

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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In the Matter of the Petition of:	:
	:
ABDUL WAHID AND ANIQA HALAL LIVE	:
POULTRY CORP.,	:
	:
Petitioners,	:
	:
To Review Under Section 101 of the Labor Law:	:
An Order to Comply with Article 19 of the Labor Law	:
and an Order to Comply under Article 19 of the Labor	:
Law, both dated November 19, 2007,	:
	:
- against -	:
	:
THE COMMISSIONER OF LABOR,	:
	:
Respondent.	:
-----X	

DOCKET NO. PR 08-005

RESOLUTION OF DECISION

APPEARANCES

Stephen D. Hans & Associates, P.C., Nils Shillito of Counsel, for Petitioner.

Maria L. Colavito, Counsel to the NYS Department of Labor, Benjamin T. Garry of Counsel, for Respondent.

WITNESSES

Abdul Wahid and Jameel Uddin for the Petitioner.

Rashid Hart and Erika Castillo for the Respondent.

Mohammed Rahman, Bengali Interpreter.

WHEREAS:

The Petition for review in the above-captioned case was filed with the Industrial Board of Appeals (Board) on January 9, 2008. An answer was filed on August 1, 2008. Upon notice to the parties, a hearing was held on February 17, 2009 in New York City before Anne P. Stevason, Chairperson of the Board and the designated Hearing Officer in this proceeding. Each party was afforded a full opportunity to present documentary evidence, to examine and

cross-examine witnesses, to make statements relevant to the issues, and to file post-hearing briefs. Post-hearing briefing was complete on July 1, 2009.

The Commissioner of Labor (Commissioner, DOL or Respondent) issued the Orders under review against Petitioners Abdul Wahid (Wahid) and Aniqua Halal Live Poultry Corp. (together referred to as Petitioner) on November 19, 2007. The first Order to Comply (Wage Order) directs payment to the Commissioner for wages due and owing to six named employees in the total amount of \$85,547.38, with interest continuing thereon at the rate of 16% calculated to the date of the Wage Order, in the amount of \$6,321.39, and liquidated damages of \$21,387.00, and assesses a civil penalty in the amount of \$42,774.00, for a total amount due of \$156,329.77. The Order contained the following breakdown of wages due:

EMPLOYEE	PERIOD OF CLAIM	TOTAL DUE
Jameel Uddin	12/31/06 to 5/26/07	\$ 3,312.75
C. Felix	10/22/06 to 5/26/07	\$10,669.39
R. Duran	5/22/05 to 5/26/07	\$28,596.93
M. Bravo	5/21/06 to 5/26/07	\$16,870.43
J. Lombardi	7/14/06 to 7/07/07	\$16,897.63
G. Hernandez	10/28/06 to 5/26/07	\$ 9,200.25

The Order under Article 19 of the Labor Law (Penalty Order) assesses a civil penalty against the Petitioner in the total amount of \$4,000: \$2,000 for failing to keep and/or furnish true and accurate payroll records for each employee; and \$2,000 for failure to furnish each employee with a complete wage statement with every payment of wages.

The Petition alleges that the Orders are invalid and unreasonable because Petitioner does not owe any wages to the six employees. Specifically, the Petition alleges that: (1) Jameel Uddin worked 6 days per week, 6 hours per day and earned \$8.00 per hour or \$288.00 per week; (2) C. Felix, R. Duran and M. Bravo were employed for only fifteen days, from May 9, 2007 to May 27, 2007 and during that time they worked 5 days per week, 6 hours per day at \$7.15 per hour, earning \$214.50 per week; (3) J. Lombardi and G. Hernandez never worked for Petitioner; (4) the civil penalties assessed were unreasonably high; (5) and the penalties for failure to keep records and issue wage statements are unreasonable because Petitioner complied with all applicable recordkeeping laws from May 28, 2005 through May 26, 2007.

The Answer denied the material allegations of the Petition, alleged that the Respondent's audit of employees' wages was based on interviews with Petitioner's employees, who provided the only information available to Respondent since Petitioner failed to keep the time and payroll records required by law.

I. SUMMARY OF EVIDENCE

Petitioner Wahid operates a retail poultry store where live chickens are killed, cut up and sold to customers. He has been in the business since 1999. Respondent previously issued an Order against Petitioner for unpaid wages due to one employee and Petitioner had been

making payments of \$2000 per month on the prior Order until the new Orders were issued and he then stopped making payments.

