BEFORE THE ARKANSAS DEPARTMENT OF LABOR

ARKANSAS DEPARTMENT OF LABOR

vs. **CASE NO. WH2007-003**

ARKANSAS ARKY BARKY, INC.

ORDER

Upon Motion of the Arkansas Department of Labor herin request this matter be dismissed without prejudice.

IT IS SO ORDERED this matter is dismissed without prejudice.

James L. Salkeld
Director of Labor

BY:_____
C.J. ACKLIN
ADMINISTRATIVE LAW JUDGE

DATE:_____

Approved as to form:

_____
Daniel Knox Faulkner
Attorney for Arkansas Department of Labor

BEFORE THE ARKANSAS DEPARTMENT OF LABOR

SUZANNE WHITTINGTON **CLAIMANT**

VS. **CASE NO. 2007-060005**

SUPHAN MEDICAL CLINIC **RESPONDENT**

ORDER

This matter comes for hearing on this Friday, January 4, 2008 at 10:00 a.m. in the offices of the Arkansas Department of Labor. Neither party has appeared for the hearing. The claimant in this matter carries the burden of proof and her appearance is necessary to prevail.

THEREFORE, this matter is hereby dismissed without prejudice.

_____

C. J. ACKLIN
ADMINISTRATIVE LAW JUDGE

DATE:_____

BEFORE THE ARKANSAS DEPARTMENT OF LABOR

MIKE WALL

vs. **CASE NO. 2007060035**

THE BOY NEXT DOOR LAWN CARE

ORDER

This matter comes for hearing on this Monday, February 4, 2008 at 11:00 a.m. in the offices of the Arkansas Department of Labor. Neither party has appeared for the hearing. The Claimant in this matter carries the burden of proof and his appearance is necessary to prevail.

THEREFORE, this matter is hereby dismissed without prejudice.

IT IS SO ORDERED.

James L. Salkeld
Director of Labor

BY:_____
C.J. ACKLIN
ADMINISTRATIVE LAW JUDGE

DATE:_____

BEFORE THE ARKANSAS DEPARTMENT OF LABOR

MICHAEL THOMAS **CLAIMANT**

vs. **CASE NO. 2007030014**

NEVADA COUNTY SHERIFF **RESPONDENT**

ORDER

This matter came before the Arkansas Department of Labor on Friday, March 7, 2008. The hearing was conducted by telephone by agreement of the parties in consideration of the travel distance to the Department of Labor location in Little Rock and the inclement weather. Michael Thomas has appealed an agency finding that no unpaid wages are due to him. Thomas appeared by telephone on his own behalf. The Nevada County Sheriff's office was represented by Sheriff Bobby Carlton, who also appeared by telephone.

FINDINGS OF FACT

Michael Thomas, employee, filed a wage claim with the Labor Standards Division of the Arkansas Department of Labor on March 12, 2007. He claimed sixty-four dollars and eighty cents ($64.80) in underpaid wages earned during his shift spanning between the evening of October 26, 2006, and the morning of October 27, 2006. The Labor Standards Division, after an investigation, issued a Preliminary Wage Determination Order on May 21, 2007 finding that Thomas was owed no wages. Thomas filed an appeal of this finding on May 24, 2007.

Mr. Thomas testified that he began his employment with the Nevada County Sheriff on or about August 19, 2005. His employment was terminated on October 28, 2006. Prior to the hearing, Mr. Thomas submitted a paycheck stub dated October 26, 2006 for gross pay of six hundred forty-eight dollars ($648.00). He testified that he received this check on the night of October 26, 2007, which was his last date worked. Subsequent to the hearing, Mr. Thomas

produced an additional paycheck stub dated August 26, 2005 for gross pay of six hundred forty-eight dollars ($648.00). Mr. Thomas indicated that this check was his first paycheck that he received after he began working at the Nevada County Sheriff (August 19, 2005).

Sheriff Carlton testified that Nevada County employees are paid on or about the first and fifteenth day of each month, but that the checks are usually issued a few days early. He submitted a spreadsheet obtained through the Nevada County Payroll Clerk showing payments issued to Mr. Thomas beginning on August 26, 2005 and continuing through October 26, 2006. He testified that Mr. Thomas was on a gross salary of six hundred forty-eight dollars ($648.00) per pay period. The spreadsheet shows two payments issued per month. Sheriff Carlton indicated that the check issued to Mr. Thomas on August 26, 2005 was for the September 1, 2005 pay schedule and was payment for work performed during the last two weeks of August. The paychecks continue with one check issued a few days prior to the fifteenth of the month, and a second check issued a few days prior to the first of the following month. Sheriff Carlton testified that the check issued to Mr. Thomas on October 26, 2006 was the payment for the November 1, 2006 pay day. The record indicates that this paycheck issued was for Mr. Thomas' full gross salary amount of six hundred forty-eight dollars ($648.00).

It is clear from the record and testimony that Mr. Thomas was issued his first paycheck from the Nevada County Sheriff on August 26, 2005, and that payments commenced on an approximate schedule of every two weeks thereafter. His final two paychecks were issued on October 12, 2006 and October 26, 2006. The testimony and evidence which was produced also support that these checks were the payroll payments that were due on October 15 and November 1, and that they were each for two weeks of pay for the month of October.

CONCLUSIONS OF LAW

1. Upon application of either an employer or employee, the Director of the Department of Labor or any person authorized by the director shall have authority to inquire into, hear, and decide disputes arising from wages earned and shall allow or reject any deduction from wages. Ark. Code Ann. 11-4-303(a).

2. After final hearing by the director or person appointed by him, a copy of findings and facts and any award shall be filed in the office of the Department of Labor. Ark. Code Ann. 11-4-303(b).

3. The amount of the award of the director shall be presumed to be the amount of wages, if any, due and unpaid to the employee. Ark. Code Ann. 1-4-303(c).

4. The wage claimant carries the burden of proof for any claim of unpaid wages.

5. The employer carries the burden of proof for any set-off or affirmative defense.

6. In the present case, the documents in the record indicate that Mr. Thomas was discharged prior to the end of the month; however, his full salary was paid through October 31, 2006. The pattern of pay from initial employment to discharge, along with the testimony and evidence presented, shows Mr. Thomas is not owed any wages.

THERFORE, IT IS CONSIDERED AND ORDERD that the Claimant is due no additional wages for the date claimed of October 26, 2006, and October 27, 2006.

James L. Salkeld
Director of Labor

BY: _____
C.J. Acklin, Administrative Law Judge
Arkansas Department of Labor
10421 West Markham
Little Rock, AR 72205

DATE:_____

BEFORE THE ARKANSAS DEPARTMENT OF LABOR

DONNIE QUALLS

vs. **CASE NO. 2007070044**

BILLY DALE CLARK

ORDER

On the 6th day of February, 2008, the Court considered the request for continuance made on February 5, 2008 by Claimant in the above cause. The Court finds that the request for continuance was not made timely, nor with just cause. Therefore, the Court is of the opinion that the request shall be denied. The Claimant has stated that he is unable to attend his hearing on this date. As the matter has not been continued and the Claimant is unable to attend his hearing, this matter is hereby dismissed without prejudice.

