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: J V CAR WASH (T/A BROADWAY HAND CAR WASH), Petitioner, To review under Section 101 of the Labor Law: An Order to Comply with Article 19 and an Order under Article 19 of the Labor Law, dated June 24, 2005 - against - THE COMMISSIONER OF LABOR, Respondent.	DOCKET NO. PR-05-052 RESOLUTION OF DECISION

WHEREAS:

1. The above proceeding was commenced by the filing of a Petition for Review pursuant to Labor Law Section 101 and Part 66 of the Board's Rules of Procedure and Practice (12 NYCRR Part 66) on August 4, 2005; and

2. An Answer was served and filed by the Respondent on August 24, 2005; and

3. A hearing was scheduled to be held at the Board's offices in New York City on August 30, 2006, but was postponed at the request of Petitioner's counsel, and upon amended notice by the Board to the parties, was rescheduled and held on September 13, 2006; and

4. Both parties were present during the course of the hearing held herein, and were provided sufficient opportunity to present testimonial and documentary evidence, to examine and

cross-examine witnesses, and to make statements relevant to the issues raised in this proceeding; and

5. The Board has considered the pleadings, the testimony, the hearing exhibits, the documents and all of the papers filed here; and

6. The Memorandum of Decision in this matter, issued the date noted below, contains the Board's findings of fact and conclusions of law and is incorporated by reference in its entirety in this Resolution of Decision; and

7. All motions and objections made on the record of this proceeding that are not consistent with this determination are deemed denied.

NOW, THEREFORE, IT IS HEREBY RESOLVED:

1. That the Order to Comply with Article 19, dated June 24, 2005, under review herein, is affirmed in all respects.

2. That the Order under Article 19 assessing a civil penalty in the amount of $4,000, under review herein, be, and the same hereby is, affirmed in all respects.

3. That the Petition for Review filed herein, be and the same hereby is, denied.

Anne P. Stevason, Chairman

ABSENT
Mark S. Perla, Member

Gregory A. Monteleone, Member *

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 August 22, 2007.

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INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of:	
J V CAR WASH (T/A BROADWAY HAND CAR WASH),	
Petitioner,	
	DOCKET NO. PR-05-052
To review under Section 101 of the Labor Law: An Order to Comply with Article 19 and an Order under Article 19 of the Labor Law, dated June 24, 2005	MEMORANDUM OF DECISION
- against -	
THE COMMISSIONER OF LABOR,	
Respondent.	

The Petition for Review in the above-captioned case was filed with the Industrial Board of Appeals (Board) on August 4, 2005. The Answer was filed on August 24, 2005. Upon notice to the parties, a hearing was held on September 13, 2006 at the Board's offices in New York City before Gregory A. Monteleone, Esq., Member of the Board and designated Hearing Officer in this case.

Petitioner, JV Car Wash, was represented by Beigelman & Associates, PC, by Mark L. Beigelman, Esq. and Respondent, Commissioner of Labor (Commissioner), was represented Jerome A. Tracy, Counsel to the Department of Labor (DOL), Casey E. Callahan of counsel. Each party was afforded full opportunity to present documentary evidence, to examine and cross-examine witnesses and to make statements relevant to the issues.

The Order to Comply with Article 19 of the Labor Law, under review herein, was issued on June 24, 2005, finding violations of § 652 (1) of Article 19 (payment of a wage rate below minimum) of the Labor Law, directing payment to the Commissioner for unpaid wages due and owing to six (6) named claimants in the combined amount of $16,830.21, with continuing interest thereon at the rate of 16% calculated to the date of the Order in the amount of $6,330.61,

and assessing a civil penalty in the amount of $8,415.00, for a total due of $31,575.82.

An additional Order under Article 19, issued June 24, 2005, was found alleging four violations of § 661 of Article 19 of the Labor Law, with civil penalties assessed for each violation. The violations were for failure to keep and/or furnish true and accurate payroll records for each employee, including daily and weekly hours for the period on or about February 13, 2004 through February 19, 2004; failure to give each employee a complete wage statement with every payment of wages during the period on or about February 13, 2004 through February 19, 2004; failure to keep and/or furnish true and accurate payroll records for each employee, including daily and weekly hours for the period on or about February 20, 2004 through February 26, 2004; and failure to give each employee a complete wage statement with every payment of wages for the period on or about February 20, 2004 through February 26, 2004. The civil penalty assessed for each of the four violations was $1,000, for a total civil penalty of $4,000.

The Board having given due consideration to the pleadings, the testimony, the hearing exhibits, the documents and all of the papers filed herein, makes the following findings of fact and law pursuant to the provisions of the Board's Rules of Procedure and Practice (Rules) § 65.39 (12 NYCRR 65.39).

FINDINGS OF FACT

The Petitioner is a private employer doing business in the State of New York, as defined by Article 1 of the Labor Law, and is subject to the jurisdiction of the Commissioner of Labor. It is also an employer as defined in Labor Law § 651.6.