Wahid testified that the business is open seven days per week from approximately 7:00 a.m. until approximately 5:00 or 6:00 p.m. and sometimes later. It employs approximately eight to nine employees. Wahid is at the business premises only one to two times per week. He never hired or fired employees except for the manager. The business is run by Petitioner's manager, Delowar Hossain (Hossain). Hossain hires and fires employees and keeps the employment records. Wahid discusses the employee schedule with Hossain and supervises the schedule. Wahid gives Hossain instructions and pays the employees. Some employees are paid in cash and some are issued payroll checks. Wahid testified that Hossain was out of the country at the time of the hearing.

Wahid testified that Jameel Uddin started working for Petitioner in January or February 2007 and worked 36 hours per week, from 7:00 a.m. to 1:00 p.m. 6 days per week, earning \$388 per week. Petitioner introduced a copy of six pages from a composition book which Wahid represented was a contemporaneous record of Uddin's time kept by Hossain. The book indicated that Uddin's schedule was from 8:00 a.m. to 2:00 p.m. every day but Saturday and that his rate of pay was \$8.00 per hour. Wahid testified that the six copied pages of the composition book were the only pages of the book and that he had seen it once before and that a book was kept for each employee. However, now the business has a time clock for recording hours worked. Petitioner also introduced copies of 18 receipts for \$288 with a signature of Uddin on each receipt for the period of January 21, 2007 through May 25, 2007.

Wahid further testified that he did not know C. Felix or whether Felix worked for him; that R. Duran did work for Petitioner and continues to work for him intermittently and that he started in February or March 2007. Wahid testified that he did not know M. Bravo and does not think that he ever worked for Petitioner. Wahid does not know J. Lombardi or G. Hernandez, the two names added to the DOL's amended recapitulation sheet and testified that he does not think that either individual worked for Petitioner. A time record was introduced containing the names "Roman," "Felx," and "Migul" which was purportedly for the period of May 7, 2007 to May 27, 2007 indicating that they each worked 5 days per week either from 7:00 to 1:00 or 1:00 to 7:00, allegedly made out by Hossain, however, Wahid could not testify as to how it was prepared or where it came from.

Jameel Uddin testified for Petitioner, through a Bengali interpreter, that he is currently employed by Petitioner and started working there on January 28, 2007. He stated that his work schedule was 8:00 a.m. to 2:00 p.m. six days per week and that he was paid \$288 per week in cash. However, Uddin also testified that he started at 7:00 a.m. every day, that customers came in at 7:30 and that the store closed 7:30 p.m. in 2007 and now it closes at 8:00 p.m. Uddin testified that the manager set the schedules, supervised the store and kept time records. Wahid came by the store once a week or every two weeks and when he was there he would supervise and make sure that everything was okay. Uddin knows an employee named "Roman" who worked four to five days per week from 7:00 a.m. to 2:00 p.m. Uddin did not know any of the other names listed in the DOL audit. Uddin remembered speaking with someone from DOL and observing that that person also spoke with two or three other employees. He identified his signature at the bottom of the DOL interview sheet with his

name at the top. He testified that he received 30 minutes lunch every day as indicated on the interview sheet, but that he had just come to the United States at the time of the interview and did not understand everything that was asked of him. Uddin also testified that none of the signatures on the 18 receipts for wages introduced by Petitioner was his.

Senior Labor Standards Investigator Rashid Hart (LSI Hart) testified that he and four other DOL employees inspected Petitioner's premises as part of a sweep of the live poultry industry on May 24, 2007. LSI Hart interviewed the manager Hossain and gave him a Notice that he would revisit the premises on May 31, 2007 and that payroll and time records for the period of 2001 to the end of May 2007 needed be available for inspection at that time. While Hart was speaking with Hossain, the other DOL employees interviewed Petitioner's employees. LSI Castillo interviewed Uddin on March 24 and completed an interview sheet for him which he signed.

