

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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In the Matter of the Petition of:

BAI BUANG A/K/A MICHAEL XIA
AND FORMICA UNLIMITED, INC.,

Petitioners,

To Review Under Section 101 of the Labor Law:
An Order to Comply with Article 6 and an Order
Under Article 19 of the Labor Law, both dated
August 26, 2009,

- against -

THE COMMISSIONER OF LABOR,

Respondent.
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DOCKET NO. PR 09-289

RESOLUTION OF DECISION

APPEARANCES

Michael Xia, *pro se*, for Petitioners.

Maria L. Colavito, Counsel, NYS Department of Labor, Benjamin A. Shaw of Counsel, for Respondent.

WITNESSES

He Chang Xing and Michael Xia, for Petitioners; Gerard Capdevielle, Senior Labor Standards Investigator, for Respondent.

WHEREAS:

A Petition for review in the above-named case was received by the Industrial Board of Appeals (Board) on October 19, 2009. Petitioners Michael Xia and Formica Unlimited, Inc. (together, Petitioners) seek to vacate an Order to Comply with Article 19 and an Order Under Article 19 of the Labor Law issued against Petitioners by the Respondent Commissioner of Labor (Commissioner) on August 26, 2009. The first Order (Wage Order) directs Petitioners to pay to the Commissioner wages owed employees Sergio L. Fuentes, Jaime Ordonez, and He Chang Xing (together, Claimants) in the amount of \$16,603.92, with interest continuing thereon at the rate of 16% to the date of the Order in the amount of

\$10,730.86, and a civil penalty in the amount of \$16,603.92, for a total amount due of \$43,938.70. The second Order (Penalty Order) directs Petitioners to pay to the Commissioner a civil penalty for failure to keep and/or furnish true and accurate payroll records for Claimants in the amount of \$500.00.

The Petition alleges that the Orders are invalid and unreasonable because Claimants “have been paid all wages due to them.”

On December 10, 2009, the Commissioner filed an Answer and served a Demand for a Bill of Particulars (Demand) on Petitioners pursuant to Board Rule § 65.17 requesting any facts and documents, including payroll records, upon which Petitioners base the allegation that Claimants “have been paid all wages due to them”. After Petitioners failed to respond, the Commissioner filed a motion pursuant to Board Rule § 65.17 (d) to preclude Petitioners from introducing any evidence at hearing supporting the allegation. By letter dated September 27, 2010, Board Member and designated Hearing Officer J. Christopher Meagher, Esq. directed Petitioners to provide the Commissioner with the information requested by October 12, 2010 or the Commissioner’s motion would be granted.

By letter filed with the Board on October 12, 2010, Petitioners submitted a response to the Demand stating that, “[t]he Claimant, Mr. Chang, has confirmed that [his] former employer, Formica Unlimited, does not owe him any money. Please be advised that Formica Unlimited is no longer in business and has filed Articles of dissolution on April 19th, 2007.” No other information was provided.

By letter filed with the Board on October 13, 2010, the Commissioner requested that the Hearing Officer preclude Petitioners from submitting any evidence at hearing because the information provided by Petitioners was deemed an insufficient response to the Demand. By letter dated October 19, 2010, the Hearing Officer reserved decision on the application but ruled that Petitioners would be precluded from introducing any payroll records requested in the Demand.

Upon notice to the parties, a hearing was held on October 22, 2010. A Chinese interpreter provided by the Board was available to interpret the proceedings for the benefit of Chinese speaking witnesses. At the outset of the hearing, the Commissioner renewed her application to preclude and the Hearing Officer reiterated his prior ruling. Each party was afforded full opportunity to present documentary evidence, examine and cross-examine witnesses, make statements relevant to the issues, and submit post hearing briefs.

SUMMARY OF EVIDENCE

Petitioner Bai Buang A/K/A Michael Xia (Xia) is the manager of Petitioner Formica Unlimited, Inc. (Formica), a furniture business located in Brooklyn, New York.

Testimony of Gerard Capdevielle

Senior Labor Standards Investigator Gerard Capdevielle (Capdevielle) testified concerning the investigation of the claims by the Department of Labor (DOL) that resulted in the Orders under review.

On September 26, 2005, Claimant Sergio L. Fuentes (Fuentes) filed a claim against Petitioners with DOL for unpaid wages accrued during the period of his employment by Petitioners from March 15, 2000 to September 26, 2005. Claimant stated that his rate of pay during the claim period was \$46.67 per day from 3/15/00 to 3/18/02, \$60.00 per day from 3/18/02 to 7/14/05, and \$66.67 per day from 7/14/05 to 9/26/05. His hours were Monday to Friday 8:30 AM to 6:00 PM and Saturday 8:30 AM to 3:00 PM, with a 1 hour meal period. Claimant stated that he did not receive pay stubs or wage statements

On September 26, 2005, Claimant Jaime E. Ordonez (Ordonez) filed a claim against Petitioners with DOL for unpaid wages accrued during the period of his employment by Petitioners from September 26, 1999 to August 27, 2005. Claimant stated that his rate of pay during the claim period was \$500.00 biweekly. His hours were Monday to Friday 8:30 AM to 6:00 PM and Saturday 8:30 AM to 3:00 PM, with a 1 hour meal period. Claimant stated that he did not receive pay stubs or wage statements

On October 27, 2005, Capdevielle made a site visit to Petitioners' premises, spoke with Xia, and requested Petitioner's payroll records. Records were not available, however, so a revisit date was scheduled for the records to be produced. Capdevielle testified that he called Xia the day before the revisit to reschedule the appointment. Xia informed him there were no payroll records to review.