IT IS SO ORDERED.

James L. Salkeld
Director of Labor

BY:_____
C.J. ACKLIN
ADMINISTRATIVE LAW JUDGE

DATE:_____

BEFORE THE ARKANSAS DEPARTMENT OF LABOR

CAROLYN FAIRMON

V. **WAGE CLAIM NO.: 2007040028**

CLEAN TEAM JANITORIAL SERVICES

ORDER

This matter came before the Arkansas Department of Labor on Friday, January 4, 2008. Clean Team Janitorial Services, Inc. has appealed any agency order that eight hundred sixty-five dollars ($865.00) in unpaid wages is owed to Carolyn Fairmon ("Fairmon"). Fairmon appeared on her own behalf. Clean Team Janitorial Services was represented by owner, Sharia Harris ("Harris"). Lee Carroll ("Carroll") testified for Fairmon.

FINDINGS OF FACT

Fairmon filed a wage claim with the Labor Standards Division of the Arkansas Department of Labor on March 30, 2007. She claimed eight hundred and sixty-five dollars ($865.00) in unpaid wages earned between October 25, 2006 and December 4, 2006. After investigation, the Labor Standards Division issued a Preliminary Wage Determination Order on May 31, 2007, finding that Fairmon is owed the full amount of her claim. Harris filed an appeal of this finding June 12, 2007.

At the hearing, Fairmon and Harris presented seven (7) check stubs that indicate payment of wages from October 28, 2006 to January 19, 2007 and January 23, 2007 to February 2, 2007. Harris was unable to produce cancelled checks as proof of payment, but Fairmon testified that all the check stubs in question were paid in cash. Both parties agreed that each amount was tendered and received by Fairmon.

Harris presented payroll information in the form of sign in sheets. Fairmon presented no evidence that these sheets were inaccurate. While there were six (6) days that the hours worked were "corrected" to reflect actual hours worked, Harris testified that the corrections actually were not deducted from Fairmon's pay.

CONCLUSIONS OF LAW

The evidence as established by the record and by witness testimony shows that the wage claimant has been paid in full for all hours worked. Harris could not show the amounts were actually paid with the check stubs. Without a receipt for cash paid, Harris would have been in peril of failure to show payment, but Fairmon's testimony that she received all amounts in cash established that all wages were paid. It appears that the long delay from initial employment until the first check gave Fairmon the impression that she had not been paid for a number of hours worked. However, from the evidence pretended, is appears that all wages have been paid. Therefore, this court finds that Fairmon is owed no unpaid wages from Harris.

This order is issued this 14th day of January 2008.

_____

C.J. Acklin
Administrative Law Judge

BEFORE THE ARKANSAS DEPARTMENT OF LABOR

CARLA EDWARDS **CLAIMANT**

VS. **CASE NO. 2007-040010**

FURLOW DAIRY BAR **RESPONDENT**

ORDER

This matter comes for hearing on this Friday, January 4, 2008 at 11:00 a.m. in the offices of the Arkansas Department of Labor. Neither party has appeared for the hearing. The claimant in this matter carries the burden of proof and her appearance is necessary to prevail.

THEREFORE, this matter is hereby dismissed without prejudice.

_____

C. J. ACKLIN
ADMINISTRATIVE LAW JUDGE

DATE:_____

BEFORE THE ARKANSAS DEPARTMENT OF LABOR

PHILLIP DURHAM **CLAIMANT**

vs. **CASE NO. 200710032**

CRAIN AUTOMOTIVE GROUP **RESPONDENT**

ORDER

This matter came before the Arkansas Department of Labor on Wednesday, April 2, 2008. Mr. Phillip Durham appealed any agency order that no wages were due to him. Mr. Durham appeared on his own behalf. Crain Automotive did not appear.

FINDINGS OF FACT

Durham filed a wage claim with the Labor Standards Division of the Arkansas Department of Labor on October 16, 2007. He claimed seven hundred and fifty dollars ($750.00) in unpaid commissions earned during his employment, spanning from May 13, 2007 through June 2, 2007. After investigation, the Labor Standards Division issued a Preliminary Wage Determination Order on January 25, 2008, finding that Durham was owed no wages. Mr. Durham filed an appeal of this finding on January 29. 2008.

The hearing, scheduled for 9:00 a.m., convened at approximately 9:30 a.m., the Claimant appeared, and the Respondent, appeared not, having had due notice served upon them via certified mail, article number 71809594013140000190 delivered and accepted on February 6, 2008. Therefore, judgement is entered for the Claimant in the amount of seven hundred fifty dollars ($750.00). The Respondent is directed to issue a check payable to Mr. Durham in the

amount of seven hundred fifty dollars ($750.00) within ten (10) days of the receipt of this Order and mailed to the Department of Labor.

IT IS SO ORDERED.

James L. Salkeld
Director of Labor

BY:_____
C.J. ACKLIN
ADMINISTRATIVE LAW JUDGE
Arkansas Department of Labor
10421 West Markham
Little Rock, AR 72205

DATE:_____

BEFORE THE ARKANSAS DEPARTMENT OF LABOR

CHAD DAULTON **CLAIMANT**

vs. **CASE NO. 2007070037**

GATERS RESTAURANT & SPORTS BAR **RESPONDENT**

ORDER

This matter came before the Arkansas Department of Labor on Monday, February 4, 2008. Gaters Restaurant and Sports Bar has issued payment in the amount of one hundred fourty-six dollars ($146.00), less taxes, for a final amount of one hundred thirty-two dollars and ninety-one cents ($132.91), but has appealed any agency order that additional wages in the amount of four hundred sixty-two dollars ($462.00) are due to Chad Daulton. Daulton appeared on his own behalf. Gaters Restaurant and Sports Bar did not appear.

FINDINGS OF FACT

Daulton filed a wage claim with the Labor Standards Division of the Arkansas Department of Labor on July 25, 2007. He claimed six hundred and eight dollars ($608.00) in unpaid wages earned between May 13, 2007 and May 27, 2007. Gaters Restaurant and Sports Bar issued a check in the amount of one hundred thirty-two dollars and ninety-one cents ($132.91), which represents one hundred fourty-six dollars ($146.00) less withholdings on August 28, 2007. After investigation, the Labor Standards Division issued a Preliminary Wage Determination Order on September 17, 2007, finding that Daulton is owed the full amount of his claim. Gaters Restaurant and Sports Bar filed an appeal of this finding on October 2, 2007.

A representative from Gaters Restaurant and Sports Bar contacted the office of the Department of Labor at 9:58 a.m. on February 4, 2008, stating that he was unable to attend the hearing and would allow judgement to enter. The hearing convened as planned at approximately

10:05 a.m., the Claimant appeared, and the Respondent, appeared not. Therefore, judgement is entered for the Claimant in the amount of six hundred eight dollars ($608.00) minus one hundred fourty-six dollars ($146.00) for the remaining balance of four hundred sixty-two dollars ($462.00). The Labor Standards Division is directed to release the check dated August 28, 2007 in the amount of one hundred thirty-two dollars and ninety-one cents ($132.91) to the Claimant. The Respondent is directed to issue a check payable to Mr. Daulton in the amount of four hundred sixty-two dollars ($462.00) within ten (10) days of the receipt of this Order and mailed to the Department of Labor.