When Hart returned on May 31 he spoke with Uddin, who stated that he spoke English. Hart reviewed Uddin's interview sheet with him and Uddin confirmed all of the information: Uddin worked from 7:30 a.m. to 7:00 p.m. every day of the week but Tuesday; he had a 30 minute lunch break; and he was paid a weekly salary of \$450 in cash. Interview sheets for R. Duran, M. Bravo, G. Hernandez and J. Felix were obtained by other DOL employees. These interview sheets were kept in the DOL file and introduced into evidence.

Hart also testified that he interviewed J. Lombardi when he came into the DOL office to file a claim against Petitioner on July 9, 2007. Lombardi indicated that he worked Monday, Tuesday, Wednesday, Friday and Saturday from 7:00 a.m. to 7:30 p.m. and Sunday from 8:00 a.m. to 7:30 p.m.; received a half hour lunch; had worked for Petitioner for approximately one year; and was paid \$300 per week for the first five months of his employment and \$320 thereafter.

When LSI Hart returned to the Petitioner's premises on May 31, 2007, he was shown time and payroll records but none of the records pertained to the employees who had been interviewed. Hart computed the wages due to J. Uddin, R. Duran, M. Bravo, J. Felix and J. Lombardi based on the information in their interview sheets because that was the only information available as the employer had not produced records with regard to the six named employees. The regular rate of pay for each employee was calculated by dividing their weekly salary by the number of weekly hours worked. A compliance conference was held on October 24, 2007. The Petitioner was represented by an attorney. The attorney provided the records introduced by Petitioner but which also included an additional page of receipts for Uddin for the dates of December 31, 2006 to January 19, 2007. At the conference, Petitioner's attorney also indicated that the Petitioner's position that the workers covered in the audit were actually independent contractors and did not work the periods claimed.

LSI Erika Castillo testified that she interviewed C. Felix when she was at Petitioner's premises during the May 24, 2007 investigation; filled out an interview sheet; translated the contents of the sheet to Felix in Spanish; and witnessed him sign the sheet. According to her Felix said that he worked from 7:00 a.m. to 7:30 p.m. Tuesday through Saturday and 8:00 a.m. to 7:00 p.m. on Sunday, with Monday off. He received a 30 minute lunch break and was paid \$300 per week.

Three of the interview sheets indicated that the employees receive tips in addition to their salary, and Uddin's sheet indicates that he received two meals from Petitioner.

II. STANDARD OF REVIEW

In general, when a petition is filed, the Board reviews whether the Commissioner's order is valid and reasonable. 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). The Board is required to presume that an order of the Commissioner is valid (Labor Law § 103).

Pursuant to the Board Rules of Procedure and Practice (Rules) 65.30 (12 NYCRR 65.30): "The burden of proof of every allegation in a proceeding shall be upon the person asserting it." Therefore, the burden is on the Petitioner to prove that the Orders are not valid or reasonable.

III. FINDINGS AND CONCLUSIONS OF LAW

The Board makes the following findings of fact and law pursuant to the provision of Board Rule 65.39 (12 NYCRR 65.39).

A. Claimants were employed by Wahid

Petitioner Wahid bore the burden of proving that the Commissioner's determination that he was an employer under Article 19 was invalid or unreasonable (*see* Labor Law § 101; Rule 65.30, 12 NYCRR 65.30). He did not meet this burden.

"Employer" means "any person, corporation or association employing any individual in any occupation, industry, trade, business or service" (Labor Law § 190 [3]; *see also* Labor Law § 651 [6]). "Employed" means "suffered or permitted to work" (Labor Law § 2 [7]).

The federal Fair Labor Standards Act defines "employ" to include "suffer or permit to work" (29 USC § 230 [g]), and "the test for determining whether an entity or person is an 'employer' under the New York Labor Law is the same test . . . for analyzing employer status under the Fair Labor Standards Act" (*Chu Chung v. The New Silver Palace Rest., Inc.*, 272 F Supp 2d 314, 319 n6 [SDNY 2003]).

In *Herman v. RSR Sec. Servs. Ltd.*, 172 F3d 132, 139 (2d Cir. 1999), the Second Circuit Court of Appeals stated that the test used for determining employer status by explaining that:

“Because the statute defines employer in such broad terms, it offers little guidance on whether a given individual is or is not an employer. In answering that question, the overarching concern is whether the alleged employer possessed the power to control the workers in question with an eye to the ‘economic reality’ presented by the facts of each case. Under the ‘economic reality’ test, the relevant factors include whether the alleged employer (1) had the power to hire and fire employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records” [internal quotations and citations omitted].

