STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of:	
ANTHONY GIARLETTA (T/A GRILL BEVERAGE BARN) ALSO (T/A GCG BEVERAGE CORP.),	
Petitioner,	
	DOCKET NO. PR 09-139
To Review Under Section 101 of the Labor Law: An Order to Comply with Article 19 of the Labor Law and an Order Under Articles 5 and 19 of the Labor Law, both dated April 14, 2009,	RESOLUTION OF DECISION
- against -	
THE COMMISSIONER OF LABOR,	
Respondent.	

APPEARANCES

Philip Mancuso, Esq., for the Petitioner.

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

WITNESSES

Anthony Giarletta for petitioner; Jose R. Diaz, Senior Labor Standards Investigator Frank King, and Labor Standards Investigator Leo Lewkowitz for the respondent.

WHEREAS:

The petition in this matter was filed with the Industrial Board of Appeals (Board) on June 11, 2009, and seeks review of two orders issued by the Commissioner of Labor (Commissioner or respondent) against the petitioner Anthony Giarletta (T/A Grill Beverage Barn) also (T/A GCG Beverage Corp.) (Giarletta or petitioner) on April 14, 2009. Upon notice to the parties a hearing was held on March 8, 2011 in New York, New York, before Devin A. Rice, Associate Counsel to 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, and to make statements relevant to the issues.

The first order is to comply with Article 19 of the Labor Law (wage order). It finds that the petitioner failed to pay minimum wages in the amount of $16,334.84 to claimant Jose R. Diaz from February 15, 1999 to February 5, 2005. The wage order further finds interest due at the rate of 16% calculated to the date of the order, in the amount of $10,941.21, and assesses a civil penalty in the amount of $32,670.00, for a total amount due of $59,946.05.

The second order is under Articles 5 and 19 of the Labor Law (penalty order). It finds that from February 15, 1999 to February 5, 2005, the petitioner failed to keep and/or furnish true and accurate payroll records for each employee, failed to give each employee a complete wage statement with every payment of wages, and failed to provide employees a thirty minute meal period during each shift. The penalty order assesses a $3,000.00 civil penalty for each of the first two counts, and a $500.00 civil penalty for the third count, for a total civil penalty of $6,500.00.

SUMMARY OF EVIDENCE

Senior Labor Standards Investigator Frank King testified that "it appears" that on February 17, 2005, the claimant filed a claim form for unpaid wages and overtime. The claim form states the period of complaint as February 15, 1999 to February 5, 2005, lists the employer as Grill Beverage Barn and the owner as "Paul," and claims a 59 hour work week with no time off for meals, at a weekly wage rate of $330.00. King, who was assigned to investigate the claim, visited Grill Beverage Barn, requested payroll records, and had several conversations with the petitioner and his representative. King testified that the petitioner never provided payroll records during the time he was assigned to the case.

Labor Standards Investigator Leo Lewkowitz was assigned to work on the claim against Grill Beverage Barn in 2007. At the time Lewkowitz was assigned, no payroll records had been provided by the petitioner. Lewkowitz testified that the claimant, responding to correspondence from DOL, attempted to meet him at his office. The claimant, however, spoke to Lewkowitz's supervisor, Arlene Wiseman, because Lewkowitz was working in the field that day. Wiseman's handwritten notes from her conversation with the claimant, which are largely illegible, state in part that "meals taken while working [illegible word] [employer] never stopped him from eating."

Lewkowitz testified that he calculated the wages due and owing based on the information from claim form.

Lewkowitz testified that he never spoke to the claimant, because the claimant only speaks Spanish, but did speak on the phone one time to the claimant's son. Lewkowitz does not know whether the claimant was present during that phone call.

Claimant Jose R. Diaz testified that from February 1999 to February 2005 he worked at Grill Beverage "[doing] orders" Monday to Saturday from 8:00 a.m. until 5:00 p.m. for $330.00 a week. The claimant further testified that there were sometimes days when he worked later. Claimant also testified that he received a one hour lunch break each day, one week paid vacation per year, and did not work on July 4th, New Year's Eve, Christmas, or in April when he went to Santo Domingo to harvest his cocoa crop.

Claimant stated that he did not know who completed the claim form for him or where he went to fill it out, but he verified that he had signed it.[1]

Petitioner Anthony Giarletta testified that claimant Jose R. Diaz, who he knew as "Ramon," worked for him for approximately 15 years as a warehouseman at a soda and beer distribution company he used to own in Staten Island, New York. Giarletta testified that he paid claimant minimum wage every week, and that he used to have time cards for the hours the claimant worked, but does not know where they are now. Giarletta stated that he paid the claimant around $330.00 or $350.00 a week during the claim period. Giareletta further testified that the claimant took three months off each year to go to the Dominican Republic to harvest cocoa.

FINDINGS

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).