IT IS SO ORDERED.

James L. Salkeld
Director of Labor

BY:_____
C.J. ACKLIN
ADMINISTRATIVE LAW JUDGE
Arkansas Department of Labor
10421 West Markham
Little Rock, AR 72205

DATE:_____

BEFORE THE ARKANSAS DEPARTMENT OF LABOR

RUBY CLARK **CLAIMANT**

vs. **CASE NO. 2007-070031**

JACKSON HEWITT **RESPONDENT**

ORDER

This matter comes for hearing on this Friday, January 4, 2008 at 3:00 p.m. in the offices of the Arkansas Department of Labor. Neither party has appeared after being duly notified of the hearing. The Claimant in this matter carries the burden of proof and her appearance is necessary to prevail.

THEREFORE, this matter is hereby dismissed without prejudice.

James L. Salkeld
Director of Labor

BY:_____
C.J. ACKLIN
ADMINISTRATIVE LAW JUDGE

DATE: 1/4/2008

BEFORE THE ARKANSAS DEPARTMENT OF LABOR

WILLIAM BAZINET

vs. **CASE NO. 2007070018**

LEAD MANAGEMENT GROUP

ORDER

On the 5th day of February, 2008, the Court considered the verbal request of the Claimant made on Thursday, January 31, 2008 to dismiss his case. The Claimant in this matter carries the burden of proof. His will to pursue this matter, as well as his appearance, is necessary to prevail. As the Claimant has voiced his request for his case to be dismissed, the Court is of the opinion that the request shall be granted.

THEREFORE, this matter is hereby dismissed without prejudice.

IT IS SO ORDERED.

James L. Salkeld
Director of Labor

BY:_____
C.J. ACKLIN
ADMINISTRATIVE LAW JUDGE

DATE:_____

BEFORE THE ARKANSAS DEPARTMENT OF LABOR

ARKANSAS OCCUPATIONAL SAFETY & HEALTH DIVISION **AGENCY**

vs. **CASE NO. AOSH2007-001**

LLOYD CHOATE, JR., individually and dba STAR AMUSEMENT **RESPONDENT**

ORDER

This matter came before the Arkansas Department of Labor on Friday, March 21, 2008. The parties have agreed to stipulate that the facts surrounding the case are correct and that a violation exists. However, Lloyd Choate, Jr., individually and dba Star Amusement (hereafter referred to as "Star Amusement) has appealed the levity of penalty assessed by the Arkansas Occupational Safety and Health (hereafter referred to as "AOSH") Division of the Arkansas Department of Labor (hereafter referred to as "The Agency") as a result of this violation. The Agency was represented by the Honorable Denise Oxley. Star Amusement was represented by the Honorable James Clouette. Kevin Looney and Richard Steward testified for the Agency. Agency exhibit number one, which is a complete copy of the accident investigation conducted regarding the accident referenced below, was offered and accepted into the record.

FINDINGS OF FACT

Star Amusement is a company who owns and operates amusement rides in the State of Arkansas. On June 17, 2007, Star Amusement was operating rides, including a ride known as "The Wipeout" in a parking lot near the intersection of Asher and University Avenue in Little Rock. The Wipeout is mounted on a single trailer and is designed with "tubs" that are mounted on the frame. The frame rotates and is operated with a hydraulic lift system. At approximately

9:00 p.m. on June 17, 2007, an 11-year old boy, who was accompanied on the ride by a friend of his mother's, sustained an injury while riding the Wipeout. Specifically, he fractured his arm after falling from the ride. The boy was treated at Arkansas Children's Hospital in Little Rock. The accident was reported to the Agency at approximately 10:12 p.m. on June 17, 2007, and the Agency began an investigation the following day. The investigation was conducted by Kevin Looney. Mr. Looney testified that he is a Safety and Health Specialist with the AOSH Division of the Agency. Mr. Looney holds a Bachelors and a Masters degree from the University of Arkansas, as well as a Level II Certification from the National Association of Amusement Ride Safety Officials. During the course of Mr. Looney's investigation, it was discovered that the manufacturer of the Wipeout, Chance Rides Manufacturing, Inc., had issued service bulletin number B402CRM109-0 on December 20, 2002. (*See Exhibit 1, page 217.)* This bulletin states that "a passenger can move into an unsafe position in the seat after the lap bar is closed and locked" and the possibility of injury to passengers and bystanders exists. The bulletin indicates required action consisting of installation of a lap belt kit. Subsequent to the discovery of the service bulletin, it was confirmed with the manufacturer that Star Amusement had been provided a copy of the bulletin, and one of the two types of lap belt kits offered had been shipped to them. After it was discovered that a service bulletin had been issued, Agency employee and Chief Inspector Mike Watson discussed the matter by telephone with Mr. Lloyd Choate, Jr., the manager of Star Amusement. Mr. Watson was able to confirm that Star Amusement had received the bulletin and the lap belts to comply with the bulletin, but that Mr. Choate said they "just hadn't put them on." *(See Exhibit 1, page 3.)* A photo of the ride seat taken on June 18, 2007 confirms that the lap belts were not in place. *(See Exhibit 1, page 148.)* After it was discovered that Star Amusement failed to comply with the issued service bulletin, the Agency cited Star

Amusement with a violation of the Administrative Regulations of the Arkansas Amusement Ride and Amusement Attraction Safety Insurance Act. A copy of a letter dated September 4, 2007 from Richard Steward is on record, indicating that Star Amusement was assessed a penalty of ten thousand dollars ($10,000.00) pursuant to Ark. Code Ann. § 23-89-504(c) and § 23-89-505(d). Star Amusement has appealed this penalty and this hearing was held as a result that appeal.

Ms. Oxley, during the hearing, clarified that Star Amusement was in violation of Regulation 3, Section 3.1(h), which states:

> Regulation 3. Adopted Codes and Standards
>
> 3.1 The Department hereby adopts and incorporates the following minimum safety standards for manufacture, design and operation of amusement rides and attractions existing as of the effective date of these regulations:
>
> (h) Manufacturer's specifications for each amusement ride or attraction and subsequent updates and bulletins in reference to that ride or attraction.

Richard Steward testified on behalf of the Agency. He stated that his title was Program Support Manager with the Arkansas Department of Labor. He testified that he supervises the amusement ride inspectors and that he bears the overall responsibility of the Amusement Ride Inspection program. He stated that one of his job duties is to decide the amount of the penalty to be assessed when a violation is found. Mr. Steward's testimony was that penalties are assessed in accordance with Regulation 12.2, Administrative Penalty Assessment. *(See Exhibit 1, page 174-175.)* Mr. Steward stated that the penalties are based on a Fine Schedule, but that the Schedule is a guideline and the actual assessment of fines is discretionary. Mr. Steward further stated that the general criteria that are considered when deciding a penalty amount are found in Rule 12.2, Section d. Mr. Steward testified that his decision to assess the maximum penalty

amount of ten thousand dollars ($10,000.00) was most specifically based on Section d, Item 1, which states the criteria of "the likelihood of injury and the seriousness of the potential injuries to the public."