When applying this test, “no one of the four factors standing alone is dispositive. Instead the ‘economic reality’ test encompasses the totality of the circumstances, no one of which is exclusive.” (*Id* [internal citations omitted]).

Considering these four factors, the Board finds that Wahid, president of Aniq Halal Live Poultry Corp., was the employer along with the corporation. Although Wahid hired a manager to run the day to day operations of the business, Wahid testified that he visited the business one to two times per week, supervised the work schedules and was responsible for paying the employees. Wahid hired and directed Hossain who was responsible for the hiring and maintenance of employment records. Under the economic realities test, Wahid supervised and controlled the employee work schedules and conditions of employment, determined the rate and method of payment and had the power, which he delegated to Hossain, to hire and fire employees and maintain employment records. Given the totality of the circumstances we find that Wahid is the employer.

B. Petitioner failed to keep required records.

1. Record Keeping Requirements

Labor Law § 661 states in relevant part:

“Every employer shall keep true and accurate records of hours worked by each employee covered by an hourly minimum wage rate, the wages paid to all employees, and such other information as the commissioner deems material and necessary, and shall, on demand, furnish to the commissioner or [her] duly authorized representative a sworn statement of the same. Every employer shall keep such records open to inspection by the commissioner or [her] duly authorized representative at any reasonable time”

The Minimum Wage Order for Miscellaneous Industries specifies the information required to be maintained. 12 NYCRR 142-2.6 provides in relevant part:

“(a) Every employer shall establish, maintain

weekly payroll records which shall show for each employee:

- (1) name and address;
- (2) social security number;
- (3) wage rate;
- (4) the number of hours worked daily and weekly, including the time of arrival and departure for each employee working a split shift or spread of hours exceeding 10;
- (5) when a piece-rate method of payment is used, the number of units produced daily and weekly;
- (6) the amount of gross wages;
- (7) deductions from gross wages;
- (8) allowances, if any, claimed as part of the minimum wage;
- (9) net wages paid; and
- (12) student classification.”

§ 142-2.7 further provides:

“Every employer . . . shall furnish to each employee a statement with every payment of wages, listing hours worked, rates paid, gross wages, allowances, if any, claimed as part of the minimum wage, deductions and net wages.”

Therefore, it is an employer’s responsibility to keep accurate records of the hours worked by its employees and the amount of wages paid, and to provide its employees with a wage statement every time an employees is paid. This required recordkeeping provides proof to the employer, the employee and the Commissioner that the employee has been properly paid.

We do not credit Petitioner’s records produced at hearing. Petitioner failed to provide payroll records to DOL on its first inspection or its revisit. In addition, although it provided cash receipts purportedly signed by Uddin to DOL at the compliance conference, Uddin testified that none of the signatures on the receipts were his. Although the cash receipts at the conference started with the payroll period including December 31, 2006, which would coincide with the DOL audit, Petitioner only presented receipts starting January 21, 2007 at the hearing in combination with its claim that Uddin started in January and not December. However, Uddin testified that he started on January 28, 2007. The lack of consistency in the records as well as Uddin’s testimony about the signatures indicate that these records are not accurate and may have been compiled after the fact.

Wahid testified that there was a time record book for each employee similar to the one produced for Uddin. However, he then produced a time record which included three of the employees together and only spanned the three weeks in May 2007 during which DOL made its two visits. In addition, Wahid testified that R. Duran started working for him in March 2007 which is also inconsistent with the time record and Wahid’s testimony.

2. DOL's Calculation of Wages in the Absence of Adequate Employer Records

The law requires employers to maintain payroll records that include, among other things, its employees' daily and weekly hours worked, wage rates, and gross and net wages paid (12 NYCRR 142-2.6). Employers are required to keep such records open to inspection by the Commissioner or her designated representative (Labor Law § 661; 12 NYCRR 142-2.6).

