

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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In the Matter of the Petition of:

JAE KUN JEUNG AND SIK YOUNG KIM AND
158 W. FOOD CORP. (T/A TIMES DELI CAFÉ),

Petitioners,

DOCKET NO. PR 11-124

To Review Under Section 101 of the Labor Law:
An Order to Comply with Article 19 of the Labor
Law, an Order to Comply With Article 6 of the Labor
Law, and an Order Under Article 19 of the Labor Law,
each dated February 28, 2011,

RESOLUTION OF DECISION

- against -

THE COMMISSIONER OF LABOR,

Respondent.
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APPEARANCES

Ahne Law, P.C. (Samuel Ahne and Donald S. Kim of counsel), for petitioners.

Pico Ben-Amotz, Acting Counsel, NYS Department of Labor (Jeffrey G. Shapiro of counsel), for the respondent.

WITNESSES

Adan Capulin Peredes and Jae Jun Jeung for the petitioners; Senior Labor Standards Investigator Lawrence Breen, Senior Labor Standards Investigator Lety Escobar, Gregory Romero, and Ignacio Guadalupe for the respondent.

WHEREAS:

The petition in this matter was filed with the Industrial Board of Appeals (Board) on April 25, 2011, and seeks review of three orders issued by the Commissioner of Labor (Commissioner or respondent) against petitioners Jae Kun Jeung, Sik Young Kim, and 158 W. Food Corp. (T/A Times Deli Cafe) on February 28, 2011. Upon notice to the parties a hearing was held in this matter on December 6 and 7, 2011, in New York, New York, before Devin A. Rice, the Board's Associate Counsel, 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, make statements relevant to the issues, and file post-hearing briefs.

Parties

Petitioners Jae Kun Jeung, Sik Young Kim, and 158 W. Food Corp., operate Times Deli Café, a greengrocery and deli located in New York, New York. Respondent Commissioner of Labor is the head of the Department of Labor (DOL) (Labor Law § 10), and is authorized to enforce the Labor Law and issue orders (Labor Law § 21).

EVIDENCE

Wage Order

The order to comply with Article 19 (wage order) under review was issued by the respondent Commissioner of Labor against the petitioners on February 28, 2011. The wage order directs compliance with Article 19 and payment to the Commissioner for wages due and owing to 11 named claimants in the amount of \$155,396.24 for the time period from August 9, 2001 through February 27, 2008, with interest continuing thereon at the rate of 16% calculated to the date of the order, in the amount of \$82,355.74, and assesses a civil penalty in the amount of \$77,698.12, for a total amount due of \$315,450.10.

In April 2007, Ignacio Guadalupe, Gregorio Romero, Damian Perez, Porfirio Bharagan, Celestino Catalan, Rodrigo Hernandez, and Luis Sarmiento each filed claim forms with DOL alleging that they had been underpaid by the petitioners. These claimants alleged they had worked for the petitioners for 53 to 61 hours a week at salaries ranging from \$210.00 to \$460.00 a week.

Senior Labor Standards Investigator Lety Escobar testified that she was assigned to investigate these claims. She made a field visit to Times Deli on January 15, 2008, and spoke to four additional employees – Nicolas Ramirez Mejia, Geraldo Ramos, Marcos Hernandez, and Luis Maguina – who informed her that they worked from 49 ½ hours to 57 hours a week at salaries ranging from \$8.00 an hour to \$320.00 a week.

On February 12, 2008, Escobar made another field visit to Times Deli. Escobar testified that the petitioners showed her records during this visit, but they were not contemporaneous, nor did they show the daily and weekly hours the employees worked.

Upon completion of her field work, the investigation was transferred to Senior Labor Standards Investigator Lawrence Breen. Breen calculated the underpayments owed based on the seven wage claims and four interviews conducted by Escobar. Breen used the hours the employees stated they had worked as the basis for his calculations. He included “spread shift” or “spread of hours”, which is an additional hour’s pay at the state minimum wage, for any employee who’s starting and ending times exceeded ten hours. No meal credits were allowed because the record showed that the petitioners did not provide free meals to the claimants.

Breen testified that he recommended a 50% civil penalty in this matter because he believed the petitioners made every effort to be responsive. He also considered when imposing the penalty that "employment contracts" produced by the petitioners, according to the information provided to Escobar by the claimants, were not contemporaneous. Breen stated that a 50% penalty was at the "low end of the spectrum," that normally the penalty imposed is 100%, and that the maximum penalty DOL can impose is 200%.

