meaning that the measurements he took of the job site were correct, but that toward the end of his employment, he was informed by management when inquiring about discrepancies with his commission payments, that some of his jobs were below “par.”

Although the claimant originally claimed he was owed \$17,460.00 in unpaid commissions on thirteen sales, DOL reduced the amount of the claim to \$12,464.28 for eight sales after a meeting with the petitioner and the claimant. The parties agreed at hearing, that only three transactions were still at issue. Those transactions were for sales to Strauss, Lofty, and Doherty. The petition does not challenge Ira Sumpkin's individual liability, but does contest the reasonableness of the civil penalties imposed.

Findings of Fact and Conclusions of Law

The petitioner has the burden to show that the order is invalid or unreasonable (Labor Law §§ 101 and 103; 12 NYCRR 65.30). Accordingly, it was the petitioner's burden to prove that the amounts that the Commissioner found due on the three sales at issue were unreasonable.

Strauss sale

The claimant testified that he made a \$33,000.00 sale to Strauss based on his own lead for which he should have received a \$3,300.00 commission. However, the petitioner paid the claimant only \$1,320.00 for the Strauss sale. The petitioner produced documentation that the Strauss sale was cancelled on October 23, 2007. On cross-examination, the claimant stated that when he asked the petitioner about discrepancies with the amounts he was paid on some of his sales in 2007, he was told that the sales were not "par." The claimant denied that the Strauss sale was below par.

The \$1,320.00 that the petitioner paid the claimant on the Strauss sale was calculated at the 8% commission rate for below par sales. The petitioner has the burden of proof but was unable to offer any specific testimony why the Strauss commission was calculated below par. The petitioner also offered no testimony to rebut the claimant's testimony that he generated his own lead on the Strauss sale. The commission agreement provides for a 15% commission on self-generated sales, with 50% paid immediately after the three day cancellation period, and 50% paid after installation. Since, the petitioner's records show the contract in this case was cancelled after the cancellation period with the work never having been completed by the petitioner, the claimant should have been paid 50% of a 15% commission or \$2,475.00.

Lofty sale

The claimant testified that he and another sales representative sold a \$90,000.00 project to Lofty which generated a \$9,000.00 commission to be split between himself and the other sales representative according to the verbal authorization of the then manager of the Connecticut office. The claimant further testified that he never received any commission on the job, and that he knows the job was completed by Italia Pavers, the vendor to which the petitioner subcontracted completion of the job. On cross-examination, the claimant stated that he did not visit the job site to see if the work had been completed until after the petitioner's Connecticut office had gone out of business, and that the contract had been re-written by Italia Pavers, a company that aside from working as a vendor for the petitioner, also sold their own jobs. The petitioner produced a record dated November 7, 2007 showing that the Lofty sale had been cancelled by petitioner and the \$25,000.00 deposit refunded.

We find that the petitioner met its burden of proof to show that it cancelled the Lofty sale, but there is no evidence that such cancellation was prior to the three day cancellation period. Accordingly, under the commission agreement between the claimant and the petitioner, only half of the \$9,000.00 commission or \$4,500.00 was earned, to be split with the other sales representative. Therefore, the petitioner owes \$2,250.00 to the claimant for this sale.

Doherty sale

The petitioner produced records indicating that a \$6,000.00 sale was made by sales representative Sergey Oshansky to Doherty for paving stones, and that therefore no commission was due to the claimant. The claimant, however, provided specific testimony that he was assigned to work on the Doherty sale when Oshansky stopped working for the petitioner. The claimant testified that he was sent by his manager to the Doherty house to re-write the contract, and that, in fact, he re-wrote the contract for \$8,000.00. The claimant further testified that he gave the contract to his manager in the Connecticut office and assumed it had been sent to the main office in Amityville for processing. We find in the absence of any proof that a commission was paid to Oshansky for this sale, and absent rebuttal of the claimant's testimony, that the petitioner owes the claimant a 10% commission or \$800.00 on this sale.

Civil Penalties

The petitioner alleges that the 50% civil penalty imposed against it is unreasonable. Labor Law § 218 provides that the Commissioner, when assessing a civil penalty, "shall give due consideration to the size of the employer's business, the good faith of the employer, the gravity of the violation, the history of previous violations and, in the case of wages . . . violations, the failure to comply with recordkeeping or other non-wage requirements."

Labor Standards Investigator Frank King testified that the 50% civil penalty was imposed after considering the size of the business, how long the employer had been operating and the level of cooperation that DOL received from the employer, and also because of a prior DOL "case . . . versus Bath Fitters, which identified the employer to be in violation of [Labor Law § 191 (c)]." On cross-examination, King testified that the petitioner was "somewhat" cooperative, "however, there were some inquiries that [were] made that were never answered." Specifically, King testified that the petitioner did not answer inquiries related to what the petitioner considered "on par" sales. However, King also testified that he did not investigate whether the claimant was treated differently than other sales representatives in determining "par," did not make any written inquiries to the petitioner about "par," and did not speak to the head of sales about it, although he was aware that the petitioner had a head of sales. Additionally, King testified that the petitioner did not respond to written inquiries sent to him on September 11, 2008; however, the record shows that the petitioner responded in detail to Mr. King by letter dated September 25, 2008. Finally, King testified that he attributed a prior violation by a company called Bath Fitters to the petitioner because the claimant told him it was a subsidiary of the petitioner, and because Bath Fitters was listed at the same address in Amityville as the petitioner, although he had no specific information regarding Bath Fitters or their alleged prior violation of the Labor Law.

We find that King did not give the "due consideration" required by Labor Law § 218 to support the 50% civil penalty imposed. King was unable to convincingly explain how the petitioner had failed to cooperate with DOL, and, in fact, provided numerous examples of

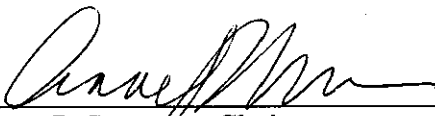
the petitioner's cooperation with DOL's investigation. King also did not substantiate by records or testimony how the prior Labor Law violation against a different company could be attributed to the petitioner, nor did he explain the circumstances of the prior violation, whether it resulted in an order, or even the year of the alleged violation. Furthermore, King testified that he did not know the size of the petitioner's business or how many employees worked for it. Accordingly, we find that DOL failed to properly assess the civil penalty in this matter and revoke that portion of the order.

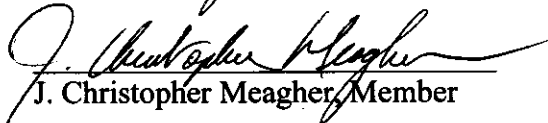
Interest

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 § 14-A sets the "maximum rate of interest" at "sixteen percent per centum per annum." We therefore affirm the rate of interest imposed but find that the amount of interest assessed must be modified based on the reduction in the amount of commissions found due.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

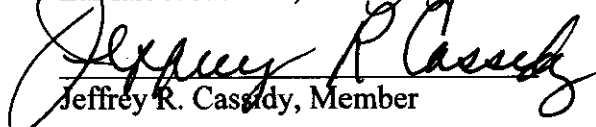
1. The order to comply with Article 6 of the Labor Law issued April 23, 2009, is modified to reduce the wages due and owing to \$5,525.00 with the interest recalculated based on the new principal; and
2. The civil penalty is revoked; and
3. The petition be, and the same hereby is, otherwise denied.


 Anne P. Stevason, Chairman


 J. Christopher Meagher, Member


 Jean Grunet, 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
 April 27, 2011.