An employer's failure to keep adequate records does not bar employees from filing wage complaints. Where employee complaints demonstrate a violation of the Labor Law, DOL must credit the complaint's assertions and relevant employee statements and calculate wages due based on the information the employee has provided. The employer then bears the burden of proving that the disputed wages were paid. (Labor Law § 196-a.) As the Appellate Division stated in *Matter of Mid-Hudson Pam Corp. v Hartnett*, 156 AD2d 818, 821 (3rd Dept 1989), "[w]hen an employer fails to keep accurate records as required by statute, the Commissioner is permitted to calculate back wages due to employees by using the best available evidence and to shift the burden of negating the reasonableness of the Commissioner's calculations to the employer."

In *Anderson v Mt. Clemens Pottery Co.*, 328 US 680, 687-88 (1949), *superseded on other grounds by statute*, the U.S. Supreme Court long ago discussed the fairness of relying on employee statements where the employer failed to keep adequate records:

"[W]here the employer's records are inaccurate or inadequate . . . [t]he solution . . . is not to penalize the employee by denying him any recovery on the ground that he is unable to prove the precise extent of uncompensated work. Such a result would place a premium on an employer's failure to keep proper records in conformity with his statutory duty; it would allow the employer to keep the benefits of an employee's labors without paying due compensation as contemplated by the Fair Labor Standards Act."

Anderson further opined that the court may award damages to an employee, "even though the result be only approximate. . . [and] [t]he employer cannot be heard to complain that the damages lack the exactness and precision of measurement that would be possible had he kept records in accordance with the [recordkeeping] requirements of . . . the Act." *Id.* at 688-89.

The legislative intent of the Unpaid Wage Prohibition Act, which includes Labor Law § 196-a, was set forth in Laws of 1997, Ch. 605, and states, in pertinent part: "The legislature finds . . . that too often the working people of our state do not receive the full wages they have earned, and that some workers are never paid at all for their labor. . . [W]e must ensure that working people are paid what they earn."

The remedial purpose of the Unpaid Wage Prohibition Act mirrors that of the prevailing wage statute and federal law. We therefore follow the precedent set in *Mid-Hudson Pam Corp.* that where an employer fails to keep records, DOL may use the best available evidence to calculate back wages due and "to shift the burden of negating the reasonableness of the Commissioner's calculations to the employer. . . In such a situation the amount and

extent of underpayment is a matter of just and reasonable inference” *Mid-Hudson Pam Corp.*, *supra* at 821.

When combined with the burden of proof that the employer normally bears in a petition before the Board to show that the Order of the Commissioner is invalid or unreasonable, the burden of disproving the amounts sought by the Commissioner in its Order, whether based on employee claims or not, and using the best available evidence, rests with the employer. To hold otherwise would reward the employer’s disregard of its statutory obligation to maintain employee records.

C. Wages are due under the Minimum Wage Act.

The Minimum Wage Order for Miscellaneous Industries provides that an employer shall pay a non-residential employee minimum wage and overtime at a wage rate of 1 ½ times the employee’s regular rate for hours worked over 40 in a work week subject to any applicable exemptions (12 NYCRR 142-2.2). The minimum wage was \$6.00 per hour from May through December 2005; \$6.75 per hour from January through December 2006; and \$7.15 per hour from January 1, 2007 through July 2007.

As the Board has discussed in *Matter of Cayuga Lumber*, PR 05-099 (Decision on Reconsideration, September 26, 2007) the regular rate of pay, which is the basis for determining the premium pay for overtime, is calculated by dividing the employee’s weekly salary by the regular number of hours worked per week.

Section 142-2.5 of the Minimum Wage Order (12 NYCRR 142-2.5) provides for certain allowances for meals and tips which may be deducted from the minimum wage.

“(a) *Allowances for meals, lodging and utilities.* (1) Meals and lodging furnished by an employer may be considered a part of the minimum wage, but shall be valued at . . . \$2.45 per meal on and after January 1, 2007.”

“(b) *Allowances for tips.* (1) Tips, or gratuities, may be considered a part of the minimum wage, subject to the following conditions:

“(i) the particular occupation in which the employee is engaged is one in which tips have customarily and usually constituted a part of the employee’s remuneration ;

“(ii) substantial evidence is provided that the employee received in tips at least the amount of the allowance claimed. An example of substantial evidence is a statement signed by the employee that he actually received in tips the amount of the allowance claimed; and

“(iii) the allowance claimed by the employer is recorded on a weekly basis as a separate item in the wage record.” [Emphasis added.]

