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**INDUSTRIAL BOARD OF APPEALS**

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STATE OF NEW YORK
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| In the Matter of the Petition of:<br><br>FRANBILT INC. AND/OR THOMAS J. BARNES AND/OR MICHAEL J. BURNS<br><br>Petitioners,<br><br>To review under Section 101 of the New York State Labor Law: An Order to Comply with Article 6 of the Labor Law, dated February 23, 2007<br><br>-against-<br><br>THE COMMISSIONER OF LABOR,<br><br>Respondent. | DOCKET NO. PR-07-019 |

INTERIM RESOLUTION OF DECISION

WHEREAS:

A single Petition for review in the above-captioned case was filed on behalf of all three petitioners with the Industrial Board of Appeals (Board) on April 20, 2007. Respondent Commissioner of Labor (Commissioner) filed an Answer as well as a Motion to Dismiss on May 10, 2007. Subsequently, Petitioner Michael J. Burns (Burns) entered a separate appearance while Petitioners Franbilt, Inc. and Thomas J. Barnes (Barnes) were collectively represented. Only Burns filed Opposition to the Motion to Dismiss.

Counsel that initially represented Petitioners Franbilt, Inc. and Barnes has withdrawn, and all of the Petitioners are proceeding *pro se.* Respondent is represented by Maria Colavito, Counsel to the Department of Labor (DOL), Jeffrey G. Shapiro of counsel.

The Order to Comply under review here was issued on February 23, 2007 and concerns Petitioners' failure to pay various workers for the period of January 8, 2007 through January 21, 2007 pursuant to Article 6 of the New York State Labor Law. The Order directs payment of unpaid wages in the amount of $85,972.27 as well as $1,119.37 in interest and $171,944.54 in civil penalty.

Briefly, the Petition alleges that the Order is invalid or unreasonable because the failure to pay employees is attributable to the misrepresentations, guarantees and ultimate breach of contract of a co-contractor. In addition, the Petition alleges that neither Barnes nor Burns were employers.

The Commissioner's Motion to Dismiss argues, *inter alia*, that the facts set forth in the Petition, even if true, do not provide a legal basis to excuse Petitioners' failure to pay wages to employees. The Petition admits that the Franbilt employees were not paid the wages due and owing, but alleges that the non-payment was not Petitioners fault. Respondent argues that although the co-contractor may have some liability, that liability does not relieve Petitioners of any obligation to see that their employees are paid. The Commissioner's Motion to Dismiss the Petition as to Barnes and Burns argues that the Petition's allegations that these two individuals are not employers is a conclusion of fact and law which under Board Rule § 66.3(e) is improper.

Burns' opposition to the motion is limited to the assertion that he is individually liable as an employer. He seeks a review of the reasonableness and validity of only his classification as an employer as defined in Labor Law § 190.3.

Standard of Review

In general, 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).

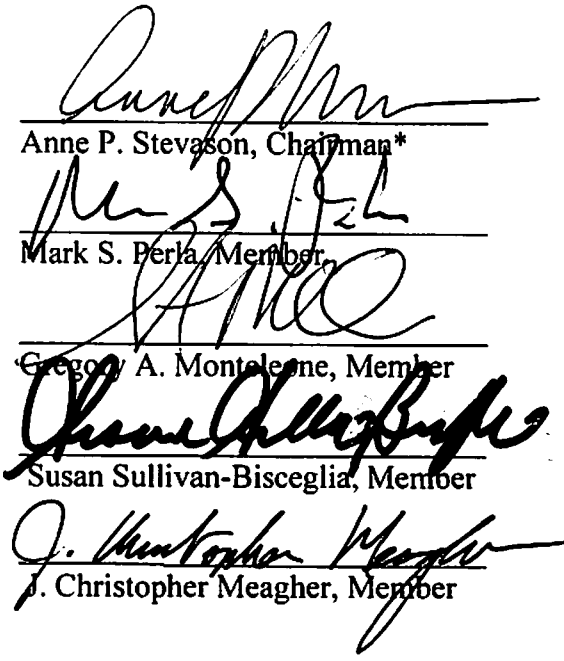
Petitioner Franbilt, Inc. admits throughout the Petition that it failed to pay various workers for the period of January 8, 2007 through January 21, and does not dispute the validity or reasonableness of the Order. Franbilt instead attempts to raise as a defense the alleged misrepresentations, guarantees and contractual breaches of a third party. This defense must fail as a matter of law, because even if we consider the pleadings in the light most favorable to Franbilt, as we must, it has raised no valid objection to the reasonableness or validity of the Order. It is well settled that an employee may have more than one employer (*see e.g. Zheng v Liberty Apparel Co., Inc.*, 355 F.3d 61 [2nd Cir. 2003]). Therefore, even if a party that was not named in the Order is a joint-employer of the unpaid employees, Franbilt remains liable for the unpaid wages under Labor Law § 191, and the Petition must be dismissed with respect to the corporate Petitioner for its failure to contest the reasonableness or validity of the Order (*see* 12 NYCRR § 65.49; *see also* 12 NYCRR § 66.3[e]).

As to the individual Petitioners Burns and Barnes, we find that the Petition contests the validity or reasonableness of the Order with respect to their inclusion as "employers" under

Article 6 of the Labor Law. Accordingly, the Motion to Dismiss is denied with respect to the individual Petitioners.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

The Commissioner's Motion to Dismiss the petition as to the Petitioner Franbilt, Inc., be, and hereby is, granted. In all other respects the Motion is denied.



Anne P. Stevason, Chairman*

Mark S. Perla, Member

Gregory A. Montelenne, Member

Susan Sullivan-Bisceglia, Member

J. Christopher Meagher, Member

Dated and Signed in the Office of the Industrial Board of Appeals, at New York, New York, on January 23, 2008.

Filed in the Office of the Industrial Board of Appeals at Albany, New York, on January 28, 2008.