STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of:	
JAY METZ AND ALICIA H. METZ AND LAUREN SIMONS and GRJH Inc. (T/A SUNOCO QUEENSBURY),	
Petitioner,	DOCKET NO. PR 09-390
To Review Under Section 101 of the Labor Law: Two Orders to Comply With Article 6 of the Labor Law and an Order to Comply Under Article 19 of the Labor Law, all dated December 17, 2009,	RESOLUTION OF DECISION
- against -	
THE COMMISSIONER OF LABOR,	
Respondent.	

APPEARANCES

Hacker & Murphy, LLP (John Harwick of counsel), for Petitioners.

Pico Ben-Amotz, Acting Counsel, NYS Department of Labor (Benjamin A. Shaw of counsel), for the respondent.

WITNESSES

Theresa McKee (Claimant) for Petitioners; Elizabeth A. Ares (Senior Labor Standards Investigator, Department of Labor) for Respondent.

WHEREAS:

On December 30, 2009, the Industrial Board of Appeals (Board) received a petition for review in this matter. An answer to the petition was filed on February 12, 2010. On April 14, 2011, the Board received an amended petition, without objection from Respondent. The petitions (petition) seek review of two Orders to Comply. The first Order (Wage Order) directs Petitioners to pay to the Commissioner of Labor (Commissioner, Respondent) wages owed to Teresa McKee (Claimant) in the amount of $390.00, with interest continuing thereon at the rate of 16% to the date of the Order in the amount of $30.00 and a civil penalty in the amount of $780.00, for a total of $1,200.09. The second Order (Penalty Order) directs Petitioners to pay to the Commissioner $500.00 for the failure to post regulations on prohibited deductions from

wages and appropriation of tips (Count 1); and $2,000 for the failure to keep and/or furnish true and accurate payroll records (Count 2).

Upon notice to the parties a hearing was held on January 26, 2012, in Albany, New York before Board Member and designated hearing officer Jeffrey R. Cassidy. 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 submit post-hearing briefs.

Claimant claims unpaid wages for the period June 21, 2009 to June 24, 2009. Petitioners argue that all wages have been paid to Claimant and that the interest and penalty on the Wage Order and the Penalty Order are invalid and unreasonable. Petitioners argue that Claimant was suspended without pay for the claim period for misconduct, was invited back to the work place for those days to discuss her alleged misconduct, but refused to do so. The Commissioner responds that Claimant was not suspended and worked her normal hours for the claim period.

Petitioners assert that the Penalty Order (Count 1) is invalid or unreasonable because the at-issue place of business is not a restaurant and §§ 193 and 196-d of the Labor Law requiring the posting of regulations on prohibited deductions from wages and appropriation of tips is inapplicable. Petitioners also argue that the Penalty Order (Count 2) is unreasonable as Claimant was not on the payroll for the claim period and that payroll records were available at petitioner GRJH's Sharon, Connecticut headquarters.

The Commissioner's answer denies the petitioner's material allegations and asserts that the calculation of wages, interest and penalties in the Orders in all respects is valid and reasonable. At the conclusion of Petitioners' case, the Commissioner made a motion to dismiss the petition for Petitioners' failure to make a prima facie case. In support of the motion to dismiss, the Commissioner argues that at hearing Petitioners failed to produce any evidence in support of its position that Claimant did not work during the claim period; that the at-issue work location was not covered by §§ 193 and 196-d of the Labor Law; that it complied with the requirement to keep and/or furnish true and accurate payroll records; or, that the Wage Order's interest or penalty was unreasonable or invalid. The hearing officer reserved decision on Commissioner's motion.

SUMMARY OF EVIDENCE

Testimony of Claimant

Claimant began work as a store manager at Petitioners' Queensbury Sunoco facility in January 2009. She described the facility as a gas station located on New York State's "Northway" (I-87) that contained a deli convenience store that served food for take-out or for eating at the store's tables. One employee was in charge of the deli operation, and worked from 7 to 3, though Claimant helped out as needed.

Claimant testified that she worked at Queensbury Sunoco on June 22, 23, and 24, 2009, worked her normal shift beginning at 5:30 a.m. She performed her normal duties

and was not paid for those days. On June 24, her supervisor, Jimmy Metz[1], accused her of misconduct and told her to hand in her shirt and keys, and terminated her. She recorded her hours for these days on the work schedule posted in at the worksite. Claimant denied ever having received a written notice of her termination, ever having been suspended, and ever being invited to return to Queensbury Sunoco to discuss her alleged misconduct.