With certain modifications, we affirm the Commissioner's Wage Order directing payment of unpaid wages and overtime owed the six employees.

1. Jameel Uddin

Uddin testified on behalf of Petitioner that he started working on January 28, 2007. He first stated that he worked from 8:00 a.m. to 2:00 p.m., but then changed his testimony to say that he started at 7:00 a.m. every day. He stated that he never worked more than 36 hours per week and was paid \$288.00 per week. Wahid testified that Uddin worked for Petitioner from 7:00 a.m. to 1:00 p.m. and that he was paid \$388 per week. The records produced, which were allegedly prepared by the manager, indicate that Uddin worked from 8:00 a.m. to 2:00 p.m. These were not original records and all had the appearance of being created at the same time.

Petitioner also produced receipts for cash wages allegedly signed for by Uddin. Uddin, however, testified that the signatures on the receipts were not his. In addition, although Petitioner initially produced receipts at a DOL compliance conference, dating from December 31, 2006 which matches the starting date of Uddin in DOL's audit, at hearing the Petitioner produced receipts dating from only January 21, 2007. No records were produced at the first or second visit to Petitioner's premises.

Uddin testified that he was interviewed by DOL on May 24, 2007 and that it was true that he had a 30 minute lunch. At hearing, he did not deny his answers on his interview sheet, he did testify that he was confused at the time, having only recently arrived in the country.

Respondent produced the testimony of LSI Hart that he went over Uddin's interview with Uddin and that he confirmed all of the information. In addition, the hours of operation and other parts of the interview were consistent with the other interviews.

Based on the internal inconsistencies in Petitioner's evidence and the unreliability of Petitioner's records, we find that Petitioner failed to meet its burden of proof with regard to the proper payment of wages to Uddin. However, because Uddin testified that he began work on January 28, 2007, we modify the Order to reflect our finding started employment on January 28, 2007 and not December 31, 2006, since Uddin testified as to the January date and the December date was a DOL approximation.

2. Roman Duran

Petitioner alleges in its Petition and brief that Roman worked for Petitioner for only three weeks from May 7 to May 27, 2007. In support, it introduced a time sheet that contains three names: "Roman," "Felx," and "Migul" for the period May 7, 2007 to May 27, 2007. Wahid testified that the manager gave him the sheet but that he had never seen it before. Wahid further testified that Roman started work at Petitioners in March 2007. We do not credit the information on the time sheet. It lacks foundation, contradicts Wahid's testimony that a separate book was kept for each employee since all three employees were listed on one sheet, and is inconsistent with Wahid's testimony that Roman began in March. We also find it suspicious that the time periods claimed as the only time periods worked by these three employees match the time that DOL paid its visits to Petitioner's premises. In addition,

although Wahid testified that the business is open only until 5:30 p.m. the time sheet consistently lists Migul as working from 1:00 – 7:00.

We therefore find that Petitioner failed to bear its burden to prove that Roman was properly paid and that DOL's determination of the unpaid wages due to Roman based on its interview of him was reasonable.

3. C. Felix and M. Bravo

Similar to its argument with regard to Roman, Petitioner argues that C. Felix and M. Bravo worked only 3 weeks in May 2007 and as proof, submitted the time record discussed above. Again, we do not give any credence to this evidence. In addition, in the case of C. Felix, LSI Investigator Castillo testified that she interviewed Felix and that he confirmed the information that she took down and signed the interview sheet.

We, therefore, find that DOL's determination of the unpaid wages due to Roman based on its interview, was reasonable and that Petitioner failed to bear its burden to prove that Roman was properly paid.

4. J. Lombardi and G. Hernandes

Petitioner argued that these two employees never worked for Petitioner. These two employees were not listed on DOL's first audit. G. Hernandes was interviewed by DOL in May 2007 along with the other employees. Hart testified that J. Lombardi came to DOL to file a claim in July 2007 and Hart interviewed him and witnessed him sign the interview sheet.

Again, we find that Petitioner failed to prove that the Order is unreasonable with respect to these two employees, and we uphold DOL's determination regarding the unpaid wages due Lombardi and Hernandes.