Ignacio Guadalupe testified that he started working at Times Deli "around" 2001. He no longer works there, and does not remember when his employment ended. He filed a claim for unpaid wages with DOL on April 11, 2007. At that time he was still employed by the petitioner as a cleaner and "stockboy." At various times he had also worked at the deli counter and making deliveries. When he made deliveries, he received tips from customers. His claim alleges that he worked from 6:00 a.m. to 4:00 p.m. six days a week. He testified that was his schedule for the last three years he worked for the petitioners; before that his schedule was different. For example, he recalled that when he was first hired he worked 1:00 p.m. to 12:00 a.m. six days a week. Guadalupe's claim states that his salary from September 2001 to October 31, 2004 was \$210.00 a week; his salary from November 1, 2004 to October 31, 2005 was \$280.00 a week; and his salary from November 1, 2005 to April 11, 2007 was \$450.00 a week. The claim further alleges that he received a 30 minute meal period during each break, that meals were provided at a charge of \$20.00 per week, and that he received \$48.00 to \$120.00 a week in tips. Guadalupe testified that when he was first hired, a manager told him his salary was \$240.00 a week. He recalled working eleven hour days at some points during his employment with the petitioner, and admitted that his working hours varied from what he wrote on his claim form. He indicated \$210.00 on the claim form as his salary for the first three years, because he "didn't recall the amount exactly." He further testified that his schedule from 2001 to October 21, 2004 was 1:00 p.m. to 12:00 a.m. six days a week. From November 1, 2004 to October 31, 2005 he worked eleven or twelve hours a day, six days a week. He had a 30 minute break each day.

The petitioners moved a "contract of employment" for Guadalupe into evidence. The contract states various information related to the terms and conditions of Guadalupe's employment with the petitioners, including an hourly rate of \$6.00 an hour and an overtime rate of \$9.00 an hour, and sets forth a work schedule of 57 hours a week for a weekly total wage of \$468.44 less a deduction of \$21.00 for the provision of two meals per day at \$1.75 per meal for six days, for a net wage of \$447.41 per week. The contract is signed by Guadalupe and dated January 2, 2006. Guadalupe acknowledged that he signed the document, but does not understand its contents, because he is unable to read English. He testified that when he asked the manager for a copy of the contract, the manager refused to provide it to him. Guadalupe further testified that he signed the contract after an investigator from DOL had already inspected the deli.

The petitioners also moved several years of weekly payroll records for Times Deli into evidence. These payroll records contain a list of employees with their regular hours, regular rates, wages, overtime hours, overtime rates, overtime wages, additional compensation such as tips, gross wages, deductions such as tips, and net wages. The employees' initials appear beside their net wages each week. Guadalupe recognized his initials in the records and testified that the initials were done "a couple of years before, like 2009. We did it in one day. We spent like four hours doing this."

Gregory Romero testified that he has worked for the petitioners since "around" 2006. On April 6, 2007, he filed a wage claim against the petitioners with DOL. His claim alleges that he worked 58 hours a week for \$460.00 a week from February 7, 2007 to April 6, 2007. From February 7, 2006 to February 7, 2007 his salary was \$450.00 a week. Romero testified that his job is to prepare sandwiches. He testified that he signed an "employment contract" after his salary was raised, but never signed one when he was originally hired. He does not read English, and does not know what the contract says. When he was originally hired, the petitioners told him his schedule was Monday to Saturday and that his salary was \$450.00 a week. He has never received tips.

Damian Perez testified that he worked for the petitioners from October 2003 to January 2010. He filed a wage claim with DOL on April 5, 2007. His claim alleges that he worked 53 hours a week, and that his salary from October 15, 2003 to December 14, 2003 was \$290.00 a week; his salary from December 15, 2003 to October 15, 2006 was \$290.00 a week; and his salary from October 16, 2006 to April 9, 2007 was \$330.00 a week. Perez's job duties included stocking the refrigerators with soda, cleaning, and occasionally making deliveries. Perez signed an "employment contract," but does not remember when. He signed it because the owner and manager told him to. He requested a copy in Spanish, which was never provided.