Ms. Oxley's closing argument summarizes that there are no factual disputes in this case, nor is there a dispute regarding Star Amusement's cooperation with the Agency's investigation after the accident. She argued that the owner/operator of the amusement ride has the duty to comply with service bulletins issued by manufacturers, and that the bulletin issued in this case was very clear regarding the necessity of the installation of the seat belts.

CONCLUSIONS OF LAW

Star Amusement is in violation of Regulation 3, Section 3.1(h) as stipulated, and as shown from the testimony and record. The act of not installing the seat belts pursuant to bulletin number B402CRM109-0 of December 20, 2002 is sufficient to support the conclusion that Star Amusement violated Regulation 3, Section 3.1(h). Star Amusement admits this failure.

Regulation 12.2 and 12.3 address the considerations to be applied in assessing the penalty. The parties agree that 12.3(d) is instructive and not limited to only those items listed. Star Amusement's efforts to cooperate with the Agency after the accident is a mitigating factor. Therefore the penalty as imposed by the Department is set aside and shall be imposed by the A.L.J. as $7,500.00.

THEREFORE, IT IS CONSIDERED AND ORDERED that Star Amusement is in violation as described above and is directed to pay an administrative penalty of $7,500.00.

James L. Salkeld
Director of Labor

BY:_____
C.J. Acklin, Administrative Law Judge
Arkansas Department of Labor
10421 West Markham
Little Rock, AR 72205

DATE:_____

BEFORE THE ARKANSAS DEPARTMENT OF LABOR

TAMEKIA ANDERSON **CLAIMANT**

vs. **CASE NO. 2007080015**

CP TRANSPORTATION **RESPONDENT**

ORDER

This matter came before the Arkansas Department of Labor on Wednesday, February 6, 2008. CP Transportation has appealed any agency order that six hundred thirty-seven dollars and fifty cents ($637.50) in unpaid wages is owed to Tamekia Anderson. Anderson appeared on her own behalf. CP Transportation did not appear.

FINDINGS OF FACT

Anderson filed a wage claim with the Labor Standards Division of the Arkansas Department of Labor on August 6, 2007. She claimed six hundred eleven dollars and forty-two cents ($611.42) in unpaid wages earned between July 16, 2007 and July 31, 2007. After investigation, the Labor Standards Division issued a Preliminary Wage Determination Order on October 16, 2007, finding that Anderson is owed six hundred thirty-seven dollars and fifty cents ($637.50). CP Transportation filed an appeal of this finding on November 15, 2007.

The hearing was set for 11:00 a.m. The hearing convened at approximately 11:15 a.m. The Claimant appeared, and the Respondent, appeared not. Therefore, judgement is entered for the Claimant in the amount of six hundred thirty-seven dollars and fifty cents ($637.50). The Respondent is directed to issue a check payable to Ms. Anderson in the amount of six hundred thirty-seven dollars and fifty cents ($637.50) within ten (10) days of the receipt of this Order and mailed to the Department of Labor.

IT IS SO ORDERED.

James L. Salkeld
Director of Labor

BY:_____
C.J. ACKLIN
ADMINISTRATIVE LAW JUDGE
Arkansas Department of Labor
10421 West Markham
Little Rock, AR 72205

DATE:_____

BEFORE THE ARKANSAS DEPARTMENT OF LABOR

GLEN ALAN AMBROSE

vs. **CASE NO. 2007090027**

MATLOCK & SONS, INC.

ORDER

This matter came for hearing on Tuesday, February 19, 2008 in the offices of the Arkansas Department of Labor. The hearing was set for 10:00 a.m. The hearing convened at approximately 10:15 a.m. The Respondent appeared and was represented by his attorney, the Honorable R. Chris Parks. The Claimant appeared not. Considerable efforts were made to reach the Claimant to no avail. Furthermore, as of this date, the Arkansas Department of Labor has not been contacted by the Claimant in regards to his failure to appear.

THEREFORE, this matter is hereby dismissed with prejudice.

IT IS SO ORDERED.

James L. Salkeld
Director of Labor

BY:_____
C.J. ACKLIN
ADMINISTRATIVE LAW JUDGE

DATE:_____

BEFORE THE ARKANSAS DEPARTMENT OF LABOR

PAMELA WILLIAMS **CLAIMANT**

vs. **CASE NO. 2007100043**

FERGUSON INTERNATIONAL, INC. **RESPONDENT**

ORDER

This matter came before the Arkansas Department of Labor on Wednesday, February 6, 2008. Pamela Williams has appealed an agency finding that no unpaid wages are due to her. Williams appeared on her own behalf. Ferguson International, Inc. was represented by a supervisor, Ms. Sandra Ham. Rena Piggee and Rachel Harris testified for Williams.

FINDINGS OF FACT

Ferguson International, Inc. is a company who provides security services for third parties. Pamela Williams, employee, filed a wage claim with the Labor Standards Division of the Arkansas Department of Labor on October 18, 2007. She claimed five hundred eighty-two dollars and eighty cents ($582.80) in underpaid wages earned between September 16, 2007 and September 29, 2007. The Labor Standards Division, after an investigation, issued a Preliminary Wage Determination Order on December 6, 2007 finding that Williams was owed no wages. Williams filed an appeal of this finding on December 14, 2007.

Prior to the hearing, Ms. Williams submitted information and documentation which includes, among other items, a form titled "payroll change/correction" dated July 21, 2006 which shows that Ms. Williams was promoted to the position of Assistant Supervisor, and that her rate of pay was adjusted from $8.69 per hour to $9.25 per hour. Williams produced six (6) check stubs to show the record of her pay rate from May 13, 2007 through September 29, 2007. The

stub dated June 1, 2007 indicates that Ms. Williams' rate of pay was adjusted from $9.25 per hour to $12.00 per hour for the pay period beginning May 13, 2007. The base wage of $12.00 per hour continues until the check stub dated October 5, 2007, which indicates that her hourly rate was changed from $12.00 per hour to $8.24 per hour. Both parties agreed that an oral agreement was made between Ms. Williams and Ferguson International in May of 2007 which provided that Ms. Williams would act in a temporary supervisory capacity at the rate of $12.00 per hour. Both parties further agreed that the permanent supervisor, Ms. Ham, was hired on or about July 31, 2007.