D. Civil Penalties for failure to pay wages are affirmed.

The Wage Order additionally assessed a civil penalty in the amount of 50% of the wages due. The Board finds that the considerations and computations that the Commissioner was required to make in connection with the imposition of the civil penalty amount set forth in the Order is proper and reasonable in all respects. Petitioner argues that it should not be penalized so harshly because it is a small business and was not aware of the recordkeeping obligations until Hart educated it in May 2007. However, Petitioner had one previous Order issued against it for underpayment of wages and at that point, at the very least, was on notice that its recordkeeping and payment practices were unlawful.

E. Liquidated Damages are affirmed.

Labor Law § 663 provides that if an employee is paid less than he is entitled under the Minimum Wage Act, the employee may bring a civil action, or the commissioner, on the employee's behalf, may bring "any legal action" to collect such underpayment and "if such underpayment was willful, [award] an additional amount as liquidated damages equal to

twenty-five percent of the total of such underpayments found to be due him.”¹ “The applicable test for willfulness appears to parallel that employed in determining willfulness for limitations purposes under the FLSA. *See, e.g., Moon v Kwon*, 248 F Supp 2d 201, 235 (SDNY 2002). As noted, willfulness in that context involves either knowledge by the employer that his conduct is illegal or reckless disregard for whether it is statutorily prohibited. *See McLaughlin v Richland Shoe Co.*, 486 US 128, 135 (1988).” *Ke v Saigon Grill, Inc.*, 595 F Supp 2d 240, 261 (SDNY 2008).

We affirm the assessment of liquidated damages of 25% of the unpaid wages because we find that, based on the above standard, Petitioner’s underpayment was willful. Petitioner had a previous Order issued against it for underpayment of wages for which it was still making payments at the time of DOL’s inspection. Although Wahid testified that he was unaware of his recordkeeping obligations until after Hart’s visit, a previous violation, at the very least, put Petitioner on notice that it needed to look into its employment practices. In addition, Petitioner’s violations of failure to pay minimum wage and overtime are violations of basic employee rights and failure to adhere to these minimal obligations show a reckless disregard of the law. This reckless disregard is further evidenced by Petitioner’s failure to keep time and payroll records for these particular employees. Petitioner was aware records needed to be kept since it kept records for some of its employees but not all.

F. The Civil Penalties for failure to have records and issue pay statements are upheld.

Although the Petition alleges that Petitioner kept the required payroll records and wage statements, in fact, it did not and could produce no records that complied with the law. Adding to the egregiousness of Petitioner’s violations was its attempt to introduce records that appeared to be created after the fact. The Civil Penalties are upheld.

G. Interest is due.

Labor Law § 219(1) provides that when the Commissioner determines that wages are due, then the order directing payment shall include “interest at the rate of interest then in effect as prescribed by the superintendent of banks pursuant to section fourteen-a of the banking law per annum from the date of the underpayment to the date of payment.” Banking Law § 14-A sets the “maximum rate of interest” at “sixteen percent per centum per annum.”

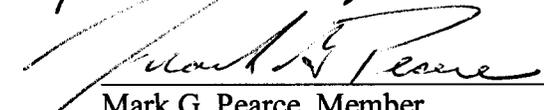
¹ Labor Law § 663 has been amended and the new law will take effect in November 2009 (L 2009 Chap. 372). The new law clarifies existing law that DOL may seek liquidated damages in administrative proceedings but changes the standard for awarding liquidated damages to mirror the FLSA standard and shift the burden to the employer to prove that it had a “good faith basis to believe that its underpayment of wages was in compliance

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT

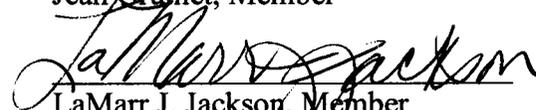
1. The Order to Comply with Article 19 (Wage Order) is modified to account for the fact that Jameel Uddin commenced work on January 28, 2007 and not December 31, 2006 and the attendant 50% penalty, 25% liquidated damages and 16% interest shall be modified accordingly; and
2. The Orders are affirmed in all other respects; and
3. The Petition is denied.


Anne P. Stevason, Chairman


J. Christopher Meagher, Member


Mark G. Pearce, Member


Jean Grumet, Member


LaMarr J. Jackson, Member

Dated and signed in the Office
of the Industrial Board of Appeals
at New York, New York, on
November 17, 2009.