STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of:	
CAYUGA LUMBER, INC.	
Petitioner,	
To review under Section 101 of the Labor Law: An Order to Comply with Article 19 dated January 14, 2005,	DOCKET NO. PR 05-009
- against -	RESOLUTION OF DECISION
THE COMMISSIONER OF LABOR,	
Respondent.	

WHEREAS:

1. Pursuant to Labor Law § 101 and Part 66 if the Board's Rules of Procedure and Practice (Rules) (12 NYCRR Part 66), the above-captioned proceeding was commenced by the filing of a Petition on February 18, 2005 to review an Order to Comply (Order) of Respondent Commissioner of Labor (Commissioner); and

2. The Order of the Commissioner was issued on January 14, 2005 and found in relevant part that Petitioner violated Labor Law Article 19 § 651 (1) by making minimum wage underpayments for overtime hours worked by Claimant Edward Enders (Claimant); and

3. The Commissioner served and filed an Answer to the Petition on May 6, 2005; and

4. The Board held a hearing on November 30, 2006; and

5. The Board duly issued a Resolution of Decision (Decision) on May 23, 2007, finding that the Commissioner's methodology for computing wages due to the at-issue Claimant for overtime hours worked was not reasonable and, on that basis, modified the Order and remanded the matter to the Commissioner for recalculation of the unpaid wages due the Claimant; and

6. Pursuant to the Rules § 65.41 (12 NYCRR § 65.41), on August 9, 2007, the Commissioner filed an Application for Reconsideration (Application) limited to the Decision's modification and remand with respect to the Board's finding that the Commissioner's methodology was unreasonable, modification of the Order, and remand to the Commissioner for recalculation of unpaid wages due the Claimant; and

7. On August 21, 2007, Petitioner Cayuga Lumber, Inc. filed a Statement in Opposition to the Application; and

8. The Board has reviewed its Decision and the parties' papers in support of and in opposition to the Application; and

9. The Memorandum of Decision in this matter, issued this date, contains the findings of the Board upon the Commissioner's Application and is incorporated by reference in its entirety in this Resolution of Decision.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1 The Commissioner's Application for Reconsideration is hereby granted; and

2. The Board's Resolution of Decision dated May 23, 2007 is hereby modified so as to affirm in all respects the Order to Comply with Article 19, issued by the Commissioner in this matter on January 14, 2005; and

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

Anne P. Stevason, Chairman

Mark S. Perla, Member

Gregory A. Monteleone, Member

ABSENT
Susan Sullivan-Bisceglia, Member

J. Christopher Meagher, Member

Dated and Filed in the Office of the
Industrial Board of Appeals,
at New York, New York,
on September 26, 2007.

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In the Matter of the Petition of: CAYUGA LUMBER, INC. Petitioner, To review under Section 101 of the Labor Law: An Order to Comply with Article 19 dated January 14, 2005 - against - THE COMMISSIONER OF LABOR, Respondent.	DOCKET NO. PR-05-009 MEMORANDUM OF DECISION

In review of an Order to Comply (Order) issued by Respondent Commissioner of Labor (Commissioner) on January 14, 2005, the Board issued a Resolution of Decision (Decision) in the above-captioned case on May 23, 2007, finding that the methodology used by the Commissioner to calculate the "regular rate of pay" of Claimant Edward Enders (Claimant) was unreasonable because such methodology would always result in finding an overtime violation. The Decision modified the Order in part and remanded the matter to the Commissioner to recalculate unpaid wages due the claimant in accordance with the Board's Decision.

On August 9, 2007 the Commissioner filed an Application for Reconsideration (Application) of the Decision, arguing that the Board's method of calculating the Claimant's regular rate of pay was error. Petitioner Cayuga Lumber, Inc. (Petitioner) opposes the Application.

The Board grants the Application, modifies its May 23, 2007 Decision, and affirms the Commissioner's January 14, 2005 Order to Comply in its entirety.

STATEMENT OF THE CASE

On January 14, 2005, the Commissioner issued an Order to Comply against Petitioner, finding a violation of Section 652(l) of Article 19 of the Labor Law (minimum wage underpayments) and 12 NYCRR Part 142. The Order directs the payment of wages to three Claimants including Enders, with interest, and assesses a civil penalty. The Commissioner's determination that the Petitioner failed to pay overtime wages to the Claimants was a basis for finding a violation of the minimum wage standards, which encompasses the requirement that premium wages be paid for overtime hours worked. 12 NYCRR 142-2.2.

Petitioner filed a Petition for review of the Commissioner's Order on February 18, 2005, and the Commissioner filed her Answer on May 6, 2005. A hearing was held on November 30, 2006. The Board's May 23, 2007 Decision affirmed the Commissioner's Order as to the Claimants other than Enders and modified the Order as to Enders, finding that the methodology used by the Commissioner to calculate his "regular rate of pay" was unreasonable because it would always result in finding an overtime violation. The Board held, at page 6 of the Decision, that:

> "[t]he correct formula to use in determining a failure to pay overtime, where an employment agreement exists for a fixed salary for a set number of hours in excess of 40, is to divide the fixed weekly salary by the sum of 40 times the hourly rate plus the set number of hours worked in excess of 40 times 1 ½ the hourly rate. This is the formula that the Respondent should have used in her investigation in the case under review herein."

