

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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In the Matter of the Petition of: :

NARVEL BENNING :
(T/A BRADY and CARUSO, LLC), :

Petitioner, :

DOCKET NO. PR 10-334
Order to Comply No. 10-00951

To Review Under Section 101 of the Labor Law: :
Two Orders to Comply with Article 6 of the Labor :
Law, both dated August 23, 2010, :

INTERIM
RESOLUTION OF DECISION

- against - :

THE COMMISSIONER OF LABOR, :

Respondent. :
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APPEARANCES

Narvell Benning *pro se*.

Maria L. Colavito, Counsel, NYS Department of Labor, Benjamin A. Shaw of Counsel, for Respondent.

WHEREAS:

The above proceeding was commenced on October 22, 2010, when Petitioner Narvell Benning (Petitioner) filed a petition for review pursuant to Labor Law § 101 and Part 66 of the Industrial Board of Appeals' Rules of Procedure and Practice (12 NYCRR Part 66). Petitioner sought to have the Board review two orders, each dated August 23, 2010. One was an Order to Comply with Labor Law article 6 in the total amount of \$1,566.40, including \$496.04 in wages, \$78.28 in interest at 16%, and a civil penalty of \$992.08. The other was an Order to Comply with Labor Law article 6 in the total amount of \$2,390.84, including \$757.12 for vacation and bonus pay (supplemental wages), \$119.48 in interest at 16%, and a civil penalty of \$1514.24.

On January 14, 2011, the Board served the petition on Respondent Commissioner of Labor (Respondent), who by letter dated February 14, 2011, advised the Board that the amounts designated "wages" and "supplemental wages" in the orders are incorrect, that the

correct amount of wages found due is \$336.76 (plus interest and civil penalty), and the correct amount of supplemental wages found due is \$916.40 (plus interest and civil penalty), but that these amounts total the same sum as the total in the original orders with only the distribution between wages and supplemental wages being different. As a result, Respondent sought to withdraw the orders and to issue corrected amended orders. She requested the Board's approval to withdraw the orders. Respondent also sent a second letter, reiterating the contents of the February 14, 2011 letter and adding that her answer would be served along with the amended orders.

On March 2, 2011, the Board advised Respondent that once an order has been appealed pursuant to Labor Law § 101, Respondent must obtain Board approval to either withdraw or amend it, or both, and that such approvals might be sought by filing with the Board either a motion or a letter supported by a stipulation of the parties. The Board's letter also imposed a new date for Respondent to answer if she did not move to withdraw and amend the orders here.

Apparently the Board's March 2, 2011 letter crossed a letter of Respondent's dated March 1, 2011, which the Board received on March 3, 2011. Respondent's March 1 letter enclosed amended orders dated February 28, 2011, an answer to the petition, a demand for a bill of particulars, and proof of service of all on Petitioner.

By letter of March 8, 2011, the Board reiterated the contents of its March 2 letter and advised that in the event that by April 2, 2011, Respondent moved or filed a stipulation with respect to the August 23, 2011 orders, the answer and demand for a bill of particulars would be held in abeyance. The Board's letter also stated that **"the only valid orders in this matter are the ones that were originally issued on August 23, 2011 [sic]. The orders dated February 28, 2011 are void."**

On April 1, 2011, Respondent filed a motion to withdraw the August 23, 2010 orders and to issue amended orders. The proposed amended and reissued orders are dated February 28, 2011. The total found due in the wage order is \$1,129.66, including \$336.76 in wages, \$119.38 in interest, and \$673.52 in civil penalty. The total found due in the supplemental wage order is \$2,931.41, including \$916.40 in vacation and bonus pay, \$182.21 in interest, and \$1,832.80 in civil penalty. Respondent's motion avers that the proposed amended orders "do not contain a modification of the total amount of wages and supplements owed, they just break down the wages and supplements correctly" and that the amended orders "do not change the bottom line, and do not raise any new factual issues."


A schedule was set for the parties to file responsive papers on the motion, but Petitioner did not respond to the motion.

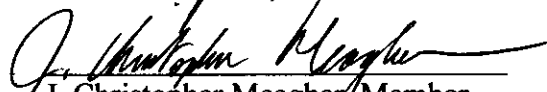
The Board notes that the sum found due for wages together with supplemental wages is the same in both the original and the proposed amended orders, with only the amount distributed between wages and supplemental wages varying from the original to the proposed amended orders. The same is the case with respect to the amounts for civil penalties. The amounts of interest found due in the August 2010 orders have increased in


the proposed amended orders, presumably reflecting additional interest that has been found to accrue with the passage of time. However, the Board finds it unfair to charge Petitioner for interest that accrued during the time it took to correct what appears to have been an avoidable mistake that should have been caught before the orders originally issued. Correcting such a mistake at this juncture protracts case processing time before the Board, and Petitioner should not be penalized for this added time. Accordingly, the Board approves the withdrawal of the August 23, 2010 orders and their amendment and reissuance as discussed above, effective the date of this decision, but suspends the interest that accrued between August 23, 2010 and the date of this decision.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

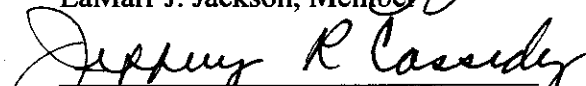
1. Respondent's motion to withdraw the Order to Comply with Labor Law article 6 for wages against Petitioner Narvel Benning, dated August 23, 2010, and to amend and reissue the Order on February 28, 2011, so as to reduce the amount of wages found due from \$496.04 to \$336.76 and to reduce the civil penalty from \$992.08 to \$673.52 is granted, except that interest is suspended from August 23, 2010 to the date of this decision; and
2. Respondent's motion to withdraw the Order to Comply with Labor Law article 6 for supplemental wages against Petitioner Narvel Benning, dated August 23, 2010, and to amend and reissue the Order on February 28, 2011, so as to increase the amount of supplemental wages found due from \$757.12 to \$916.40 and to increase the civil penalty from \$1,514.24 to \$1,832.80 is granted, except that interest is suspended from August 23, 2011 to the date of this decision; and
3. Within 35 days of service of this decision on him, Petitioner shall file with the Board either a response to Respondent's bill of particulars or an amended petition challenging the amended and reissued orders.


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
June 7, 2011.