New Jersey Department of Labor and Workforce Development,
Petitioner,

v.

Alcaro & Alcaro Plating Co., Inc., and Leonard Alcaro, Owner and, Individually,
Respondents.

STATE OF NEW JERSEY
DEPARTMENT OF LABOR
AND
WORKFORCE DEVELOPMENT

FINAL ADMINISTRATIVE ACTION
OF THE
COMMISSIONER

OAL DKT. NO. LID 3630-14
LWD DKT. NO. GE-2045-0913-POP

Issued: October 13, 2015

The New Jersey Department of Labor and Workforce Development (the Department) served a notice upon Alcaro & Alcaro Plating Company, Inc., and Leonard Alcaro, Owner and Individually (A&A or respondents), dated September 23, 2013, finding violations of N.J.S.A. 34:11-56a4 for failure to pay overtime and N.J.S.A. 34:11-4.2 for unpaid wages or late payment of wages. On the basis of the violations listed, the Department sought the collection of wages in the amount of $12,337.10, an administrative fee in the amount of $1,233.71, and penalties in the amount of $1,000.00.

Respondents requested a hearing with regard to the assessment for wages, an administrative fee and penalties. The matter was transmitted to the Office of Administrative Law (OAL) for determination as a contested case, pursuant to N.J.S.A. 52:14F-1 et seq. Following a hearing, Administrative Law Judge Barry E. Moscowitz (ALJ) found that A&A, a New Jersey corporation engaged in the business of electric plating various types of metal parts, had given its employees two unpaid fifteen-minute breaks (one in the morning and one in the afternoon) and one unpaid half-hour lunch per workday. According to the ALJ, A&A's failure to compensate its employees for the two 15-minute breaks had been admitted by respondents in a letter, dated September 9, 2013, authored by A&A's General Manager, Michelle Kendall. There are two letters authored by Ms. Kendall which are in the hearing record: one dated August 16, 2013 and attached as Exhibit 2 to the April 9, 2015 certification of Deputy Attorney General (DAG) Peter Jenkins, and the other dated September 9, 2013 and attached as Exhibit 3 to the certification of DAG Jenkins. The August 16, 2013 letter reads as follows in its entirety:

> We have been deducting 30 minutes from total time for employees for the two 15-minute breaks they take each day. They take one 15-minute break in the morning and

one 15-minute break in the afternoon. We were unaware that this is a wage and hour violation. We will make necessary corrections and conduct a self-audit for [the] past 2 years. We will compensate all affected employees.

The September 9, 2013 letter is the cover letter to the promised self-audit. The audit, according to Ms. Kendall's September 9, 2013 letter, contains a list of "wages owed to employees for break deductions." At the end of the list of wages owed to employees for break deductions, the self-audit indicates that the total wages owed are $12,337.10.

Regarding governing law and regulations, the ALJ explained that 29 CFR 785.18 requires that rest periods of short duration, from five to twenty minutes, be counted as hours worked and are customarily paid as working time. The ALJ quoted Fact Sheet #22 from the United States Department of Labor (USDOL), Wage and Hour Division, which states the following:

> **Rest and Meal Periods**: Rest periods of short duration, usually 20 minutes or less, are common in industry (and promote the efficiency of the employee) and are customarily paid for as working time. These short periods must be counted as hours worked. Unauthorized extensions of authorized work breaks need not be counted as hours worked when the employer has unambiguously communicated to the employee that the authorized break may only last for a specific length of time....Bona fide meal periods (typically 30 minutes or more) generally need not be compensated as work time.

The ALJ also cited and discussed at length the holding in Brock v. Claridge Hotel and Casino, 664 F. Supp. 899 (1986), in which the United States District Court for the District of New Jersey addressed the compensability under the Federal Fair Labor Standards Act (FLSA) of break times given to Boxpersons, Floorpersons and Pit Bosses employed by Claridge. In that case, according to the ALJ, the court did not consider the breaks at issue "off duty time" because they did not last longer than 30 minutes, nor did the court consider the breaks "bona fide meal periods" because they were not for the purpose of eating a regularly scheduled meal. Thus, according to the ALJ, the court determined that the breaks were "rest periods" – periods of short duration, running five to 20 minutes – and ordered Claridge to pay their employees for those rest periods.