The Commissioner's Application argues that the Board's holding was legal error. She urges that, in the absence of an express agreement and records to show that wages were computed to incorporate overtime, the proper method for determining an employee's regular rate of pay, and therefore, the premium pay due for overtime hours, is by dividing the total hours worked during a week into the employee's total earnings. In support, the Commissioner cites to the regulations found at 12 NYCRR 142-2.2 and 142-3.14. Opposing the Application, Petitioner argues that the Board's holding is in keeping with *Harper v. Fredonia Seed Co., Inc.*, 275 AD 244, 89 NYS2d 530 (4th Dept 1949), where the court utilized the same formula as the Board did here for determining the regular rate of pay. Accordingly, the issue on reconsideration is whether the Board erred in finding that the methodology used by the Commissioner to calculate the regular rate of pay for Enders was unreasonable.

FACTS

Petitioner's only witness at the Board's evidentiary hearing was its general manager who testified that the Claimants never received any overtime pay because they were considered exempt, salaried employees, even though at times they worked over 40 hours in a week. Petitioner did not dispute the audit of hours and payments prepared by the Department of Labor (DOL) based on review of Petitioner's time and payroll records. In our Decision, we held that the three Claimants were not exempt employees, that the two Claimants other than Enders were due the overtime wages assessed by DOL, and we affirmed the civil penalties assessed. We now re-affirm these findings.

According to the DOL audit, Mr. Enders worked from 25 to 52 hours per week and was paid the same salary each week without regard to the number of hours worked. Enders was the only

Claimant to testify at the hearing. Although we credited his testimony regarding the hours he typically worked each week, our Decision mistakenly found that he worked the same hours each week. We held that given the fact that Enders worked a standard week for a standard salary, Enders and the Petitioner were in agreement on the number of hours that his salary covered However, the DOL audit, based on Petitioner's time records, is more accurate as to the hours that Enders actually worked each week and establishes that he worked a fluctuating workweek and not a standard week as we earlier found.

THE STATUTORY SCHEME

The overtime provisions of New York Labor Law, which require that a covered employee be paid a premium rate for overtime hours, are found in the wage orders which are given full force and effect through the New York State Minimum Wage Act at Labor Law §652(2). The wage order applicable here provides, at 12 NYCRR 142-2.2:

> "An employer shall pay an employee for overtime at a wage rate of 1 ½ times the employee's regular rate in the manner and methods provided in and subject to the exemptions of sections 7 and 13 of...the Fair Labor Standards Act of 1938, as amended."

Therefore, the state overtime provisions are to be interpreted in accordance with standards of the Fair Labor Standards Act (FLSA).

The term "regular rate" is defined at 12 NYCRR 142-2.16:

> "The term *regular rate* shall mean the amount that the employee is regularly paid for each hour of work. When an employee is paid on a piece work basis, salary, or any basis other than hourly rate, the regular hourly wage rate shall be determined by dividing the total hours worked during the week into the employee's total earnings."

Likewise, the Fair Labor Standards Act of 1938, as amended, (29 U.S.C. § 207 (a) (1)), requires that covered employees be paid "at a rate not less than one and one-half times the regular rate" for hours over 40 in a week. To calculate the regular rate of pay for a salaried, nonexempt employee, 29 C.F.R. § 778.113 provides:

> "If the employee is employed solely on a weekly salary basis, his regular hourly rate of pay, on which time and a half must be paid, is computed by dividing the salary by the number of hours which the salary is intended to compensate...."

The FLSA and the New York State Minimum Wage Act (Acts) are remedial legislation. A general rule of statutory construction is that remedial legislation is to be broadly construed.

> "The FLSA embodies a Congressional intent to 'give specific minimum protections to *individual* workers.' Its maximum hours provisions, 'like the other portions of the Fair Labor Standards Act, are remedial and humanitarian in purpose. Such a statute must not be interpreted or applied in a narrow, grudging manner." [Citations omitted; emphasis in original.]

Giles v. City of New York, 41 F Supp 2d 308, 316 (SDNY 1999). The Acts do not forbid work hours of over 40 in a week but they provide that a worker must be compensated at a premium, "stepped-

up" rate of one and one-half times the employee's regular rate for these overtime hours. The imposition of this premium is the way in which overtime hours are discouraged.

