STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of: LONG COVE DENG AND NEW YORK MART, INC., Petitioners, To Review Under Section 101 of the New York Labor Law: an Order to Comply with Article 6, and an Order under Article 19 of the Labor Law, both dated March 19, 2014, - against - THE COMMISSIONER OF LABOR, Respondent.	DOCKET NO. PR 14-101 RESOLUTION OF DECISION

APPEARANCES

Law Office of Thomas D. Gearon, Flushing (*Thomas D. Gearon* of counsel), for petitioners.

Pico Ben-Amotz, General Counsel, NYS Department of Labor, Albany (*Jake A. Ebers* of counsel), for respondent.

WITNESSES

Bing Yan, for petitioners.

Qingqing Li and Jeremy Kuttruff, Senior Labor Standards Investigator, for respondent.

WHEREAS:

The petition in this matter was filed with the Industrial Board of Appeals on May 19, 2014, and seeks review of two orders issued by respondent Commissioner of Labor on March 19, 2014, against petitioners Long Cove Deng and New York Mart, Inc. Respondent filed her answer to the petition on September 9, 2014.

Upon notice to the parties, a hearing was held in this matter on November 13, 2014, in New York, New York before Vilda Vera Mayuga, Chairperson of the Board and designated hearing officer in this proceeding. Each party was afforded a full opportunity to present documentary evidence, examine and cross-examine witnesses, and make statements relevant to the issues.

The order to comply with Article 6 (wage order) directs compliance with Article 6 and payment to respondent of wages in the amount of $2,250.00 due and owing to claimant Qingqing Li for the period of January 9, 2012 to January 28, 2012, with interest continuing thereon at the rate of 16% calculated to the date of the order in the amount of $770.30, and liquidated damages at 25% equal to $562.50, and assesses a civil penalty in the amount of $2,250.00, for a total amount due of $5,832.80.

The order under Article 19 (penalty order) assesses a $500.00 civil penalty against petitioners for violating Labor Law § 661 and 12 NYCRR 142-2.6 by failing to keep and/or furnish true and accurate payroll records for each employee for the period of January 9, 2012 through January 28, 2012.

The petition alleges that the wage order is unreasonable or invalid because (1) claimant was terminated on January 9, 2012; (2) the amounts demanded are "excessive;" and (3) there is "no basis under Labor Law § 220" for the amounts demanded.

For the following reasons, we find petitioners failed to meet their burden of proof to establish that the orders are invalid or unreasonable.

SUMMARY OF EVIDENCE

Wage Claim

On February 27, 2012, Qingqing Li filed a claim for unpaid wages in the amount of $2,250.00 for work as a manager from January 9, 2012 to January 28, 2012.

Petitioners' Evidence

Bing Yan testified that he is a former assistant to Long Cove Deng, President of the supermarket chain New York Mart, Inc. Yan worked for New York Mart from October 2010 until September 2014 and part of his duties included "oversee[ing] the [approximately 10] supermarkets," and "talk[ing] with the managers and assistant managers of different supermarkets" once or twice a week about sale prices and status. He testified that he knew claimant because she managed petitioners' supermarket in Little Neck, New York and he spoke with her once or twice a week. Yan testified that while he spoke with Deng daily, he was not familiar with payroll reports, was not responsible for paying employees or for any of the bookkeeping. Yan testified that he learned from Deng that claimant "no longer worked for" New York Mart "at the beginning of 2012, maybe January or February."

Respondent's Evidence

Claimant Li testified that she worked as the General Manager of petitioners' Little Neck grocery store from July 2, 2008 until January 28, 2012. Li testified that she was never told that she was fired, never received anything in writing to that effect, and only learned she was fired when petitioners locked her out of the store where she still has some personal belongings. At the time when she stopped working at the store, Li was being paid $900.00 weekly, partially in cash and partially by check.

Senior Labor Standards Investigator Kuttruff testified that he reviewed Li's claim form, interviewed her by telephone and wrote petitioners with notice of the claim and seeking payroll records. Petitioners responded alleging that claimant had been terminated on January 9, 2012, and did not work beyond that date. Kuttruff testified that petitioners provided no documentation confirming the termination despite respondent's request. Having received no response to additional correspondence sent to petitioners, Kuttruff referred the claim for an order to comply and the orders under review were issued. He also testified that he had contacted claimant after receiving petitioners' letter reporting her termination and that claimant denied she had known she was terminated "until after she worked the period of her claim." He testified further that in calculating the penalty amount respondent considered petitioners' failure to respond to repeated efforts to obtain required documentation, how long petitioners had been in business, the amount owing claimant and the fact that petitioners had no prior history of violations.