Capdevielle testified that he spoke with some of Petitioner's employees who were present on his visit and provided Claimant He Chang Xing (Xing) with a DOL questionnaire concerning wages and hours. Xing filled out and signed the questionnaire in Capdevielle's presence and it was entered in DOL's investigative file. Xing stated in his questionnaire that he started working for the company on 6/1/97, was still employed, and that his hours of work were customarily Monday to Friday 9 AM to 6 PM and Saturday 9 AM to 2 PM, with a 1 hour meal period. Xing stated that his hours were always the same while he worked for the company and that his full weekly wage (before deductions) was \$360.

Capdevielle testified that Petitioners did not submit any payroll records to DOL during the course of its investigation. Wage calculations were therefore based solely on the information provided by the Claimants. Claimants' statements demonstrated they were paid straight time for their overtime hours and were owed additional half time for the hours they worked over forty each week.

By letter dated April 19, 2006, Capdevielle issued Petitioners a notice recapitulating the claims and informing Petitioners that DOL had computed a total underpayment of \$16,603.92. The letter requested that Petitioners remit payment of the unpaid wages within three weeks and advised that failure to respond could entail the assessment of interest and

penalties. The letter enclosed a "Notice of Labor Law Violation" for failure to maintain payroll records and a "Recapitulation Sheet" listing the period of underpayment and amount of wages due each Claimant. The Recapitulation stated that Fuentes was owed \$7,738.08 and Ordonez \$7,738.08 for the periods covered by their claims. Xing was owed \$1,701.44 for the period 10/19/03 to 10/23/05. Petitioners did not respond to the notice.

Based on DOL's investigation and Petitioners' failure to provide payroll records establishing that Claimants were paid the wages owed, the Commissioner issued Petitioners the Orders under review on August 26, 2009.

Testimony of Claimant He Chang Xing

On direct examination, Xing testified that his work schedule was Monday to Friday from 9:00 AM to 6:00 PM, with a one hour lunch break and one 15 minute break each morning and afternoon. On Saturdays he started at 9:00 AM and left at 2:00 PM, with a one hour lunch break and one 15 minute break in the morning.

On cross examination, Xing stated that he did not always work his full schedule of 44 hours each week and was paid for whatever hours he did work. Xing acknowledged that he did not keep any record of the hours he worked and did not bring any of his W-2 tax forms to the hearing showing how much he was paid for the periods of his claim. When asked whether there were deductions taken out of his pay for payroll taxes, Xing answered "No."

Testimony of Petitioner Michael Xia

Xia testified that he paid his employees \$360 per week for a 44 hour week, broken down as follows: (1) \$60 per day for 40 regular hours Monday to Friday from 9:00 AM to 6:00 PM, including a one hour lunch break and two 15 minute breaks each day; and (2) \$60 per day for four overtime hours on Saturdays. Xia asserted that the pay rate was \$7.50 per hour for the regular hours and \$15 "double pay" for the overtime hours. Responding to Ordonez' claim to DOL, Xia stated that Ordonez worked for him for ten years and denied that Ordonez was paid only \$250 per week.

On cross examination, Xia was asked if he had any records that would prove the number of hours worked by any of his employees during the periods of their respective claims. Xia testified that he made a record of the hours worked and salary paid each employee and had given copies to his employees and accountant. However, he did not retain copies for himself. Xia could not recall the hours worked by Xing for any specific week during his claim period and stated that his employees generally worked the schedule described above. Finally, Xia testified that he deducted payroll taxes from his employees' pay and remitted them to the State from 1999 to 2005.

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 [C]ommissioner 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 order under review is invalid or unreasonable (Board’s Rules of Procedure and Practice § 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 AD 3d 850, 854 [3d Dept 2003]).

It is therefore Petitioners’ burden to prove the allegation in the Petition, as particularized by their response to the Demand, that Claimant Xing was paid all wages owed him for the period of his claim.

B. Recordkeeping Requirements

Article 19 of the Labor Law, known as the “Minimum Wage Act,” defines “[e]mployee,” with certain exceptions not relevant to this appeal, as including “any individual employed or permitted to work in any occupation (Labor Law § 651 [5]).” Labor Law § 661 requires employers to maintain payroll records for employees covered by the Act and to make such records available to the Commissioner:

“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 Commissioner’s regulations implementing Article 19 provide at 12 NYCRR § 142-2.6:

- “(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) 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.”