The wage order

The petitioner's burden of proof in this matter, in the absence of records of the actual hours worked by the claimant and wages paid, is to submit sufficient proof so as to provide an accurate estimate of the hours the claimant worked and wages paid (Matter of Mohammad Aldeen et al. Docket No. PR 07-093 [March 28, 2008] aff'd sub nom. Matter of Aldeen v Industrial Appeals Board, 82 AD3d 1220 [2d Dept 2011]).

The claimant filed a claim alleging that he worked 59 hours a week for $330.00 with no breaks for the entire claim period. In the absence of payroll records, DOL calculated the wages due to the claimant based on the claimant's statement that he worked 59 hours and was paid $330.00 (Labor Law § 196-a). However, we find, based on the evidence at hearing, that this was unreasonable.

The claimant testified that he worked six days a week from 8:00 a.m. to 5:00 p.m. with a one hour lunch break each day. Although the claimant alluded to sometimes working longer hours, his testimony was vague at best regarding the frequency he worked longer hours and concerning how many hours he worked on those days. Accordingly, we find based on the claimant's testimony, that he worked 48 hours a week for the petitioner during the claim period.

The petitioner alleged that the claimant did not work three months per year when he was out of the country harvesting cocoa. The claimant agreed that he went to the Dominican Republic each year to work on his cocoa crop, but stated it was only for one month each April. Because the petitioner did not have records of the actual time the claimant worked, we credit the claimant's testimony concerning the amount of time he spent in the Dominican Republic each year.

---

[1] The claimant cannot read English and therefore was unable to review and verify the accuracy of the claim form at the hearing.

The claimant testified consistent with his claim form that the petitioner paid him $330.00 a week. This is also consistent with the petitioner's testimony that he paid the claimant $330.00 or $350.00 a week. We, therefore, find that the petitioner paid the claimant $330.00 a week during the claim period.

Under Article 19 of the Labor Law, an employee's regular wage rate is found by dividing his gross wages by the number of hours he worked, in this case $330/48, for a regular rate of $6.88 an hour (12 NYCRR 142-2.6). An employee's overtime rate is one and one half-times the regular rate, which in this case is $10.32 an hour (12 NYCRR 142-2.2). Therefore, under Article 19, the petitioner was required to pay the claimant $357.76 a week. Accordingly, we find that the petitioner owes the claimant $27.76 per week for each week of the claim period except for April of each year when the claimant was out of the country to harvest his cocoa crop, one week per year when the claimant testified he took a paid vacation, and the weeks of July 4th, Christmas, and New Year's Eve where it is agreed that the claimant did not work over 40 hours and is therefore not owed overtime. Therefore, we reduce the wages due and owing from $16,334.84 to $7,356.40.

DOL assessed a 200% civil penalty on the wage order, which the petitioner did not challenge, and is therefore waived (Labor Law § 101 [2]). Accordingly, the 200% civil penalty is affirmed.

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."

The penalty order

Count 1 of the penalty order charges that the petitioner failed to keep and/or furnish true and accurate payroll records for the claimant during the relevant time period. The petitioner admitted that he could not find the records. King testified that he verbally requested payroll records from the petitioner, and King and Lewkowitz each testified that no payroll records were ever produced to DOL by the petitioner. However, there is no evidence in the record to support the $3,000.00 civil penalty imposed against the petitioner by count 1. Labor Law § 218 provides that "[w]here the violation is for a reason other than the employer's failure to pay wages, benefits or wage supplements found to be due, the order shall direct payment to the commissioner of a civil penalty in an amount not to exceed one thousand dollars for a first violation, two thousand dollars for a second violation or three thousand dollars for a third or subsequent violation." As there is no evidence before the Board that the petitioner had any prior violations for not keeping or furnishing accurate payroll records, we reduce the penalty for count 1 to $1,000.00[2].

[2] We note that there are documents in evidence prepared by DOL's investigators during the course of their investigation that reference alleged prior violations. However, there was no testimony about those alleged prior violations or any documents entered regarding the final disposition, if any, of any such prior proceedings.

Count 2 of the penalty order charges that the petitioner failed to provide complete wages statements to the claimant during the relevant time period. The petitioner provided no evidence concerning count 2. Again, as there is no evidence that the petitioner had any prior violations for failing to provide employees with complete wage statements, we reduce the penalty for count 2 to $1,000.00.

Count 3 of the penalty order charges that the petitioner did not provide the claimant with a thirty minute meal period each day. The claimant testified at hearing that he was allowed one hour for lunch each day. Accordingly, we revoke the $500.00 civil penalty imposed by count 3.

Based on the above, the total civil penalty imposed by the penalty order is reduced to $2,000.00.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The wage order is modified to reduce the wages due and owing to $7,356.40 and the civil penalty to $14,712.80; with interest at 16% per annum recalculated based on the new principle amount;

2. Counts 1 and 2 of the penalty order are each modified to reduce the penalties imposed to $1,000.00 for each count for a total penalty due of $2,000.00; and

3. Count 3 of the penalty order is revoked; 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 Albany, New York, on
October 11, 2011.