Early on in its interpretation of the FLSA, the United States Supreme Court held that the FLSA was meant to address "the evil of overwork as well as underpay." *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 578 (1942). Discouraging overtime hours by requiring premium pay was viewed as a way of inducing worksharing and relieving unemployment as well as protecting workers from excessive hours. *Id.* at 577-78. In *Missel*, an employee received a set salary each week for working between 65 and 80 hours. The lower court held that as long as the salary met the minimum wage standards and overtime based on the minimum wage rate, then the employer complied with the FLSA. The Supreme Court overturned the lower court ruling and held that the "act was designed to require payment of overtime at time and a half the regular pay, where that pay is above the minimum, as well as where the regular pay is at the minimum." *Id. at* 578. The Court went on to explain that where there is a fixed weekly wage for regular contract hours which are the actual hours worked, "Wage divided by hours equals regular rate. Time and a half regular rate for hours employed beyond statutory maximum equals compensation for overtime hours." *Id.* at n16. Where there is a fluctuating workweek, the regular rate will vary from week to week since it is determined by dividing the salary by the number of hours worked in a single week.

> "The Supreme Court instructs more generally that courts must construe the FLSA overtime provisions broadly; a finding that a salary included overtime, in the absence of an agreement so stating would be the sort of 'narrow, grudging' FLSA application that the Court rejected soon after enactment. *Tenn. Coal, Iron & R.R. Co. v. Muscoda Local No. 123 et al.*, 321 U.S. 590, 597, 64 S. Ct. 698, 88 L.Ed. 949 (1944)."

Giles v. City of New York, supra at 317. In *Giles*, the court also reviewed federal case law and its interpretation of what is included in a weekly salary:

> "Unless the contracting parties intend and understand the weekly salary to include overtime hours at the premium rate, courts do not deem weekly salaries to include the overtime premium for workers regularly logging overtime, but instead hold that the weekly salary covers only the first 40 hours. [Citations omitted.]"

Similarly, in *Doo Nam Yang v. ACBL Corp.*, 427 F Supp 2d 329 (SDNY 2005), the court found that the weekly salary was intended to cover a 50 hour workweek. However, the court did not impute a premium pay element to that salary. Rather, it computed the regular rate by dividing the salary by 50 and then awarded overtime wages in the amount of .5 times the regular rate for hours between 40 and 50 and 1.5 times the regular rate for all hours over 50.

In sum, based on the remedial purpose of labor standards legislation, the governing federal and state law require that in the absence of an explicit, mutual agreement that a salary provides for a premium "stepped-up" rate for overtime hours, the regular rate of pay for a nonexempt salaried employee is computed by dividing the weekly salary by the number of hours worked. The premium wage that is due for all overtime hours is then computed by multiplying the overtime hours by half of the regular rate. If there is an employment contract between the parties which complies with the overtime requirements by specifically providing that the salary includes a premium for overtime hours, the burden is on the employer to prove the contract and its terms.

DISCUSSION

Applying the governing law to the issue before us, we find that in the absence of proof of an employment agreement between Petitioner and Enders providing that Enders' salary included premium pay for overtime hours that he worked and in light of Petitioner's admission that overtime was not paid, the methodology that the Commissioner employed in issuing her Order was correct.

By this decision, we put to rest our previous reliance on *Harper v. Fredonia Seed Co., supra,* and distinguish our holding in *In the Matter of the Petition of David and Laura Guy,* PR 36-99, upheld by the Appellate Division of the New York Supreme Court for the Second Department in *McGowan v. Guy,* 304 AD2d 666 (2d Dept 2003), as limited to the specific facts of that case, as stated therein. There the Board found that there was a contract between the parties which provided for overtime. Although the Board used the *Harper* formula in calculating regular rate of pay and the court upheld its decision as a rational interpretation, the Board finds that in keeping with the remedial intent of the legislation which requires broad application, the federal and state regulations on calculating regular rate, and the numerous state and federal cases which hold that there is a rebuttable presumption that salary does not include a premium for overtime, the Board will no longer give credence to *Harper.* The formula in *Harper* incorrectly presumes that the overtime premium is included in the salary.

There is a rebuttable presumption that salary does not include a premium for overtime hours. "Unless the contracting parties intend and understand the weekly salary to include the overtime hours at the premium rate, courts do not deem weekly salaries to include the overtime premium for workers regularly logging overtime...". *Doo Nam Yang, supra* at n10 quoting *Giles v. City of New York*, 41 F.Supp.2d 308, 316-17 (SDNY 1999). There must be an explicit agreement between the parties that the salary compensates the employee for regular and overtime rates. "The important objective is assurance that the employees and employer are aware that overtime compensation in a specific amount is included in the contract. Unless both sides clearly understand this to be so, it cannot be said that the purposes of the law in requiring additional pay for overtime is being achieved." *Id.*

CONCLUSION

The Board grants the Commissioner's Application for Reconsideration and, in so granting, modifies its May 23, 2007 Resolution of Decision by affirming the Commissioner's Order of January 14, 2005 in its entirety.

Let a Resolution of Decision issue accordingly.

Anne P. Stevason, Chairman

Mark S. Perla, Member

Gregory A. Monteleone, Member

ABSENT
Susan Sullivan-Bisceglia, Member

J. Christopher Meagher, Member

Dated and Filed in the Office of the
Industrial Board of Appeals,
at Albany, New York,
on September 26, 2007.