Adin Capulin Peredes testified that he has worked for the petitioners in the "deli section" for sixteen years. He prepares sandwiches, answers phones, prepares deliveries, and describes himself as "like the assistant manager in the deli section." Peredes, when shown the payroll records, testified that he initialed them each week when he was paid. He testified that in 2004, he signed a contract stating his hourly wage rate was \$10.00 an hour and his overtime rate was \$15.00 an hour.

Peredes testified that he worked 57 hours every week. He believes the information in the weekly payroll records for 2002 and 2003 is correct, but testified that he "[doesn't] pay much attention to that" and that he does not remember. He further testified that he does not recall whether there was ever a period when he was paid a different salary or why at one point his schedule changed.

Petitioner Jae Jun Jeung testified that he has owned Times Deli Café for seventeen years, and that he is the general manager. He described his duties as overall management of the deli, including preparing the payroll, maintaining books and records for the business, and hiring and firing employees. Jeung testified that when an employee is hired, he drafts a contract that includes work hours and pay rates. The contracts are redrafted whenever the minimum wage is increased or an employee's salary is raised. He testified that the contracts are true and accurate.

Jeung testified that he used to use time cards to track the employees' hours, but the employees were not "faithful" in using them and they were, therefore, unreliable. He testified that he determined the payroll based on the weekly schedules he made for the employees, and checked up on when employees were late or did not come to work. He testified that the weekly payroll records were prepared each week, and were based on the contents of the "employment contracts", the work schedules, and his own verification of the hours worked. The records are of the actual hours worked. If an employee is late or misses

a day, then he makes up the time during the same pay period. Jeung explained that the tips were always recorded as the same amount each week, because the smallest amount the employees received was always more than what was listed. He further explained that this was just a "guesstimation" of the tips the employees actually received. A deduction was taken from the employees' wages for two meals per day. Jeung testified that Catalan received tips in addition to his hourly wage, and that his wage rate decreased when he started to make deliveries. He also testified that Sarmiento stopped making deliveries in 2004, although he did continue to do a "little" delivery during lunch which is why the records show he received \$20.00 a week in tips from 2004.

Tip Appropriations Order

The order to comply with Article 6 (tip appropriations order) under review was issued by the respondent Commissioner of Labor against the petitioners on February 28, 2011. The tip appropriations order directs compliance with Article 6 and payment to the Commissioner for tip appropriations due and owing to four named claimants in the amount of \$4,307.10 for the time period from August 9, 2001 through January 16, 2008, with interest continuing thereon at the rate of 16% calculated to the date of the order, in the amount of \$2,637.79, and assesses a civil penalty in the amount of \$2,153.55, for a total amount due of \$9,098.44.

Celestino Catalan and Rodrigo Hernandez each filed "tip appropriation questionnaires" along with their wage claims. Catalan's questionnaire states that he earns \$30.00 a week in credit card tips, and that the petitioners require him to share these tips with "all employees." Hernandez's questionnaire states that he receives from \$15.00 to \$17.00 per day in tips, and is required by the petitioners to give 15% to 20% of his tips to "Adan, Luiz, Gregorio, and Ignacio," who work at the deli counter.

Peredes testified that there are normally four employees working together as a team – somebody takes the order, somebody prepares the order, and somebody gives it to the "delivery boy" to deliver the food to the customer. Peredes stated that the customers normally tip the delivery boy by cash or on a credit card. The delivery boys keep the cash tips, and the charged tips are split between the delivery boy and the employees who took the order and prepared the food.

Jeung testified that when delivery people receive a cash tip, they keep it, and that the credit card tips are pooled.

Guadalupe testified that on a typical day, he made between three to ten deliveries. He estimated that he earned \$15.00 to \$20.00 a day in tips, and received more by credit card, but the petitioners did not give him all of his credit card tips. Perez testified that he received \$10.00 to \$15.00 a week in cash tips, and that the credit card tips were distributed by the petitioners three or four months after they were earned. The petitioners gave him around \$80.00 to \$100.00 from the credit card tips with each payment, which was "not complete."

