

Anne P. Stevason
Chairman

Mark S. Perla
Gregory A. Monteleone
Susan Sullivan-Bisceglia
J. Christopher Meagher
Members

State of New York
Industrial Board of Appeals



Empire State Plaza
Agency Building 2, 20th Floor
Albany, New York 12223
Phone: (518) 474-4785
Fax: (518) 473-7533

Sandra M. Nathan
Deputy Counsel

Khai H. Gibbs
Associate Counsel

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

-----X
In the Matter of the Petition of:

ROBERT SCORES
(T/A ON THE SPOT AUTO REPAIR),

Petitioner,

To review under Section 101 of the Labor Law: Two
Orders to Comply with Article 6 and an Order under
Article 19 of the Labor Law, dated February 10, 2006

DOCKET NO. PR-06-019

RESOLUTION OF DECISION

- against -

THE COMMISSIONER OF LABOR,

Respondent.
-----X

WHEREAS:

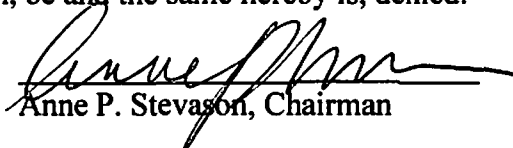
1. The above proceeding was duly commenced by the filing of a Petition for Review pursuant to Labor Law Section 101 and Part 66 of the Board's Rules of Procedure and Practice (12 NYCRR Part 66) on April 10, 2006; and
2. An Answer was duly served and filed by the Respondent on July 10, 2006; and
3. A hearing was scheduled, noticed and held at the Department of Labor's offices in Poughkeepsie on November 21, 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

Visit our Website at <http://www.labor.state.ny.us/lba/index.htm>

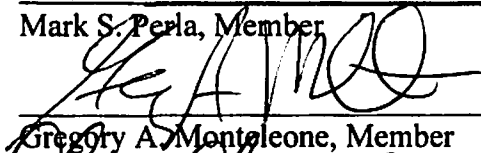
5. The Board has considered the pleadings, the testimony, the hearing exhibits, the documents and all of the papers filed here; and
6. The Memorandum of Decision in this matter, issued the date noted below, contains the Board's findings of fact and conclusions of law and is incorporated by reference 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.

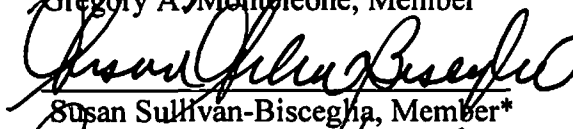
NOW, THEREFORE, IT IS HEREBY RESOLVED:

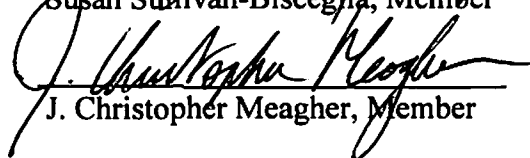
1. That the Orders to Comply, under review herein, are hereby affirmed in all respects.
2. That the Petition for Review filed herein, be and the same hereby is, denied.


Anne P. Stevason, Chairman

ABSENT
Mark S. Perla, Member


Gregory A. Monteleone, Member


Susan Sullivan-Biscegha, 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.

Anne P. Stevason
Chairman

State of New York
Industrial Board of Appeals

Sandra M. Nathan
Deputy Counsel

Mark S. Perla
Gregory A. Monteleone
Susan Sullivan-Bisceglia
J. Christopher Meagher
Members



Khai H. Gibbs
Associate Counsel

Empire State Plaza
Agency Building 2, 20th Floor
Albany, New York 12223
Phone: (518) 474-4785
Fax: (518) 473-7533

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

-----X

In the Matter of the Petition of: :

ROBERT SCORES :
(T/A ON THE SPOT AUTO REPAIR), :
Petitioner, :

To review under Section 101 of the Labor Law: Two :
Orders to Comply with Article 6 and an Order under :
Article 19 of the Labor Law, dated February 10, 2006 :

- against - :

THE COMMISSIONER OF LABOR, :

Respondent. :

-----X

DOCKET NO. PR-06-019

MEMORANDUM OF DECISION

The Petition for Review in the above-captioned case was filed with the Industrial Board of Appeals (Board) on April 10, 2006. The Answer was filed on July 10, 2006. Upon notice to the parties, a hearing was held on November 21, 2006 in Poughkeepsie, New York before Susan Sullivan-Bisceglia, Member of the Board and designated Hearing Officer in this case.

