STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of: MARVIN E. MILICH, Petitioner, To Review Under Section 101 of the Labor Law: An Order to Comply with Article 19 of the Labor Law and an Order Under Article 19 of the Labor Law, each dated April 16, 2010, - against - THE COMMISSIONER OF LABOR, Respondent.	DOCKET NO. PR 10-145 INTERIM RESOLUTION OF DECISION

APPEARANCES

Frank & Associates, P.C, Caroline L. Kinsey, Esq. and Jeffrey B. Silverstein, Esq., of Counsel, for Petitioner.

Maria L. Colavito, Counsel, New York State Department of Labor, Larissa C. Wasyl, of Counsel, for Respondent.

WHEREAS:

The petition for review in the above-captioned case was received by the Industrial Board of Appeals (Board) on May 12, 2010. The petition seeks review of an order to comply with Article 19 of the Labor Law and an order under Article 19 of the Labor Law issued together on April 16, 2010 by the Commissioner of Labor (Commissioner). The first order (minimum wage order) directs payment of $85,065.38 in wages due and owing together with $20,695.36 in interest at 16% per annum calculated to the date of the order, and a civil penalty in the amount of $63,799.03, for a total amount due of $169,559.77. The second order (penalty order) directs payment of $2,000.00 in civil penalties for failing to keep and/or furnish true and accurate payroll records and for failing to give each employee a complete wage statement with each payment of wages.

THE COMMISSIONER'S MOTION TO STRIKE

On June 23, 2010, The Commissioner moved to strike paragraphs I (B) (i), II (A) (i), and II (A) (ii)[1] from the petition as irrelevant, unnecessary and/or frivolous, pursuant to Board Rule 65.13 (a) (12 NYCRR 65.13 [a]), because those paragraphs refer to a Worker's Compensation Board proceeding between the claimant and the petitioner, and requests issue preclusion with respect to the findings of the Worker's Compensation Board judge. We understand frivolous, for purposes of this motion, to mean clearly insufficient as a matter of law, and agree with the Commissioner that the paragraphs she seeks stricken make allegations that are insufficient to show that the order is unreasonable or invalid as a matter of law.

The petitioner alleges in his petition that the hours of work and wages paid to the claimant were litigated at a Worker's Compensation Board hearing, and that the Worker's Compensation Judge's determination that the claimant was not credible must be given preclusive effect by the Board. Attached to the petition as Exhibit "A" is a one paragraph decision denying the claimant's worker's compensation claim and finding without explanation or analysis that her testimony was not credible. Although factual findings of one administrative agency may be binding on another, we decline to give preclusive effect to the Worker's Compensation Judge's credibility determination in this case and note that the Worker's Compensation Judge made no findings with respect to the petitioner's liability for wages and civil penalties under Article 19 of the Labor Law.

Collateral estoppel is applicable to quasi-judicial determinations of administrative agencies such as the Workers' Compensation Board (*see e.g. O'Gorman v Journal News Westchester*, 2 AD3d 815 [2d Dept 2003]). However, generally, issue preclusion is only applicable to an administrative agency's quasi-judicial determinations of evidentiary facts, and not to the legal conclusions drawn from those facts (*Pelzer v Transel Elevator & Electric, Inc.*, 41 AD3d 379 [1st Dept 2007]; *O'Gorman*, 2 AD3d at 816; *Matter of Bartenders Unlimited, Inc. v Labor Commissioner*, 289 AD2d 785, 786 [3d Dept 2001]).

Issue preclusion additionally requires an "identity of issue which has necessarily been decided in the prior action and is decisive of the present action, and, second, there must have been a full and fair opportunity to contest the decision now said to be controlling" (*Bernstein v Birch Wathen School*, 71 AD2d 129, 132 [1st Dept 1979] *affd* 51 NY2d 932 [1980]). Furthermore, when issue preclusion is asserted, "the core question is whether the party against whom issue preclusion is sought to be invoked had a fair opportunity to contest the issue in prior litigation irrespective of the identity of the adversary" (*GTF Marketing, Inc. v Colonial Aluminum Sales, Inc.*, 108 AD2d 86, 89 [2d Dept 1985] [internal quotes omitted] *affd* 66 NY2d 965 [1985]).