Claimant described what payroll records were kept at Queensbury Sunoco. A schedule of each employee's work hours were kept on an electrical box located in a back room. Employees wrote their names or their hours under each scheduled workday signifying the completion of their work. If the employee forgot to record their hours, Claimant recorded it for them. The recordings were not precise as an employee who was a few minutes late merely recorded his scheduled work hours. Every Monday Claimant forwarded these schedules to Petitioner (GRJH, Inc.) at its Sharon, Connecticut headquarters. The work schedules kept at Queensbury Sunoco did not include employees' last names, social security numbers, addresses, phone numbers, wages, or deductions. Job applications, which included employees' addresses and phone numbers, were kept at Queensbury Sunoco.

GOVERNING LAW

A. Standard of Review and Burden of Proof

The Labor Law provides that "any person . . . may petition the board for a review of the validity or reasonableness of any . . . order made by the commissioner under the provisions of this chapter" (Labor Law § 101 [1]). It also provides that an order of the Commissioner shall be presumed "valid" (Labor law § 103 [1]).

A petition filed with the Board that challenges the validity or reasonableness of an order issued by the Commissioner must state "in what respects [the order on review] is claimed to be invalid or unreasonable" (Labor Law § 101[2]). It is a petitioner's burden at hearing to prove the allegations that are the basis for the claim that the orders under review is invalid or unreasonable (Board's Rules of Procedure and Practice (Rule) § 65.30 at 12 NYCRR § 65.30 ["the burden of proof of every allegation in a proceeding shall be upon the person asserting it"]; *Angello v Natl. Fin. Corp.*, 1 AD3d 850, 854 [3d Dept 2003]). A proceeding may be dismissed upon motion of a party to the Board (Rule 65.49 at 12 NYCRR § 65.49).

B. Recordkeeping Requirements

Labor Law §§ 195(4) and 661 require employers to maintain payroll records. Section 661 requires employers to make such records available to the Commissioner:

> "Every employer shall keep true an 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

[1] Jimmy Metz is petitioner Jay Metz's son.

> 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 the Restaurant Industry requires the following information to be maintained for a period off six years (12 NYCRR 137-2.1):

> "(a) Every employer shall establish, maintain and preserve for not less than six years weekly payroll records which shall show for each employee:
> (1) name and address;
> (2) social security number;
> (3) occupational classification and 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) the amount of gross wages;
> (6) deductions from gross wages;
> (7) allowances, if any, claimed as part of the minimum wage.
> (8) money paid in cash; and
> (9) student classification.

Additionally, pursuant to 12 NYCRR § 137-2.6 (e), "[e]mployers, including those who maintain their records containing the information required by this section at a place outside of New York State, shall make such records or sworn certified copies thereof available upon request of the commissioner at the place of employment."

C. The Department of Labor's (DOL) Calculation of Wages in the Absence of Adequate Employer Records.

An employer's failure to keep adequate records does not bar employees from filing wage claims. Where employee claims 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; *Angello,* 854. As the Appellate Division stated in *Matter of Mid-Hudson Pam Corp. v Hartnett,* 156 AD2d 818, 821 [3d 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 calculation to the employer."

In *Anderson v Mt. Clements Pottery Co.,* 328 U.S. 680, 687-688 [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 by the Fair Labor Standards Act."

Citing to *Anderson,* the Appellate Division in *Mid-Hudson Pam Corp,* 821, agreed:

> "The public policy of providing protection to workers is embodied in the statute which is remedial and militates against creating an impossible hurdle for the employee . . . Where we to hold otherwise, we would in effect award petitioners a premium for their failure to keep proper records and comply with the statute. That result should not pertain here."

D. Employer Posting Requirements

An employer who is engaged in the "sale or service of food or beverages" is required to post "in a place accessible to his employees and in a visually conspicuous manner, a copy of sections one hundred ninety-three and one hundred ninety-six-d of this chapter and any regulations promulgated pursuant thereto relating to illegal deductions from wages and tips by employers." (Labor Law § 198-d; 12 NYCRR § 137-2.4). Labor Law § 193 restricts, with certain exceptions, employers from making wage deductions from employees (see also, 12 NYCRR § 137-2.5). Labor Law § 196-d limits employers from retaining employee gratuities.

FINDINGS

Petitioners Failed to Meet Their Burden to Establish that the Wage and Penalty Orders are Invalid or Unreasonable. The Commissioner's Motion to Dismiss the Petition for the Petitioners' Failure to Make a Prima Facie Case is Granted.