Petitioner, Robert Scores (T/A On the Spot Auto Repair), represented himself and Respondent, Commissioner of Labor (Commissioner), was represented by Jerome A. Tracy, Counsel to the Department of Labor (DOL) Benjamin T. Garry 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 6, § 191(1) of the Labor Law, under review herein, was issued February 10, 2006, finding that Petitioner failed to pay all wages earned and directing that payment be made to the Commissioner in the amount of \$3,269.00 for wages due and owing claimant for the period of February 3, 2001 through June 27, 2003, with continuing interest thereon at the rate of 16%, calculated to the date of the Order, in the amount of \$1,372.80, and assessing a civil penalty in the amount of \$6,538.00, for a total due of \$11,179.80.

A second Order to Comply, also under review herein, was issued on February 10, 2006 to Petitioner pursuant to Article 6, §193(1) of the Labor Law, finding that Petitioner took unlawful deductions from wages and directing that payment be made to the Commissioner in the amount of \$6,017.00 for wages due and owing for the period of February 3, 2001 through June 27, 2003, with continuing interest thereon at the rate of 16%, calculated to the date of the Order, in the amount of \$2,526.81, and assessing a civil penalty in the amount of \$12, 034.00, for a total due of \$20,577.81.

A third Order, under review herein, was issued on February 10, 2006. This Order alleged two (2) violations of Article 19, § 661 of the Labor Law and of Part 142 of Title 12 of the New York Code Compilation of Codes and Regulations (12 NYCRR § 142). These violations were for failure to keep and furnish true and accurate payroll records for each employee for the period of February 3, 2001 through June 27, 2003; and failure to give each employee a complete wage statement with every payment of wages for the period of February 3, 2001 through June 27, 2003. The civil penalty assessed for each violation was \$500.00, for a total civil penalty of \$1,000.00.

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 Board Rule §65.39 (12 N.Y.C.R.R. § 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.

Robert E. Kirkey, Jr. was employed by Petitioner as an automobile mechanic at a weekly salary of \$400.00. He worked Monday through Friday from 8:00 a.m. to 5:00 p.m. He testified that, to his knowledge, Robert Scores was the owner of On the Spot Auto and that Scores was at the worksite practically every day. When Kirkey was first employed, he informed Scores that he had to have child support payments of \$160.00 per week taken out of his paycheck and sent to Dutchess County Office of Child Support ("Dutchess County"). Thereafter, his weekly wages were reduced by Petitioner by at least \$160.00. He testified that, for example, in one particular week, his total wages were \$400.00, and the net wages paid to him was \$153.64 since his wages were reduced by the child support payment and taxes. Kirkey never received a pay statement with his paycheck.

In the beginning of 2003, Kirkey learned that Petitioner was not paying Dutchess County on Kirkey's behalf, when he found out that his New York State drivers' license was suspended due to nonpayment of child support. He testified that, when he went to family court to get a letter to reinstate his driver's license, he was told that in 2002, only 26 of 52 weeks of child support payments had been made. Kirkey informed Petitioner about the nonpayment and Petitioner replied that he would "get right on it, I'll take care of it." However, Petitioner never made up the payments. In addition to the deductions of \$160 per week, in some weeks Kirkey was not paid the full amount of the remainder of wages due to him. Although Petitioner sometimes made up the difference the following week, there were still wages outstanding.

On August 25, 2003, Kirkey filed a wage claim with DOL and included in his claim proof that he obtained from Family Court of the total amounts of child support paid to Dutchess County.

DOL Investigator Charles Lombardo testified as to the contents of the DOL investigation file in this matter. The audit of wages due was based on the hours worked by claimant, the amounts paid to him and the amounts paid to Dutchess County, as evidenced by the records from Dutchess County as well as by the cancelled checks produced by Petitioner. A breakdown of the amounts due was sent to Petitioner requesting that petitioner respond with payment or a statement as to why the amounts were not due. In addition, it was requested that documentation, such as payroll records, be provided to support any defense.