Jesus Santiago, who filed a claim with DOL against Petitioner for unpaid wages, testified at the hearing that he worked at JV Car Wash from approximately April 1986 through August 2001, washing and cleaning cars. He was paid $35.00 per day in cash at the end of the day but never received any wage statements with his pay. Mr. Santiago stated that he worked 14 hours per day – sometimes more, every day of the week, including Sundays. The car wash was open every day from approximately 7:00 a.m. to 8:00 p.m. and sometimes 9:00 p.m. Mr. Santiago's claim is for the period of February 1997 through August 2001 when his employment was terminated. Mr. Santiago also testified that, although tips were collected each day, the tips were retained by Petitioner and not distributed to the employees.

David An, Labor Standards Investigator with the DOL, testified concerning the DOL investigation. The investigation was opened when Mr. Santiago filed his wage claim. On April 7, 2004 DOL investigators visited JV Car Wash and interviewed Lorenzo Francisco, Luis Manuel Francisco, Ramon Emilio Francisco, Javier Leal and Saturino Vargas. Each employee signed a statement memorializing the information that he had given to the DOL investigator and certified that it was true. The statements were consistent in indicating that the car wash was open from approximately 7:30 a.m. to 7:30 or 8:00 p.m. The employees were paid daily in cash and did not receive a wage statement with their pay. Mr. An stated that while he did receive many documents from the Petitioner's accountant, Richard Stone, in response to a request for payroll records, the records did not reflect weekly wages of any of the employees or any deductions taken, as required by law. In computing what was owed in unpaid wages, DOL usually examines an employer's payroll records. In the absence of records, an unpaid wage audit is based on the statements of the employees. Mr. An then testified as to the methodology used in calculating the unpaid wages due, which formed the basis for the Order to Comply. Four of the employees later came in to the office of DOL and gave statements that they worked 40 hours per week and were paid $5.15 an hour.

Subsequently, the employer provided written statements signed by the same four employees, indicating that they worked 40 hours per week and were paid a salary of $240 per week plus tips. A notarized stamp was on the statements. However, the statements were not dated or sworn to. Additionally, these four employees were not called by Petitioner to testify at the hearing, even though they were currently employed by Petitioner.

The investigator further testified that the Petitioner received a Notice of Conference to appear on April 7, 2005 with his records for the past twelve months, but the Petitioner did not appear. At a later time, in response to a telephone call, one of the owners of JV Car Wash told Mr. An that he would not cooperate in the investigation and was adamant that no money was owed to any employee.

At the hearing, Victor Vasquez testified that he was an agent of Petitioner, and the vice president of the car wash. He stated that he had oversight duties at the car wash, was the head manager, and has been managing the car wash since 1985. He testified that the employees were paid daily, and usually work twelve (12) hours a day, three (3) days a week, for a total of thirty-six (36) hours, although sometimes they worked 40 hours. He admitted that the employees were not given a wage statement with their pay and that there is no time clock or sign in sheet for the employees, and that the employees come in at 8:00 a.m. and leave at 7:00 p.m. Mr. Vasquez denied that Mr. Santiago had ever worked at the car wash. He testified that Mr. Santiago had worked for the witness's father, at a building in New Jersey, doing "repairs on the building, paint jobs, roofing, and stuff like that." Vasquez denied that he took tips from employees. He stated that other than Santiago, Javier Leal was the only one who had not provided a statement to DOL and that was because he worked for the car wash only one day, which happened to be the day that the DOL investigator was there.

STANDARD OF REVIEW

The Board reviews the validity and reasonableness of an Order to Comply made by the Commissioner upon the filing of a Petition for Review. 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." Labor Law § 101.

When reviewing an Order to Comply issued by the Commissioner, the Board shall presume that the Order is valid. Labor Law § 103.1 provides, in relevant part:

> "Every provision of this chapter and of the rules and regulations made in pursuance thereof, and every order directing compliance therewith, shall be valid unless declared invalid in a proceeding brought under the provisions of this chapter."

Pursuant to Board Rule § 65.30: "The burden of proof of every allegation in a proceeding shall be upon the person asserting it." Therefore, the burden is on the Petitioner to prove that the Order under review is not valid or reasonable.

EMPLOYER'S FAILURE TO KEEP ADEQUATE RECORDS

An employer's obligation to keep adequate employment records is found in the Labor Law, at § 195, as well as in the New York Code of Rules and Regulations (NYCRR). Specifically, Title 12 of the NYCRR, § 142-2.6 provides, in pertinent part:

> "(a) Every employer shall establish, maintain and preserve for not less than six years, weekly payroll records which shall show for each employee (4) the number of hours worked daily and weekly, ...(6) the amount of gross wages...
> "...
> "(d) Employers...shall make such records...available upon request of the commissioner at the place of employment."

§ 142-2.7 (12 NYCRR 142-2.7) further provides:

> "Every employer. . . shall furnish to each employee a statement with every payment of wages, listing hours worked, rates paid, gross wages, allowances, if any, claimed as part of the minimum wage, deductions and net wages."