At the conclusion of the Petitioners' case, the Commissioner moved to dismiss the petition on the grounds that Petitioners failed to establish a prima facie case or otherwise meet their burden of proof that the Wage Order and Penalty Order are invalid or unreasonable. A motion to dismiss made at the close of a petitioner's case "succeeds or fails on the evidence presented by that party" (*Public Employees Federation [Benson]* v *New York State Public Employment Relations Board,* 288 AD2d 542 [2001]); *Matter of Richard Delledone*, Docket No. PR 08-145 [July 22, 2009]. Only evidence offered by Petitioners before the motion to dismiss can be considered (*Public Employees Federation,* at 543). Having reviewed the evidence admitted during Petitioners' case, we grant the motion to dismiss.

The Wage Order is for $390.00, which is payment for Claimant's unpaid wages for June 22, 23, and 24, 2009. The Wage Order is presumed valid and it is Petitioners burden to prove that it is invalid or unreasonable. (Rule § 65.30 at 12 NYCRR § 65.30). Claimant was Petitioner's only witness and testified that she worked her normal hours on those days, performed her normal job functions, and was not paid the $390.00 that were

the wages due her for those three days. Also, Claimant testified that she was not suspended for the three claim days.

Petitioners argue that the civil penalty, and the interest, in the Wage Order are unreasonable or invalid. However, they offered no evidence in their direct case supporting their position. While Petitioners offered evidence that DOL, upon Petitioners' request, provided them with prior violations that it relied upon in assessing the civil penalty that were not the same violations cited in Senior Labor Investigator Ares' investigative report, that evidence was offered only after Petitioners concluded their direct case. Even if we were to consider such evidence, it is not dispositive of whether the 200% penalty is unreasonable or invalid. Ares testified that she considered all of Petitioners prior violations, not just those included on her report, and while Petitioners may have been unintentionally misled as to which prior violations were relied upon, we do not believe that Petitioners were unduly prejudiced by the error. Further, Ares did not just rely on Petitioners' prior violations in assessing the penalty.

Count 1 of the Penalty Order asserts that Petitioners failed to post regulations on prohibited deductions from wages and tip appropriation. Petitioners argue that Queensbury Sunoco is a gas station, and is not a restaurant, and is not covered under the Labor Law requiring postings for businesses engaged in the "sale or service of food or beverages." Claimant testified that Queensbury Sunoco had a deli counter and employed someone devoted to serving food, such as sandwiches, and that customers used the deli for either take-out or for eating at the facility. No other evidence was offered by Petitioners to show that Queensbury Sunoco was not covered by Labor Law § 198-d.

We find that Queensbury Sunoco is a place of business covered under Labor Law § 198-d, and that Petitioners did not establish that the required postings were made. Claimant testified that she could not recall if there were any postings at Queensbury Sunoco, however, it is Petitioners' burden to show that the required postings were made. This they failed to do.

Count 2 of the Penalty Order asserts that Petitioners failed to keep and/or furnish payroll records as required by Labor Law § 661, as supplemented by 12 NYCRR § 137-2.1. Claimant testified that she was in charge of keeping employee schedules and hours worked and that these were kept at Queensbury Sunoco. However, those records were not payroll records as defined in 12 NYCRR § 137–2.1, as they did not include social security numbers, occupational classifications and wage rates, deductions, gross wages, or precise hours of work. Petitioners offered no other evidence supporting their contention that they maintained true and accurate payroll records, or that they provided such records at Queensbury Sunoco (12 NYCRR § 137-2.1 (e).

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NOW , THEREFORE IT IS HEREBY RESOLVED THAT:

1. The Order to Comply with Article 6 of the Labor Law dated December 17, 2009, is affirmed in its entirety.

2. The Order to Comply under Article 6 and 19 of the Labor Law dated December 17, 2009, is affirmed in its entirety.

3. The petition for review by, and the same hereby is, otherwise denied.

Anne P. Stevason, Chairperson

J. Christopher Meagher, Member

Jean Grumet, Member

LaMarr J. Jackson, Member

Jeffrey R. Cassidy, Member

Date and signed in the Office of
the Industrial Board of Appeals
at New York, New York on
May 30, 2012.

NOW, THEREFORE IT IS HEREBY RESOLVED THAT:

1. The Order to Comply with Article 6 of the Labor Law dated December 17, 2009, is affirmed in its entirety.

2. The Order to Comply under Article 6 and 19 of the Labor Law dated December 17, 2009, is affirmed in its entirety.

3. The petition for review by, and the same hereby is, otherwise denied.

Anne P. Stevason, Chairperson

J. Christopher Meagher, Member

Jean Grunet, Member

LaMarr J. Jackson, Member

Jeffrey R. Cassidy, Member

Dated and signed by a Member
of the Industrial Board of Appeals
at Rochester, New York, on
June 4, 2012.