Escobar testified that on or about February 29, 2009, one of the claimants contacted her by telephone to advise her that he had found records in the petitioners' garbage that he

believed were relevant to DOL's investigation. He gave the records to Escobar, who determined that they were records of the distribution of tips to the petitioners' employees, including employees who had not made the deliveries. Escobar explained that each employee had a number, and she knew from her investigation which employees made deliveries and which did not. Escobar calculated the amount of tips that had been distributed to employees who were not entitled to them as follows:

“ . . . I took the \$180, for example, as the total amount, and this \$180 is what was returned to the number 3, number 5, number 5, number 9 and number 11. And I did it based on the percentage of the total tips that they received at the end. So . . . Rodrigo's [Hernandez] total was \$[475], it seems. So I took the percentage of \$[475] out of the total tips that he received, and he would receive that percentage of the \$180.”

Penalty Order

The order under Article 19 (penalty order) under review was issued by the respondent Commissioner of Labor against the petitioners on February 28, 2011. The penalty order finds that the petitioners violated Article 19 of the Labor Law by failing to keep and/or furnish true and accurate payroll records for each employee for the period from on or about August 15, 2001 through February 27, 2008. The penalty order also finds that the petitioners violated Article 19 of the Labor Law by failing to give each employee a complete wage statement with each payment of wages from on or about August 15, 2001 through February 27, 2008. The Commissioner imposed a \$1,000.00 civil penalty for each violation, for a total due of \$2,000.00.

ANALYSIS

The Board makes the following findings of fact and law pursuant to the provision of Board Rules of Procedure and Practice (Rules) 65.39 (12 NYCRR 65.39):

Burden of Proof

The petitioners' burden of proof in this matter was to establish by a preponderance of the evidence that the orders issued by the Commissioner are invalid or unreasonable (State Administrative Procedure Act § 306 [1]; Labor Law §§ 101, 103; 12 NYCRR 65.30).

Wage Order

Article 19 of the Labor Law, entitled “Minimum Wage Act” sets forth the minimum wage that every employer must pay each of its non-exempt employees for each hour of work (Labor Law § 652 [1]). Article 19 also requires payment of time and one-half the regular wage rate for hours worked over 40 in a work week (12 NYCRR 137-1.3 [2008]), and an additional hour's pay at the minimum hourly wage rate on each day in which an employee's

spread of hours exceeds ten (12 NYCRR 137-1.7 [2008]¹). Certain allowances are allowed against the minimum wage for service employees who regularly receive tips (12 NYCRR 137-1.4 [2008]). DOL's investigation found that the petitioners failed to pay the required minimum wage, overtime, and/or spread shift to the claimants.

The petitioners proffered employment contracts and weekly payroll records in an effort to prove not only that they maintained the types of records required by Article 19, but that they did not underpay the claimants. 12 NYCRR 137-2.1 (a), which was in effect during the relevant time period, provided that the petitioners were required to maintain weekly payroll records for each employee that included, *inter alia*, the wage rate, number of hours worked daily and weekly, the amount of gross wages, deductions from gross wages, allowances, if any, claimed from the minimum wage, and money paid in cash. The records proffered by the petitioners did not meet the requirements of the statute in so far as they did not indicate the number of hours worked each day by the claimants. Furthermore, although Jeung testified that the records were accurate and maintained contemporaneously, they are, in fact, neither credible nor reliable. Not only do the weekly payroll records appear incredible on their face – week after week of identical information – but, Guadalupe's un rebutted testimony that the petitioners required the claimants to initial the records after DOL had commenced its investigation established that the records were, at a minimum, not kept contemporaneously as asserted by Jeung.

In the absence of credible records, petitioners then bear the burden of proving that the disputed wages were paid (Labor Law § 196-a; *Angello v Natl. fin. Corp.*, 1 AD3d 818, 821 [3d Dept 1989]; *Garcia v Heady*, 46 AD3d 1088 [3d Dept 2007]). 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." Therefore, the petitioners have the burden of showing that the Commissioner's order is invalid or unreasonable by a preponderance of the evidence of the specific hours that the claimants worked and that they were paid for those hours, or other evidence that shows the Commissioner's findings to be invalid or unreasonable (*In the Matter of Ram Hotels, Inc.* Board Docket No. PR 08-078, October 11, 2011). Where incomplete or unreliable wage and hour records are available, DOL is "entitled[d] to make just and reasonable inferences and use other evidence to establish the amount of underpayments, even though the results may be approximate" (*Hy-Tech Coatings v New York State Dept. of Labor*, 226 AD2d 378, [(1st Dept 1996), citing *Mid-Hudson Pam Corp.*).