It is clear from the record and testimony that Ms. Williams was made an Assistant Supervisor at the rate of $9.25 per hour on July 21, 2006. The testimony and evidence which was produced also support that an oral agreement was made between Ferguson International and Ms. Williams that she would be acting in a supervisory capacity at a rate of $12.00 per hour. In reviewing the record and testimony, it appears that she continued to earn $12.00 per hour until the contested date of September 16, 2007. The testimony of Ham is that Williams' rate of pay was reduced to $8.24 per hour, but subsequently adjusted back to her previous rate of pay of $9.25 per hour, and that Ms. Williams was compensated for the discrepancy between her adjusted rate of $8.24 per hour and $9.25 per hour. The Claimant agrees. A differential payment for this discrepancy was made in the amount of $156.30 on or about October 30, 2007. Testimony from Ms. Ham indicated that the position of Assistant Supervisor does not exist at the site where Ms. Williams is assigned. However, she was unable to produce the payroll change/correction form for the September 2007 change of Ms. Williams' rate of pay or status change. The Claimant, Ms. Williams, had previously submitted the payroll change/correction form from July of 2006. She further produced, at the hearing, an additional form from May 23,

2006 which documents her prior position change from shift leader. These are the forms used by Ferguson to show status and rate. No form was produced to show where Ms. Williams was made an acting supervisor, nor was a form produced to show where she was demoted back to shift leader. According to the Ferguson company documents that are in the record, she was made an Assistant Supervisor in September 2006, and no documents exist to show that her current status is contrary to such.

CONCLUSIONS OF LAW

1. Upon application of either an employer or employee, the Director of the Department of Labor or any person authorized by the director shall have authority to inquire into, hear, and decide disputes arising from wages earned and shall allow or reject any deduction from wages. Ark. Code Ann. 11-4-303(a).

2. After final hearing by the director or person appointed by him, a copy of findings and facts and any award shall be filed in the office of the Department of Labor. Ark. Code Ann. 11-4-303(b).

3. The amount of the award of the director shall be presumed to be the amount of wages, if any, due and unpaid to the employee. Ark. Code Ann. 1-4-303(c).

4. The wage claimant carries the burden of proof for any claim of unpaid wages.

5. The employer carries the burden of proof for any set-off or affirmative defense.

6. In the present case, the documents in the record indicate that the position of Assistant Supervisor at Ferguson International is compensated at a rate of $9.25 per hour. Evidence and testimony support the conclusion that Ms. Williams became an Assistant Supervisor at such rate. Evidence and testimony also support the conclusion that the parties entered into a verbal agreement which made Ms. Williams a temporary acting supervisor for which she received a

temporary wage increase to $12.00 per hour. Evidence and testimony further support the conclusion that Ms. Williams pay was continued at that rate until she was notified of the change September 16, 2007. She remained at the status of an Assistant Supervisor at the rate of $9.25 per hour after September 16, 2007, at which time she was told that she was no longer acting in the capacity of a Supervisor and that her pay rate of $12.00 per hour would be reduced. It is agreed that Ms. Williams was reduced to $8.24 per hour but was subsequently adjusted to $9.25 per hour, and compensated for that discrepancy. Based upon the evidence and testimony, Ms. Williams is an Assistant Supervisor making $9.25 dollars per hour who, for a period of time, made $12.00 per hour and was an acting Supervisor.

THERFORE, IT IS CONSIDERED AND ORDERD that the Claimant is due no additional wages for the period claimed of September 16, 2007 through September 29, 2007.

James L. Salkeld
Director of Labor

BY:_____
C.J. Acklin, Administrative Law Judge
Arkansas Department of Labor
10421 West Markham
Little Rock, AR 72205

DATE:_____

BEFORE THE ARKANSAS DEPARTMENT OF LABOR

LABOR STANDARDS DIVISION — AGENCY

VS. — CASE NO. WH2007-006

SONIC DRIVE-IN OF POCAHONTAS, INC. — RESPONDENT

ORDER

This matter comes before the Director of Labor, State of Arkansas on an assessment for back wages and a civil money penalty assessment for violations of Arkansas' Minimum Wage Act, Ark. Code Ann. § 11-4-201 *et seq.* and regulations adopted pursuant thereto. The parties have reached a satisfactory settlement of the issues in this matter. The matter is dismissed with prejudice.

IT IS SO ORDERED.

C. J. ACKLIN 05/23/08
ADMINISTRATIVE LAW JUDGE

Approved:

Denise P. Oxley, 84-117
Attorney for Agency
Arkansas Department of Labor
10421 W. Markham St.
Little Rock, AR 72205
(501) 682-4502

Mike Cone
Attorney for Respondent
Lyons, Emerson & Cone, PLC
407 South Main Street
P. O. Box 7044
Jonesboro, AR 72403-7044

BEFORE THE ARKANSAS DEPARTMENT OF LABOR

ARKANSAS DEPARTMENT OF LABOR

VS. CASE NO. WH2007-001

GEORGE NERHAN INDIVIDUALLY AND DOING
BUSINESS AS HERITAGE HOUSE LLC

ORDER

The parties having reached a settlement agreement, this matter is hereby dismissed **with prejudice against** George Nerhan individually and doing business as Heritage House LLC.

IT IS SO ORDERED this matter is dismissed with prejudice.

C. J. ACKLIN
ADMINISTRATIVE LAW JUDGE

DATE: 05/23/08

APPROVED BY:

Daniel Knox Faulkner, AR Bar #2002-168
Attorney for Arkansas Department of Labor

Mark J. Riable
Attorney for George Nerhan individually
and doing business as Heritage House LLC

BEFORE THE ARKANSAS DEPARTMENT OF LABOR

JACK SAMPSON

vs. **CASE NO. 2008010021**

J.L. WEIR

ORDER

This matter came for hearing on Friday, May 23, 2008 in the offices of the Arkansas Department of Labor. The hearing was set for 1:00 p.m. The hearing convened at approximately 1:20 p.m. The Respondent appeared, the Claimant appeared not. As of this date, the Arkansas Department of Labor has not been contacted by the Claimant in regards to his failure to appear.

THEREFORE, this matter is hereby dismissed with prejudice.

IT IS SO ORDERED.

James L. Salkeld
Director of Labor

BY:_____
C.J. ACKLIN
ADMINISTRATIVE LAW JUDGE

DATE:_____

BEFORE THE ARKANSAS DEPARTMENT OF LABOR

JEFF MASON

vs. **CASE NO. 2007060049**

THE BOY NEXT DOOR LAWN CARE

ORDER

The record in this case indicates that the case was originally set for hearing on January 25, 2008 and subsequently continued due to transportation difficulties of the Claimant. The second setting of this case for March 7, 2008 was continued due to inclement weather. This matter was reset for final hearing on this Friday, May 23, 2008 at the offices of the Arkansas Department of Labor. Both parties were duly notified of the resetting via certified mail with return receipt requested, along via regular mail, to the permanent addresses listed in the file. The hearing was set for 10:00 a.m. The hearing convened at approximately 10:40 a.m. Neither party has appeared for the hearing. The Claimant in this matter carries the burden of proof and his appearance is necessary to prevail.

THEREFORE, this matter is hereby dismissed without prejudice, however due to the history of proceedings in this case, a re-filing of the claim will only be accepted under proof of good cause.

IT IS SO ORDERED.