STANDARD OF REVIEW AND BURDEN OF PROOF

When a petition is filed, the Board reviews whether an order issued by the Commissioner is "valid and reasonable" (Labor Law § 101 [1]). A petition must state "in what respects [the order on review] is claimed to be invalid or unreasonable," and any objections not raised shall be deemed waived (*id.* § 101 [2]). The Labor Law provides that an order of the Commissioner shall be presumed valid (*id.* § 103 [1]). The hearing before the Board is *de novo* (Board Rules of Procedure and Practice [Board Rules] [12 NYCRR] § 66.1 [c]). Petitioner has the burden to prove by a preponderance of the evidence that the orders are not valid or reasonable (Board Rule 65.30 [12 NYCRR] § 65.30; State Administrative Procedure Act § 306; *Matter of Angello v Natl. Fin. Corp.*, 1 AD 3d 850, 854 [3d Dept 2003]).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Board makes the following findings of fact and conclusions of law pursuant to Board Rule (12 NYCRR) § 65.39. The wage order finds that petitioners owe claimant $2,250.00 in unpaid wages. Petitioners allege claimant is not entitled to wages beyond January 9, 2012, when she was terminated from her employment with petitioners. We find that petitioners failed to meet their burden of proving claimant was not entitled to wages for the claim period or to negate the reasonable inferences the Commissioner drew from claimant's credible evidence. We, therefore, affirm the wage order.

We Affirm the Wage Order

Article 6 of the Labor Law requires that an employer pay wages to its employees (Labor Law § 191). Labor Law § 190 (1) defines "wages" as "the earnings of an employee for labor or services rendered, regardless of whether the amount of earnings is determined on a time, piece, commission or other basis." Article 6 also requires employers to maintain for six years certain records of the hours their employees worked and the wages they paid them (Labor Law § 195 [4]). The records must show for each employee, among other things, the number of hours worked daily and weekly, the amount of gross wages, deductions from gross wages, allowances, if any, and money paid in cash (*id.*). Employers must keep such records open for inspection by the Commissioner or a designated representative. In the absence of required payroll records, the

Commissioner may draw reasonable inferences and calculate unpaid wages based on the "best available evidence" drawn from employee statements or other evidence, even if the results may be merely approximate (*Ramirez v Commissioner of Labor*, 110 AD3d 901 [2d Dept. 2013]; *Matter of Mid-Hudson Pam Corp. v Hartnett*, 156 AD2d 818, 820-21 [3rd Dept 1989]).

In a proceeding challenging such determination, the employer must come forward with evidence of the "precise" amount of work performed or with evidence to negate the reasonableness of the inferences to be drawn from the employee's evidence (*Anderson v Mt. Clemens Pottery*, 328 US 680, 687–88 [1949]; *Mid-Hudson Pam Corp.*, 156 AD2d at 821). Given the interrelatedness of wages and hours, the same burden shifting applies to wages and requires the employer to prove the "precise wages" paid for that work or to negate the inferences drawn from the employee's credible evidence (*Doo Nam Yang v ACBL Corp.*, 427 F Supp 2d 327, 332 [SDNY 2005]; *Matter of Kong Ming Lee*, PR 10-293 at 16 [April 20, 2014]).

Because petitioners failed to offer accurate and reliable payroll records, the Commissioner was entitled to draw reasonable inferences and calculate the underpayment based on the best available evidence of employee statements and other circumstantial evidence. Petitioners' only witness was a manager who had no role in payroll and was not involved in claimant's termination of employment. Claimant credibly testified that she worked for petitioners until she was locked out of the premises without notice, and was receiving $900.00 per week in wages until then. Petitioners did not rebut her testimony. We, therefore, find that the Commissioner relied on the best available evidence in calculating the wage underpayment due and owing to claimant (*see Matter of Mid-Hudson Pam Corp.*, 156 AD2d at 820–21; *Ramirez v Commissioner of Labor*, 110 AD3d 901 [2d Dept 2010]). Petitioners failed to meet their burden of proof in showing the wage order was invalid or unreasonable.

Liquidated Damages

Where the Commissioner determines an employee has not been paid all wages owed, Labor Law § 198 requires her to assess liquidated damages in an amount not to exceed 100% of the amount of unpaid wages unless the employer proves a good faith basis to believe that its underpayment was in compliance with the law. Here, respondent correctly determined that claimant was not paid all wages owed and the amount assessed does not exceed 100%. Accordingly, we affirm the imposition of liquidated damages.

Interest

Labor Law § 219 (1) provides that when the Commissioner determines that wages are due, then the order directing payment of those wages shall include "interest at the rate of interest then in effect as prescribed by the superintendent of financial services 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 per centum per annum." Here, respondent correctly determined that claimant was not paid all wages owed. Thus, we affirm the rate of interest imposed in the wage order.

Civil Penalty

Labor Law § 218 (1) provides that when the Commissioner determines that an employer has violated a provision of Articles 6 or 19, she must issue an order directing payment of wages found to be due, "plus the appropriate civil penalty." The wage order assesses a 100% civil penalty. Petitioners opposed the civil penalty, claiming it to be "excessive," but offered nothing in support of this claim. Petitioners failed to meet their burden of showing the penalty amount was excessive and the civil penalty is, thus, affirmed.

The Penalty Order Is Affirmed

Petitioners did not challenge the penalty order and the issue is thereby waived pursuant to Labor Law § 101 (2) ("[a]ny objections to the . . . order not raised in such appeal shall be deemed waived"). We find that the considerations and computations respondent made in issuing the penalty order are valid and reasonable in every respect, and affirm them.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The wage order is affirmed; and

2. The penalty order is affirmed; and

3. The petition be, and the same hereby is, otherwise denied.

Vilda Vera Mayuga, Chairperson

J. Christopher Meagher, Member

Michael A. Arcuri, Member

Molly Doherty, Member

Gloribelle J. Perez, Member

Dated and signed by the Members
of the Industrial Board of Appeals
in New York, New York
on March 1, 2017.