We reject the petitioner's argument that the Worker's Compensation Board decision is binding on the Board, because the legal issues decided there are not decisive of the present action. The Worker's Compensation Board hearing concerned whether the claimant

[1] The Commissioner's motion asks us to strike paragraphs I (i), II (i) and II (ii) of the petition, however these are clearly references to paragraphs I (B) (i), II (A) (i) and II (A) (ii).

suffered a compensable injury and the Worker's Compensation Board decision is limited to that issue. There was no finding by the Worker's Compensation Board with respect to the number of hours worked by the claimant or the wages she was paid by the petitioner. Additionally, although we agree with the petitioner that the parties need not be identical for collateral estoppel to apply, neither the claimant nor the Commissioner had any opportunity before the Worker's Compensation Board to contest the issues related to the Commissioner's finding that the petitioner violated Article 19 of the Labor since the Commissioner's order was not before the Worker's Compensation Board, nor could it have been (*see* Labor Law § 101). Finally, we believe that findings of credibility are not findings of evidentiary or ultimate fact for which issue preclusion is appropriate (*cf. Blake v Race*, 487 F Supp 2d 187, 205 n13 [EDNY 2007]), and note that nothing in our decision prohibits the petitioner from using prior sworn testimony to impeach any witness who appears before the Board.

The Commissioner's motion also objects to the petitioner's description of the burden of proof in proceedings before the Board. The Board has held on numerous occasions that the petitioner bears the burden of proof at a hearing before the Board and that where an employer fails to keep required records, the burden of disproving the amounts sought by the Commissioner in her order rests with the employer (*see e.g. Matter of Warszycki*, PR 08-113 [July 28, 2010]; *see also* Labor Law § 196-a])

For the reasons set forth above, we grant the Commissioner's motion to strike and deem the petition amended in accordance with this decision.

THE PETITIONER'S MOTION FOR A BILL OF PARTICULARS, DEPOSITIONS AND INTERROGATORIES

The petitioner moved on July 26, 2010 for a Board order allowing the petitioner to serve the Commissioner with a demand for bill of particulars, conduct discovery depositions of parties or witnesses, and serve interrogatories to parties or witnesses. The petitioner's bases for such request are that the facts are lengthy and complex, the respondent has not permitted meaningful discovery in a complex law case, and the damages and penalties are excessive under the facts. The petitioner's motion is denied for the reasons set forth below.

Prehearing procedure and discovery is governed by Board Rules of Practice and Procedure (Board Rules) sub-part D, 12 NYCRR 65.15 to 65.20. Board Rules 65.17 allow for a demand for a bill of particulars to be served within eight days after issue is joined, and thereafter only by motion to the Board (12 NYCRR 65.17). Issue has not yet been joined in this matter, and therefore, the petitioner will have eight days after issue is joined to demand a bill of particulars without the necessity of making a motion and therefore, its request for an order to serve a bill of particulars is premature and must be denied.

Board Rules 65.18 states that "except by order of the Board, discovery depositions of parties or witnesses, or interrogatories directed to parties or witnesses, shall not be allowed" (12 NYCRR 65.18). The petitioner has not demonstrated a compelling reason for the Board

to order depositions and interrogatories in this case. The petitioner has not demonstrated that the facts are so lengthy or complex that depositions or interrogatories are necessary in this matter. Furthermore, the respondent is under no obligation to permit discovery in this matter where the petitioner has an opportunity to contest the respondent's findings at a hearing before the Board which is charged with reviewing the orders to determine whether they are invalid or unreasonable.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT

1. Paragraphs I (B) (i), II (i), and II (ii) be, and hereby are stricken from the petition to the extent that they are inconsistent with this decision; and

2. The petition is deemed amended in accordance with this decision; and

3. The respondent Commissioner of Labor shall serve and file an answer to the remaining paragraphs of the petition on or before December 24, 2010.

4. The petitioner's discovery motion dated July 26, 2010 is denied.

Anne P. Stevason, Chairman

J. Christopher Meagher, Member

Jean Grumet, Member

Absent
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
November 18, 2010.

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Anne P. Stevason, Chairman

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