James L. Salkeld
Director of Labor

BY:_____
C.J. ACKLIN
ADMINISTRATIVE LAW JUDGE

DATE:_____

BEFORE THE ARKANSAS DEPARTMENT OF LABOR

CHRISTOPHER PEACH **CLAIMANT**

vs. **CASE NO. 2008010014**

RELAY SYSTEMS/APEX ALARMS **RESPONDENT**

ORDER

This matter came before the Arkansas Department of Labor on Friday, May 23, 2008. Christopher Peach has appealed an agency finding that no unpaid wages are due to him. Peach appeared on his own behalf. Ms. Monaca Walker of Relay Systems/Apex Alarms (hereafter referred to as "Relay Systems") was present and was represented by the Honorable Jess Sweere of Cross, Gunter, Witherspoon & Galchus, P.C. Offered and received into the record were Claimant's Exhibits one and two (copies of Peach's final paychecks for the periods of December 3, 2007 through December 9, 2007 and December 10, 2007 through December 16, 2007.) Also offered and received into the record were Respondent's Exhibits as follows: One (posting dated March 12, 2007 pertaining to the company policy regarding employee financial responsibility); Two (form titled "New Alarm Employee Application" dated October 22, 2007); Three (form titled "Arkansas Driving Records Request" dated September 7, 2005 authorizing release of Mr. Peach's driving record along with the subsequent request and proof of payment for the record); Four (sheet containing figures of calculations for the deduction made from Mr. Peach's paycheck); Five (Business Records Affidavit and Affidavit Regarding Fees completed by Corporal Ricky Briggs of the Arkansas State Police along with a memo detailing the charge for background checks and a copy of the Rules and Regulations of the Arkansas Board of Private Investigators and Private Security Agencies and Alarm System Companies pertaining to the licensing and fees for alarm systems); Six (form titled "Employee Transfer Form" dated

December 28, 2007); and Seven (form titled "Notification of Terminated Employee" dated December 18, 2007.)

FINDINGS OF FACT

Christopher Peach, employee, filed a wage claim with the Labor Standards Division of the Arkansas Department of Labor on January 12, 2008. He claimed seventy-four dollars and fifty-five cents ($74.55) in improper deductions taken from his last paycheck for the pay period of December 10, 2007 through December 16, 2007. The Labor Standards Division, after an investigation, issued a Preliminary Wage Determination Order on January 29, 2008 finding that Peach was owed no wages. Peach filed an appeal of this finding on February 13, 2008.

Mr. Peach testified that he began his employment with Relay Systems on or about October 22, 2007 after an interview with an individual identified as "Ms. Walker's husband." Peach indicated that he informed the hiring official that he was in possession of current licensing permitting him to work as an alarm system technician. It was further established in the testimony of both Mr. Peach and Ms. Walker that Mr. Peach had completed the proper paperwork upon hire and provided his work history and prior experience to Relay Systems. Evidence and testimony further reflected that Mr. Peach accepted a position at another alarm installation company subsequent to his discharge from Relay Systems in December of 2007.

CONCLUSIONS OF LAW

1. Upon application of either an employer or employee, the Director of the Department of Labor or any person authorized by the director shall have authority to inquire into, hear, and decide disputes arising from wages earned and shall allow or reject any deduction from wages. Ark. Code Ann. 11-4-303(a).

2. After final hearing by the director or person appointed by him, a copy of findings and facts and any award shall be filed in the office of the Department of Labor. Ark. Code Ann. 11-4-303(b).

3. The amount of the award of the director shall be presumed to be the amount of wages, if any, due and unpaid to the employee. Ark. Code Ann. 1-4-303(c).

4. The wage claimant carries the burden of proof for any claim of unpaid wages.

5. The employer carries the burden of proof for any set-off or affirmative defense.

6. In the present case, the testimony and evidence contained in the record indicate that Mr. Peach was an experienced alarm technician who would have been eligible for a transfer of his current alarm technician licensing, and therefore would not have been required to obtain a completely new license because of change in employment. Relay Systems is an entity experienced in this industry and is expected to be familiar with the licensing and transfer of licensing of the technicians they employ. The fee for a transfer of license is twenty dollars ($20.00) whereas the fee charged to Mr. Peach was for a completely new license in the amount of forty dollars ($40.00).

7. Evidence and testimony presented at the hearing indicated that the policy of Relay Systems is that these fees are the responsibility of the employee if the span of employment is less than one year, and also that this policy is conveyed verbally to new employees and is also posted in a conspicuous location in the workplace.

8. A deduction of seventy-four dollars and fifty-five cents ($74.55) was made from Mr. Peach's last paycheck, which represents a pro-rated portion of the licensing fee that was paid on Mr. Peach's behalf.

9. Mr. Peach's employment spanned from October 22, 2007 through December 10, 2007, for a total of fifty days. Expenses paid relating to Mr. Peach's employment totaled ninety-one dollars and twenty five cents ($91.25) which is representative of $81.25 paid for licensing and $10.00 paid for a request for a commercial copy of the employee's driving record, with an apparent agreement of reimbursement if the length of employment is less than one year. However, with the common industry knowledge that a transfer of license was available, the employment-related expenses would have been twenty dollars ($20.00) less for the charge of a transfer rather than the charge of a new license. Therefore, the total of allowable expenses is found to be seventy-one dollars and twenty-five cents ($71.25).

10. The pro-rata amount for $71.25 over one year (three hundred sixty-five days) is twenty cents ($0.20) per day. The amount worked of fifty days at $0.20 per day calculates to a total pro-rated amount of $10. $71.25 minus $10.00 leaves a total of $61.25 to be the responsibility of the employee. The difference in the deduction made and the actual responsibility of the employee is thirteen dollars and thirty cents ($13.30).

THERFORE, IT IS CONSIDERED AND ORDERD that judgment is entered for the Claimant in the amount of thirteen dollars and thirty cents ($13.30). The Respondent is directed to issue a check payable to Mr. Peach in the amount of thirteen dollars and thirty cents ($13.30) within ten (10) days of the receipt of this Order and mailed to the Department of Labor.

James L. Salkeld
Director of Labor

BY: _____
C.J. Acklin, Administrative Law Judge
Arkansas Department of Labor
10421 West Markham
Little Rock, AR 72205

DATE:_____

BEFORE THE ARKANSAS DEPARTMENT OF LABOR

LABOR STANDARDS DIVISION **AGENCY**

vs. **CASE NO. PEA2007-001**

LINDSEY RAE JONES, individually and dba NANNIES PLUS MORE, INC. **RESPONDENT**

ORDER

This matter came before the Arkansas Department of Labor on April 17, 2008. The parties agreed to stipulate to the facts surrounding the case and brief their issues and arguments to the Administrative Law Judge. Lindsey Rae Jones, individually and dba Nannies Plus More (hereafter referred to as "NPM") paid a penalty assessed under Ark. Code Ann § 11-11-203, but appealed the finding of Labor Standards Division of the Arkansas Department of Labor (hereafter referred to as "the Agency") that the fees collected from employees during the operation of this business should be refunded. The Agency was represented by the Honorable Denise Oxley. NPM was represented by the Honorable Robert Rhoads.