Applying the above-cited law to the facts of the case at hand, the ALJ found that the two 15-minute breaks given to employees of A&A could not be considered "off duty time" because they had not lasted longer than 30 minutes. The ALJ also found that the two 15-minute breaks could not be considered "bona fide meal periods" because they had not been for the purpose of eating a regularly scheduled meal. Therefore, the ALJ concluded, "that the two 15-minute breaks in this case were 'rest periods' under the FLSA, that the rest periods were to promote employee efficiency at A&A, and that these two 15-minute breaks should be paid as working time," adding, "[j]ust because employees may have used them [the 15-minute breaks] to eat does not convert them into bona fide meal periods." Consequently, the ALJ issued an initial decision ordering A&A to pay the $12,337.10 in wages, the $1,233.71 administrative fee and the $1,000 penalty assessed by the Department. No exceptions to the initial decision were filed.

Upon de novo review of the record, and after consideration of the ALJ's initial decision, I accept the ALJ's finding that the two 15-minute breaks given by A&A to its employees (one in the morning and one in the afternoon) lasted less than 30 minutes. I also accept the ALJ's finding that the two 15-minute breaks were not for the purpose of eating a regularly scheduled meal. Furthermore, I accept both the ALJ's conclusion that the two 15-minute breaks are hours of work for which A&A's employees are entitled to be paid and the ALJ's recommendation that A&A be ordered to pay the $12,337.10 in wages, the $1,233.71 administrative fee and the $1,000 in penalties assessed by the Department. Regarding the ALJ's legal analysis, as noted above, I agree that the two 15-minute breaks are hours of work for which A&A's employees are entitled under the law to be paid; however, I wish to emphasize one important point of clarification. That is, although the ALJ notes within his procedural history that A&A was cited by the Department for violations of New Jersey Wage and Hour Law and Wage Payment Law - specifically, N.J.S.A. 34:11-56a4 and N.J.S.A. 34:11-4.2 – he relies entirely in his legal analysis on the FLSA and the regulations promulgated in accordance therewith by the USDOL. The ALJ does not bridge the analytical gap within the body of his initial decision between the federal law and regulations upon which he relies exclusively and the New Jersey law and regulations upon which the Department based its assessment of wages, fees and penalties against A&A.

New Jersey Wage and Hour Law (specifically, N.J.S.A. 34:11-56a4) speaks of compensating employees for "hours of working time." N.J.A.C. 12:56-5.1 requires that employees be paid for "all hours worked." Neither New Jersey statute, nor New Jersey rules, expressly address whether "15-minute breaks," "rest periods," or breaks lasting less than 30 minutes are considered "hours of working time" or "hours worked." Nevertheless, as indicated by the ALJ in his initial decision, the federal regulations promulgated by the USDOL in its implementation of the FLSA do address rest periods and do distinguish them from bona fide meal periods; the former included by the USDOL in its calculation of minimum wage and overtime pay under the FLSA and the latter not included in that calculation. As noted in Marx v. Friendly Ice Cream Corp., 380 N.J. Super. 302 (App. Div. 2005), the New Jersey Wage and Hour Law (referred to within the Marx opinion as "New Jersey's minimum wage law" or "MWL") is patterned on the FLSA. Furthermore, as noted by the court in Marx, regarding interpretation of New Jersey Wage and Hour Law, because the New Jersey law is modeled on the FLSA, in the absence of a material difference between the New Jersey Wage and Hour Law and the FLSA, and in the absence of contrary guidance within the New Jersey Department of Labor and Workforce Development's own rules, a court (or administrative agency) may rely for guidance regarding interpretation of New Jersey Wage and Hour Law upon judicial decisions construing the FLSA or construing an FLSA regulation. Of course, where instructive, a court or an administrative agency may also rely for guidance directly upon an FLSA regulation. Accordingly, in the matter at hand, I believe that it was appropriate for the ALJ to look for guidance to 29 CFR 785.18 and to the opinion in Brock v. Claridge Hotel and Casino, supra. However, I want it to be clear that it is under New Jersey law – specifically, N.J.S.A. 34:11-56a4 and N.J.S.A. 34:11-4.2 – and not under the FLSA that the wages, fee and penalties for which the Department assessed A&A are due.

ORDER

Therefore, it is hereby ordered that respondents pay to the Department $12,337.10 for wages owed, plus $1,233.71 in an administrative fee and $1,000 in penalties.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum

DECISION RENDERED BY THE
COMMISSIONER, DEPARTMENT OF
LABOR AND WORKFORCE DEVELOPMENT

Harold J. Wirths, Commissioner
Department of Labor and Workforce Development

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