Thereafter, an investigation was initiated and Petitioner was unresponsive and uncooperative in the investigation. Petitioner was asked twice for employment records and since the records were never produced, a notice of violation of Article 19, § 661 was issued. Lombardo testified that a civil penalty of 200% of the amount of unpaid wages was assessed on each order directing payment of wages because of the Petitioner's failure to cooperate, failure to provide records, and previous violation. Petitioner argued that there was no previous violation and that the violation against "Bobby's Auto Repair & Collision" in 1997 was not against him since he did not start doing business as Bobby's Auto Repair until 2004.

Petitioner testified that he failed to provide records due to the fact that all of his records were destroyed in a truck fire when his offices were being moved. However, he also testified that he had an accountant and he did provide cancelled checks and other records to DOL to show payments made to Dutchess County. Scores testified that "I am willing to work with Social Services if there is an unpaid balance and pay that. I ask that we see if we can work something out to do something. If there is something unpaid I would work with Social Services." Petitioner also admitted that he sometimes did not pay Kirkey all wages due but testified that he made it up the next week with cash payments. However, he admitted that he had no payroll records to support this.

STANDARD OF REVIEW

The Board reviews the validity and reasonableness of an Order of Compliance made by the Commissioner of Labor (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 of Compliance 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 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.”

In this case, the burden was on Petitioner to disprove the amounts sought in Kirkey's claim. Petitioner failed to offer any information or documentation that would prove that Kirkey was properly paid. See *Angello v. National Finance Corp.*, 1 A.D.3d 850, 768 N.Y.S.2d 66 (3d Dept. 2003). In fact, he admitted that there were no records and asked that he be able to work out

something on the repayment to Dutchess County. However, Petitioner's debt is not to Dutchess County but to Petitioner. By failing to pay Dutchess County on Kirkey's behalf, Petitioner failed to pay all wages due and the Order directing payment to Kirkey was reasonable and valid.

CIVIL PENALTIES FOR FAILURE TO PAY WAGES

The Orders of Compliance additionally assessed 200% of the amount of unpaid wages, in civil penalties. \$6,538.00 was assessed in the first order and \$12,034.00 was assessed in the second order. 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. Although there was an issue of whether the prior violation involved Petitioner, the nature of the violation, i.e. deducting monies and failing to make child support payments, to be willful and egregious so as to justify the imposition of 200% penalties.

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


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. Petitioner's testimony that all of his records were destroyed in a truck fire upon moving offices lacks credibility. He testified that he uses an accountant and he had the cancelled checks for the amounts which he paid Dutchess County on claimant's behalf, which contradicts his testimony that all records were destroyed.

INTEREST

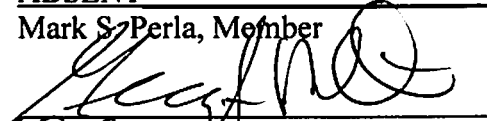
Labor Law § 219 provides that when the Commissioner determines that wages are due then the order directing payment shall include "interest at the rate of interest then in effect as prescribed by the superintendent of banks pursuant to fourteen-a of the banking law per annum from the date of the underpayment to the date of payment." Banking Law § 14-A sets the "maximum rate of interest" at "sixteen percent per centum per annum."

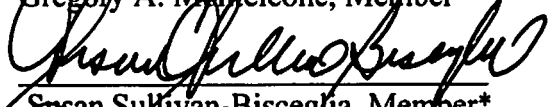
The foregoing constitutes our findings of fact and law pursuant to § 65.39 of the Board's Rules of Procedure and Practice (12 NYCRR 65.39).

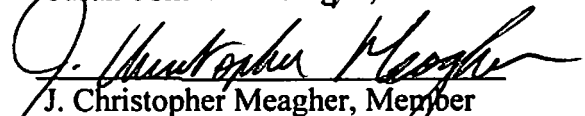
Let a Resolution of Decision issue accordingly.


Anne P. Stevason, Chairman

ABSENT
Mark S. Perla, Member


Gregory A. Manteleone, 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.