FINDINGS OF FACT

The facts were stipulated as follows:

1) Nannies Plus More, Inc. was an Arkansas corporation whose corporate franchise was revoked December 31, 2006. 2) The business was owned by Lindsey Rae Jones and operated at 201 SW 14th Street, Suite 205, Bentonville, Arkansas 72712. 3) On or about January 2006 through, on or about, May 17, 2007, the Respondent operated its business of arranging nanny or babysitter services for its clients by charging the nanny or babysitter a fee for placement. 4) In April 2007, the Labor Standards Division of the Arkansas Department of Labor received a complaint from Cindy Bruce, 3320 Ridge Road, Alma, Arkansas 72921, regarding the amount and duration of the fee she was being charged for placement as a nanny by the Respondent.

5) On April 24, 2007, the Agency initiated an investigation. Two investigators, Rusty Geurin and Stephanie Felterman, visited the business location and spoke with Lindsey Rae Jones. They confirmed the business was not licensed as a private employment agency. Mr. Geurin provided Ms. Jones with an application for licensure and associated forms. Ms. Jones scheduled a licensing examination while the investigators were present. Mr. Geurin requested Ms. Jones provide the name and address of each nanny placed, as well as the amount of the fee charged for each. Ms. Felterman returned to the business on or about May 14, 2007 and was provided with these records. 6) Ms. Jones passed a licensing examination on or about April 27, 2007. 7) On May 21, 2007, the Labor Standards Division notified the Respondent that it had assessed an administrative fine in the amount of five hundred dollars ($500.00) for operating without a license. Additionally, the Labor Standards Division's notice demanded the refund of fees in the amount of fifteen thousand three hundred seventy-nine dollars and sixty-five cents ($15,379.65). 8) A copy of the notice was mailed to each of the eighteen (18) individual nannies on whose behalf a demand for reimbursement was made. 9) The Respondent paid the fine, but contests the agency's legal authority to order reimbursement of fees. 10) Lindsey Rae Jones is not currently licensed as a private employment agency and has ceased all business operations as Nannies Plus More, Inc.

Exhibits referenced in the signed stipulations are contained in the record.

CONCLUSIONS OF LAW

The Agency filed a brief and the Respondent filed a brief and a reply brief. Both parties have stipulated to the facts and the record was presented without objection. The A.L.J. includes such and incorporates such herein.

The Agency and the Respondent both reference Arkansas Department of Labor v. American Employment Agency, 257 Ark. 509, 517 S. W. 2e 949 (1975) and Cline v. Plaza Personnel Agency, 252 Ark. 956, 481 S. W. 2d 749 (1972). The personnel agency in Cline applied for a license to operate a private employment agency in Arkansas. The Director refused to issue the license. The personnel agency sought a writ of mandamus compelling the Director to issue the license. The Supreme Court issued its opinion written by Justice George Rose Smith, which states "The statute contains no language investing the Director with discretionary power to deny the application. It is true, as the Director points out, that he may revoke a license after a hearing at which a violation of the statute is shown; but we fail to see how the authority to revoke a license for cause supplies discretionary power to deny the application in the first instance." Cline, 252 Ark. 956 at 957, 481 S. W. 2d 749 at 749. Justice Smith clearly states there is no authority for the Director to deny a license application. He further states, again clearly, that the Director does have the authority to revoke a license.

Ark. Dept. of Labor v. American Employment Agency, et al (hereafter American) was a case concerning additional rules and regulations promulgated by the Director concerning licensing. The Supreme Court's opinion, written by Justice John A. Fogleman, stated the Director issued directives which amounted to additional rules and regulations, "…upon a prohibition against the use of fictitious names by agents and employees of the agencies and the requirement that all agencies use a standard form of contract or, receipt, drawn so as to require the negotiation and execution of a new and separate contract on each referral of a job applicant to an out of state or out of city employer. Appellees [American] also complained that the directives required the disclosure of the identity of the prospective employer to the applicant before he signed the contract, and that this would effectively bypass the agency in contracts between the

applicant and the employer and deprive the agency of compensation for having brought the two together." American, 257 Ark. 509 at 511, 517 S.W.2d 949 at 950.

Justice Fogleman went on to address the Cline court findings and found in essence that, "…the Commissioner could not have either express or implied authority to impose additional conditions upon the granting of licenses by rules and regulations he might adopt." Headnote 7 of the case states "The Commissioner of Labor has implied power to adopt rules which are necessary to enable him to properly and effectively perform his duty to enforce provision of the statute but does not have either express or implied authority to impose additional conditions upon the **granting** [emphasis applied] of licenses by rules and regulations which he might adopt." The Court did state, however, "Of course, this does not necessarily mean that the Commissioner does not have implied power to adopt rules which are necessary to enable him to properly and effectively perform his duty to enforce these laws. See 1 Am.Jur.2d 894, Administrative Law § 97; 73 CJS 416, Public Administrative Bodies & Procedure, § 95." *257 Ark. 509 at 516, 517 S.W.2d 949 at 953(1975).*

> § 57 Implied and inherent powers
>
> Generally, administrative agencies have the implied or incidental powers that are reasonably necessary in order to carry out the powers expressly granted. The reason for implied powers is that, as a practical matter, the legislature cannot foresee all the problems incidental to carrying out the duties and responsibilities of the agency. However, the inherent or implied power of an administrative agency is not boundless.
>
> Courts disagree as to how much latitude administrative agencies have with respect to implied powers. Some courts say wide latitude must be given to administrative

agencies in fulfilling their duties. Some of these courts even say that the authority does not have to be "necessary" to effectuate the expressly delegated authority, but only "appropriate." Other courts say that powers should not be extended by implication beyond what may be necessary for their just and reasonable execution. Still other courts state that implied powers are "necessarily implied," and that necessary implication is an implication which yields so strong a probability of intent to allow these powers that any intention to the contrary cannot be supposed.

An administrative agency has no inherent powers, because any authority it has comes from statutes or the constitution. However, implied powers may sometimes be called inherent.

2 Am Jur 2d Administrative Law § 57

This case is not a case about granting a license. To the contrary the Respondent never filed for a license until after the case was already well underway. The Respondent also never filed a fee schedule as required by Ark. Code Ann. § 11-11-228. This case revolves around the issue questioning the authority of the Director of Labor, either actual or implied, to reimburse fees collected by the Respondent.

The Agency, in its brief, best outlined the specific statutory authority in the issuance of Administrative Orders involving fee disputes to wit:

The Arkansas Private Employment Agency Act of 1975 is codified at Ark. Code Ann. § 11-11-201 through -29 (Repl. 2002). The statutes regulating employment agencies provide that “No person shall engage in the business of or act as an employment agent, agency manager, or counselor unless he or she first

obtains a license from the Department of Labor." Ark. Code Ann. § 11-11-208(a). In addition to the license requirement, there is a bond requirement. Ark Code Ann. § 11-11-213. Every employment agency is further required to file with the Department of Labor a schedule of all fees, charges and commissions the agency charges or collects for its services. Ark. Code Ann. § 11-11-228(a). Further, with respect to fees charged by private employment agencies, Ark. Code Ann. § 228(d) provides that "It shall be unlawful for any employment agency to charge, demand, collect, or receive a greater compensation for any service performed by the agency than is specified in fee schedules filed with the department or than is specified by this chapter."