The petitioners failed to prove that the Commissioner's determination of the amount of wages owed to the claimants was unreasonable. In the absence of reliable payroll records, the Commissioner used the best available evidence, which were the claim forms and employee interviews, to calculate the amount of wages due. The inferences and evidence relied on by the Commissioner and the assumptions and conclusions made were reasonable and supported by the claimants' testimony at hearing.

¹ Effective January 1, 2011, the Minimum Wage Order for the Restaurant Industry, 12 NYCRR Part 137 was replaced by the Minimum Wage Order for the Hospitality Industry, 12 NYCRR Part 146.

Civil Penalty

The wage order assesses a 50% civil penalty. The Board finds that the considerations required to be made by the Commissioner in connection with the imposition of a 50% civil penalty were proper and reasonable in all respects.

Interest

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 section 14-A sets the “maximum rate of interest” at “sixteen percent per centum per annum.”

Tip Appropriations Order

Labor Law § 196-d prohibits any employer or his agent or an officer or agent of any corporation or any other person from demanding or accepting, directly or indirectly, any part of the gratuities received by an employee or retaining any part of a gratuity or of any charge purported to be a gratuity for an employee. The petitioners admitted that tips paid by credit card were shared with workers other than the service employees. Peredes testified that the credit card tips were shared with the counter employees who took the orders and prepared the food. The tip appropriations questionnaires indicate that sharing tips in this way was not optional. Mandatory tip sharing arrangements to non-service employees violate Labor Law § 196-d (*See Hartnett v. Wade-Mark Eleven, Inc.*, 156 AD2d 559 [2d Dept 1989]). Additionally, Labor Law § 196-d prohibits the sharing of tips with non-service employees. Accordingly, the petitioners violated Labor Law § 196-d by requiring the delivery employees to share their credit card tips with the employees who took and prepared the orders.

DOL’s method of determining the amount of tips appropriated is reasonable. A claimant provided DOL with tip pool records recovered from the petitioners’ trash, and the petitioners did not contradict or otherwise rebut Escobar’s testimony concerning what the records were or her methodology for calculating the amounts owed to the service employees. We find the Commissioner’s determination that tips in the amount of \$4,307.10 were appropriated from four claimants was reasonable.

Civil Penalty

The tip appropriations order assesses a 50% civil penalty. The Board finds that the considerations required to be made by the Commissioner in connection with the imposition of a 50% civil penalty were proper and reasonable in all respects.

Interest

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

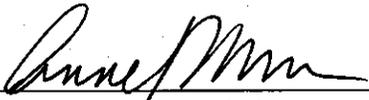
effect as prescribed by the superintendent of banks pursuant to section fourteen-a of the banking law per annum from the date of the underpayment to the date of payment. Banking Law section 14-A sets the "maximum rate of interest" at "sixteen percent per centum per annum."

Penalty Order

The petitioners presented no evidence with respect to the penalty order, and have therefore failed to meet their burden of proof to show that it is unreasonable.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

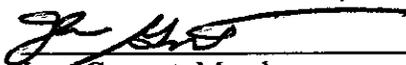
1. The wage order is affirmed; and
2. The tip appropriations order is affirmed; and
3. The penalty order is affirmed; and
4. The petition for review be, and the same hereby is, denied.



Anne P. Stevason, Chairperson

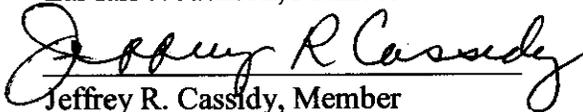


J. Christopher Meagher, Member



Jean Grumet, Member

LaMarr J. Jackson, Member



Jeffrey R. Cassidy, Member

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

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 section 14-A sets the "maximum rate of interest" at "sixteen percent per centum per annum."

Penalty Order

The petitioners presented no evidence with respect to the penalty order, and have therefore failed to meet their burden of proof to show that it is unreasonable.

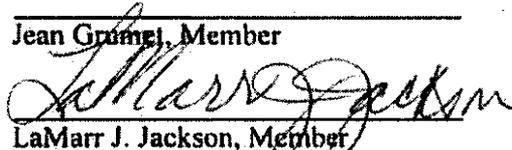
NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The wage order is affirmed; and
2. The tip appropriations order is affirmed; and
3. The penalty order is affirmed; and
4. The petition for review be, and the same hereby is, denied.

Anne P. Stevason, Chairperson

J. Christopher Mcagher, Member

Jean Grange, 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.