



STATE OF NEW YORK

UNEMPLOYMENT INSURANCE APPEAL BOARD

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DECISION OF THE BOARD

Mailed and Filed: NOVEMBER 13, 2020

IN THE MATTER OF:

Appeal Board No. 604350

PRESENT: JUNE F. O'NEILL, MEMBER

The Department of Labor issued the determinations holding BEACH CONVENIENCE STORE LT (hereinafter "Beach") liable for additional contributions, effective for the first quarter of 2014 to the first quarter of 2017 in the amount of \$6,741.03, and a 50% fraud penalty in the amount of \$3,370.51, based on estimated remuneration paid to employees in the audit. Beach objected and requested a hearing contending that there were fewer employees than the number included in the audit; and there was no fraudulent intent to avoid payment of contributions.

The Administrative Law Judge held hearings at which all parties were accorded a full opportunity to be heard and at which testimony was taken. There were appearances on behalf Beach and the Commissioner of Labor. By decision filed November 28, 2018 (), the Administrative Law Judge sustained Beach's objection and overruled the initial determinations.

The Commissioner of Labor appealed the Judge's decision to the Appeal Board, insofar as it overruled the initial determination holding Beach liable for additional contributions, effective for the first quarter of 2014 to the first quarter of 2017 in the amount of \$6,741.03, plus a 50 percent fraud penalty in the amount of \$3,370.51, based on estimated remuneration paid to employees in the audit. The Board considered the arguments contained in the written statements submitted on behalf of Beach and the Commissioner of Labor.

Based on the record and testimony in this case, the Board makes the following

FINDINGS OF FACT: Beach operates a grocery store and delicatessen that is open

24 hours a week, seven days a week. Beach does not keep time records for its' employees. Beach's owner writes down his employees' hours on a schedule and then, every two weeks, calls the hours into a payroll company.

Employees work three shifts; 6:00 am to 4:00 p.m., 4:00 pm to 11:00 pm and 11:00 pm to 6:00 am. The peak hours are from 11:00 am to 2:00 pm. Most employees work full-time, but there are also some part-time workers. Each shift has a manager. Employees can work overlapping shifts. Staff wages vary from minimum wage to \$15.00 an hour. Most staff are paid time and one-half for overtime. At least 13 employees are needed each day to cover the three shifts.

A Department of Labor auditor conducted a field audit on April 10, 2017 at Beach's premises at 3:30 pm. He observed that six employees working. He then met with a representative of Beach's accountant and was provided with the NYS-45 quarterly wage filings, payroll journals and W-2 filings for the audit period. Beach reported a total of 12 employees in 2014 and 2016; 10 employees in 2015; and 11 employees in 2017. Based on his observations during the field audit, the auditor estimated that Beach had underreported six employees for the years 2014, 2015, and 2016 and underreported seven employees for 2017.

OPINION: Under Labor Law § 575, an employer must keep true and accurate records of each person employed, which shall be open to inspection at any time and as often as necessary to verify the number of employees, the periods of their employment, and the amount of their remuneration. Under Labor Law § 571, the Commissioner shall determine the amount of contributions from such employer on the basis of such information as she may be able to obtain, in the event that an employer has failed to file a report or corrected report within twenty days after the Commissioner required the same by written notice. Under Labor Law § 570 (3), "An employer who fails to pay contributions required to be made by him to the fund shall pay interest at the rate of one per centum of the amount of such contributions for each month he is in default", and that the "interest shall be assessed, collected and paid as part of the payment required to be made by the employer to the fund." Under Labor Law § 570 (4), an employer is subject to a 50 percent fraud penalty of the total amount of the deficient contributions assessed, if any part of such "deficiency" is due to fraud with intent to avoid payments of contributions.

The credible evidence establishes that Beach underreported the number of its employees and the remuneration paid during the audit period. We reject Beach's contention that it employed only ten to twelve employees in its 24 hour a day, seven day a week business. In assessing credibility, we note that Beach did not dispute the auditor's observation that there were six employees on the shift during the audit on April 10, 2017. Beach's witness also initially testified that 13 employees are needed daily to cover the three shifts, before changing his testimony that only 10-11 employees worked per week. We note that the Beach initial testimony about the number of workers was inconsistent with the number of employees that Beach had actually reported for 2014-2017. It is undisputed that Beach failed to maintain and provide the necessary records to establish the number of employees working, their hours and the remuneration paid to them. In the absence of these records, based on the auditor's observation and Beach's lack of credibility, we find that the Commissioner had a reasonable basis to assess including six additional employees per 2014, 2015 and 2016 and seven additional employees during 2017.

The cases relied on by Beach, *Matter of Weakly*, 148 AD3d 1474 [3d Dept 2017], Appeal Board Nos. 576392, 574021, and 573161, are distinguishable, because those cases found the employer's testimony credible, whereas in the case at hand, Beach's testimony lacks credibility. As Beach underreported the number of workers during the audit period, and the remuneration paid to those workers, we conclude that Beach is liable for additional contributions for the first quarter of 2014 to the first quarter of 2017 in the amount of \$6,741.03.

The credible evidence also establishes that the fraud penalty was permissible. Significantly, as the Commissioner had found that the Beach had not properly reported the number of employees or remuneration paid to the employees sufficient to operate the business, the Commissioner could properly conclude that Beach knowingly intended to avoid payment of tax contributions (see *Matter of Body Electric Corporation of America*, 89 AD3d 1331 [3d Dept 2011]; *Matter of Mamash Restaurant Corp.*, 270 AD2d 723 [3d Dept 2000]). Accordingly, we further conclude that the fraud penalty was properly imposed.

DECISION: The decision of the Administrative Law Judge is reversed.

Beach's objection, that there were fewer employees than the number included in the audit; and there was no fraudulent intent to avoid payment of contributions, is overruled.

The determinations, holding liable for additional contributions, effective for the first quarter of 2014 to the first quarter of 2017 in the amount of \$6,741.03, plus a 50% fraud penalty in the amount of \$3,370.51, based on estimated remuneration paid to employees in the audit, are sustained.

JUNE F. O'NEILL, MEMBER