Ark. Code Ann. § 11-11-204(a) provides that "It shall be the duty of the Department of Labor, and it shall have the power, jurisdiction, and authority to administer and enforce the provisions of this subchapter." Further, "[w]here a dispute concerning a fee exists, the Department of Labor may conduct an investigation to determine all of the facts concerning the dispute. Thereafter, the Director of the Department of Labor shall issue a decision and order resolving the dispute."

Ark. Code Ann. § 11-11-227(c)(1). *Section I. of Labor Standands Division brief in chief.*

The Respondent is a Private Employment Agency as defined in A.C.A. § 11-11-202 (6)(a): "Employment agent" or "employment agency" means any person engaged for hire, compensation, gain, or profit in the business of furnishing persons seeking employment with information or other service enabling the person to procure employment by or through employers or furnishing any other person who may be seeking

to employ or may be in the market for help of any kind with information enabling the other person to procure help.

The Respondent conducted the business without a license and without the filing of the required bond. Employment agencies, of which Nannies Plus More, Inc. is, are required to be licensed and bonded with the Department of Labor as stated above. Additionally, they are required to file a fee schedule, among other requirements. Failures of an employment agency to follow the Code or the Rules and Regulations in this regard are specifically lined out by the Legislature in the following.

1. A.C.A. § 11-11-203. Penalty.
    a. The director of the Department of Labor shall have authority to impose a fine or not less than twenty-five dollars ($25.00) nor more that five hundred dollars ($500) for violation of the provisions of this subchapter by an employment agency or its employees or agents.
    b. The director shall notify the employment agency in writing of the reasons for imposition of a fine and at that time shall make available to the employment agency a signed written statement by any individual having filed a complaint with the director relative to the matter for which a fine has been imposed by the director.
    c. The agency shall have the right to a hearing before the director and the right to judicial review provided by § 11-11-223 with respect to the fine.
2. A.C.A. § 11-11-208. License required-Penalties.

a. No person shall engage in the business of or act as an employment agent, agency manager, or counselor unless he or she first obtains a license from the department.

b. (1)(A) Any person who shall engage in the business of or act as an employment agent, agency manager, or counselor without first procuring a license is guilty of a misdemeanor.

(B) He or she shall be punished by a fine of not less that fifty dollars ($50.00) and not more than two hundred fifty dollars ($250.00) for each day of acting as an employment agent, agency manager, or counselor without a license or by imprisonment for not more than three (3) months, or by both.

(2) In addition to the penalties described in subdivision (b)(1) of this section, upon petition of the director, any court in the state having the statutory power to enjoin or restrain shall have jurisdiction to restrain and enjoin any person who engages in the business of or acts as an employment agent, agency manager, or counselor without having first procured a license for so engaging or acting.

The Respondent in its brief states "Plaintiff broadly interprets the phrase "resolving a dispute" to mean that the Director has discretion to order reimbursement, where no such penalty provision exists in the statute." *Respondent Brief Page Two.* Refunds of unlawfully collected fees are not penalties. A.C.A. § 11-11-203 is a Civil Penalty which can be imposed by the Agency for "…violation of the provisions of this subchapter…" that being A.C.A. § 11-11-201 et seq. A.C.A. § 11-11-208 is a separate Criminal Penalty making operating as an employment agent or agency without a license a misdemeanor. The Agency has authority to impose and

prosecute the former. Prosecutors for the State of Arkansas have the authority to prosecute the latter. The Legislature has granted restitution under A.C.A. § 5-4-205 in criminal proceedings. Clearly restitution of the aggrieved individuals could be sought as victims in a criminal prosecution. The question here is, does the Director have the authority, either actual or implied, to refund unlawful (not "illegal") fees collected? The distinction is noteworthy. Refund of unlawfully collected fees must necessarily, of its nature, be an implied authority of the Director. The Legislature has repeatedly stated that it is unlawful to commit certain acts within A.C.A. § 11-11-101 et. seq. Examples:

1. A.C.A. § 11-11-225 Miscellaneous restrictions and requirements.

(12) No employment agency shall charge a fee to an employee for any services other than actual placement of an applicant;

(13) No employment agency shall charge an applicant a fee for accepting employment with the employment agency or any subsidiary;

(16) Under no circumstances shall more than one (1) fee for any one (1) placement be charged any applicant;

(18) All **refunds** [emphasis added] due shall be made by the agency by cash, check, or money order promptly when due. [Specifically referring to refunds and therefore impliedly granting the Director the authority to find and order such.]

2. A.C.A. § 11-11-227 Fee restrictions and requirements.

(f) It shall be unlawful for any employment agency to impose, enforce, collect or receive a fee for performance of any service for a job applicant, or for a prospective employer, unless the agency makes every reasonable effort to disclose the exact dollar

amount of the fee to the applicant or prospective employer prior to commencement of employment of an applicant by an employer.

3. A.C.A. § 11-11-228. Filing of fee schedule, forms and contracts required.

(d) It shall be unlawful for any employment agency to charge, demand, collect, or receive a greater compensation for any service performed by the agency that is specified in fee schedules filed with the department or that is specified by this subchapter.

These situations reflect the implied authority of the Director to refund unlawfully collected fees. To argue that the Director's authority does not allow the resolution of these occurrences would be an injustice which would require additional civil or even criminal prosecution be had. This A.L.J. does not believe it was the intent of the Legislature to so limit the Director's authority; neither is it without the scope of implied authority as delineated in these or other cases.

The Respondent has raised the point that if the Director has the implied authority to resolve disputes, as the Agency states, then the Director should have the same implied authority to negotiate and compromise on a reimbursement amount that would satisfy both parties. There is one train of thought that believes that the Director is limited by the Legislature to legal authority only. There is another train of thought that believes the Director has the implied authority to even apply equitable principles. The Administrative Law Judge is unable to address this issue as there is insufficient evidence contained in the record to allow the A.L.J. to rule. No evidence has been presented which would allow for any credits, offsets, analysis of normal fees or anything else on which to base an opinion even if the Director has such authority. However, this issue can be reserved for the higher courts should such occur.

No fee schedule was filed, no bond posted; and, most especially, no license was procured. It is for these reasons, and the above, that all fees collected by the Respondent were collected unlawfully and therefore must be refunded.

THEREFORE, IT IS CONSIDERED AND ORDERED that Nannies Plus More, Inc., shall reimburse the fees that were collected in the amount of fifteen thousand, three hundred seventy-nine dollars and sixty-five cents ($15,379.65). The Respondent is ordered to issue payment, as originally directed in the May 21, 2007 Notice of Violation, within thirty (30) days of the receipt of this Order and mailed to the Department of Labor.

James L. Salkeld
Director of Labor

BY:_____
C.J. Acklin, Administrative Law Judge
Arkansas Department of Labor
10421 West Markham
Little Rock, AR 72205

DATE:_____