STATE OF CALIFORNIA
PETE WILSON, Governor
DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF LABOR STANDARDS ENFORCEMENT

LEGAL SECTION
455 Golden Gate Avenue, Room 3166
San Francisco, CA 94102
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ANNE HIPSHMAN, Staff Counsel

GARY HERMANN
REDDING
SENIOR DEPTY. COMM.

RECEIVED
JUL 1998
STATE OF CALIFORNIA
LABOR COMMISSIONER
REDDING
DISTRICT OFFICE

July 15, 1998

Mr. Issac J. Vaughn
WILSON SONSINI GOODRICH & ROSATI
650 Page Mill Road
Palo Alto, CA 94304-1050

Re: Penalty Assessment No. 37448 Issued to Rosalie's Taste of New Orleans, Inc. a California corporation
Your Letter dated June 30, 1998

Dear Mr. Vaughn:

Your letter, referenced above, to Jose Millan, the State Labor Commissioner, has been referred to me for a response.

In that letter you question the citation for civil money penalties in the amount of $2,000.00 issued to Rosalie's Taste of New Orleans, Inc. (hereinafter "Rosalie's") for failure to have worker's compensation insurance and, for 2 employees, employed at the time of the inspection by Deputy Labor Commissioner Marga Morales.

You state in your letter that your client believed that, at the time of the inspection, worker's compensation insurance was not required because all "operators" of the business were either officers and relatives "of the Company."

Labor Code section 3700 requires every employer in this State that uses employee labor to have a policy of worker's compensation insurance to cover those employees.

Labor Code section 3351 defines the term "employee" for purposes of coverage under the worker's compensation act. This definition is quite broad and includes "...every person in the service under an employer under any appointment or contract of hire..." The definition goes on to include at subsection (c):

> All officers and members of boards of directors of ...private corporations while rendering actual service for the corporations for pay...

Labor Code section 3352 provides the statutory exclusions from the definition of "employee." As you can see there is no general exclusion for relatives.[1] Even if there were an exclusion for relatives of an "owner," your client would not be able to avail themselves of that exception because Rosalie's is a corporation, and as such is a separate "person" under state law. And, the corporation has no relatives.

Moreover, I have reviewed Ms. Morales' investigative file and it reveals that, at the time of the inspection, aside from any officers or relatives of the corporation, there were four employees working at the restaurant. Three of them were present and observed by Ms. Morales, and there was one other employee, not present at the time of the inspection who was listed on the restaurant's schedule, for a total of four employees. Labor Code §3722(a) states that civil money penalties for employing labor and not having worker's compensation insurance are statutorily set at $1,000.00 per employee. The Labor Commissioner's office is permitted to use the company's records to determine how many individuals are employed by the business, whether or not they were actually observed working at the time of the inspection. (See *Woodline Furniture v. Dept of Indus. Relat. et al.,* (1994) 23 Cal.App.4th 1653).

Based on the evidence that presented itself at the time of the inspection, then, without reference to any officers of the corporation, who are employees for purposes of worker's compensation coverage as explained above, Ms. Morales could have written a citation in the amount of $4,000.00 rather than the $2,000.00 actually assessed.

Had your client been interested in pursuing an appeal of this citation, and litigating the propriety of the issuance of this citation to Rosalie's, their appeal rights were plainly stated on the reverse side of the citation. The due date for contesting the citation or paying it is likewise stated plainly on the citation. Your letter was sent almost one month after the mandatory appeal period had expired. The citation is now final.

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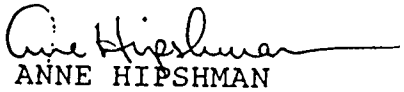
[1] The only exception for "relatives" is found at section 3352(a) when the employee is a parent, spouse or child of a person who is an owner or occupant of a residential dwelling whose duties are incidental to the "ownership maintenance or use of the dwelling..."

If you have any further questions, give me a call.

Very Truly Yours,



ANNE HIPSHMAN

cc: Jose Millan
Assistant Chiefs
Marga Morales (TIPP file)