Therefore, it is an employer's responsibility to keep accurate records of the hours worked by its employees and the amount of wages paid and to provide its employees with a wage statement every time the employee is paid. This required recordkeeping provides proof to the employer, the employee and the Commissioner that the employee has been properly paid. If an employer fails to keep such records, there are consequences for an employer which affect the burden of proof on an employee's claim for wages. The United States Supreme Court, in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687-88 (1946), stated:

> "where the employer's records are inaccurate or inadequate and the employee cannot offer convincing substitutes...[t]he solution ... is not to penalize the employee by denying him any recovery on the ground that he is unable to prove the precise extent of uncompensated work. Such a result would place a premium on an employer's failure to keep proper records in conformity with his statutory duty; it would allow the employer to keep the benefits of an employee's labors without paying due compensation..."

Labor Law § 196-a provides, in relevant part:

> "Failure of an employer to keep adequate records, in addition to exposing such employer to penalties . . . shall not operate as a bar to filing of a complaint by an employee. In such a case the employer in violation shall bear the burden of proving that the complaining employee was paid wages, benefits and wage supplements."

EMPLOYER'S FAILURE TO PAY WAGES

Labor Law § 652 provides that "[e]very employer shall pay to each of its employees for each hour worked a wage of not less than" the minimum wage set by law.

If the Commissioner determines that an employer has violated this provision, the Commissioner is required to issue a compliance order to the employer, which includes a demand that the employer pay the total amount of wages, benefits or wage supplements found to be due and owing. Section 218 (1) provides, in pertinent part:

> "If the commissioner determines that an employer has violated a provision of article six (payment of wages), article nineteen (minimum wage act), article nineteen-A, section two hundred twelve-a, section two hundred twelve-b, section one hundred sixty-one (day of rest) or section one hundred sixty-two (meal periods) of this chapter, or a rule or regulation promulgated thereunder, the commissioner shall issue to the employer an order directing compliance therewith, which shall describe particularly the nature of the alleged violation."

Turning to the facts of the instant case, the wage claim of Jesus Santiago, which was filed with the DOL pursuant to Labor Law § 196-a, and forms the basis for a portion of the Commissioner's Order, is affirmed. The employer has failed to meet its burden. The employer failed to keep time or payroll records as required by law or provide any evidence that Mr. Santiago was paid in accordance with the law. The only evidence on the subject was the testimony of Mr. Vasquez that Mr. Santiago never worked at the car wash. This was insufficient in light of Mr. Santiago's reasonable and credible testimony that he worked there for 15 years and certainly insufficient to meet Petitioner's burden of proof. *See Angello v. National Finance Corp.* 1 A.D.3d 850, 768 N.Y.S.2d 66 (3d Dept. 2003).

Likewise, that portion of the Order to Comply concerning the unpaid wages for the other 5 employees is affirmed. The information obtained from the employees by a DOL investigator at the car wash location, reduced to writing and certified by each of the employees, evidenced by the submission of the statements by the Department of Labor, without objection by Petitioner, was sufficiently reliable and probative to form the basis for the wage audits and Order. The statements of each of the 5 employees were substantially similar to each other and to the testimony of Mr. Santiago. In addition, they were consistent with the hours of operation of the car wash and with all testimony that the employees were paid on a daily basis. In contrast, the statements of the employees, submitted by the Petitioner, which included a notary stamp, but which by no means were affidavits since they failed to include any sworn statements and were not dated, were inconsistent with Mr. Vasquez's testimony. We find the initial statements to the DOL investigator, taken at the work place, more credible than the statements taken and submitted by the employer after the fact or the subsequent statements made by the employees at DOL. While the employer-produced statements indicate that the employees worked 40 hours and were paid a salary of $240 per week, Mr. Vasquez testified that the employees were paid on an hourly basis and worked three 12 hour days per week. This was likewise, inconsistent with the employee statements that they earned $5.15 per hour. As to Mr. Vasquez's testimony that Javier Leal worked at the car wash only one day, which happened to be the day that the DOL investigator was there, this statement also lacks credibility. Petitioner provided no evidence that Leal was even paid for that day.

CIVIL PENALTIES FOR FAILURE TO PAY WAGES

The Order to Comply additionally assessed 50% of the unpaid wages, or $8,415.00 in civil penalties. The Board finds that the considerations and computations required to be made by the Commissioner in connection with the imposition of the civil penalty amount set forth in the Order are proper and reasonable in all respects.

CIVIL PENALTIES FOR FAILURE TO KEEP REQUIRED RECORDS AND ISSUE WAGE STATEMENTS

The Commissioner's Order under Article 19 of the Labor Law which assessed $4,000 in civil penalties is also upheld. Petitioner admitted that it did not provide wage statements when the employees were paid and that there were no records of the daily and weekly hours worked. The Board further finds that the considerations and computations required to be made by the Respondent in connection with the imposition of the civil penalty amounts set forth in the Order are proper and reasonable in all respects.

INTEREST

Labor Law § 219 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 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."

The foregoing constitutes our findings of fact and law pursuant to Board Rule § 65.39 (12 NYCRR 65.39).

Let a Resolution of Decision issue accordingly.

Anne P. Stevason, Chairman

ABSENT
Mark S. Perla, Member

Gregory A. Monteleone, Member *

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 August 22, 2007.