C. DOL’s 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 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.; *Angello v Natl. Fin. Corp.*, 1 AD3d 850 [3d Dept 2003]). 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 calculations to the employer.”

In *Anderson v Mt. Clemens 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 as contemplated by the Fair Labor Standards Act.”

Citing to *Anderson v Mt. Clemens*, the Appellate Division in *Mid-Hudson Pam Corp. v Hartnett*, *supra*, 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.... Were 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.”

FINDINGS

Petitioners Violated Article 19 of the Labor Law by Failing to Pay Wages Due the Claimants

We affirm the Hearing Officer’s ruling precluding the introduction of payroll records into evidence but otherwise denying the Commissioner’s application. Since Petitioners’ written response stated that Claimant Xing “confirmed that his former employer ... does not owe him any money”, Petitioners were properly permitted to submit evidence in support of such allegation at the hearing. As to documents sought in the Demand, including payroll records, the Board has held that it is an appropriate use of a bill of particulars to demand that a petitioner particularize a pleading, including a request for production of documents (*Matter of COR Route 31 Company*, PR 03-039 [April 28, 2004]). Petitioners failed to produce payroll records of their employees that were requested by the Commissioner during the course of her investigation and when requested to particularize the allegation in their Petition that Claimants were fully paid their wages. In the circumstances of this case, preclusion of any payroll records that may have been proffered at hearing was reasonable and appropriate.

We affirm the Commissioner’s Order directing payment to the Commissioner of wages owed Claimant Xing and find Petitioners’ evidence submitted at hearing insufficient to overcome DOL’s calculation of his underpayment.

Xing testified on direct examination to a work schedule and salary -- i.e. 44 hours and \$360 per week -- consistent with the information he submitted to the Commissioner in his questionnaire that was used to calculate his underpayment. Petitioner Xia corroborated Xing’s testimony and prior statement by testifying that his employees customarily worked the same schedule and were paid the same wages. While Xing later qualified his testimony by asserting that he did not always work his full schedule, and was paid for whatever hours he did work, he conceded that he had no record of his actual hours and did not bring tax or other records to the hearing showing the wages he was paid. Xia also admitted that he did not recall the actual hours worked by Xing during any specific week of his claim period and did not retain any payroll records of his employees’ wages and hours.

Xia asserted that Xing was not owed overtime wages because he paid his employees at the rate of \$7.50 per hour for their regular hours and \$15 per hour “double pay” for their overtime hours. We find Xia’s credibility on this issue suspect, however, as he testified that he deducted payroll taxes from his employees pay, in contradiction to Xing’s testimony that no payroll tax deductions were made. Petitioner failed to retain contemporaneous wage statements or payroll records that would corroborate the wages paid this Claimant.

Finally, Xia denied Ordonez’ claim that he was paid only \$250 per week and argued that all three Claimants worked the same hours, were paid the same wages, and were paid

Finally, Xia denied Ordonez' claim that he was paid only \$250 per week and argued that all three Claimants worked the same hours, were paid the same wages, and were paid correctly. Any challenge to the wages found owing Fuentes and Ordonez is outside the scope of the Petition, however, since Petitioners limited their appeal to the wages owed Claimant Xing.

In the absence of contemporaneous payroll records for their employees, it was Petitioners' burden to submit sufficient affirmative evidence to negate the Commissioner's determination of wages owed (*Matter of Aldeen*, PR 07-093 at pp.13-15, *affd.*, __ AD2d __, 2011 N.Y. App. Div. LEXIS 2631 [2d Dept. March 29, 2011]). We find Petitioners' evidence that Claimant Xing "confirmed that his former employer ... does not owe him any money" simply too general, non-specific in time, and unreliable regarding Xing's actual wages and hours during the period covered by the Commissioner's audit to overcome the presumption favoring the Commissioner's calculation (*Id.*). In the absence of such proof, the Commissioner's determination based on "the best available evidence", in this case DOL's approximation drawn from Xing's prior investigative statement, is deemed valid and reasonable (*Mid-Hudson Pam Corp. v Hartnett, supra*).

By virtue of the foregoing, we affirm the Commissioner's Order directing payment to the Commissioner of unpaid wages owed the employees covered by the Wage Order. The Commissioner's calculation of overtime wages owed the three Claimant employees was valid 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 § 14-A sets the "maximum rate of interest" at "sixteen percent per centum per annum."

Petitioners did not challenge the assessment of interest made by the Wage Order. The Board finds that the considerations required to be made by the Commissioner in connection with the interest set forth in the Order are valid and reasonable in all respects.

Imposition of Civil Penalties

If the Commissioner determines that an employer has violated Article 19 of the Labor Law, she is required to issue a compliance order to the employer that includes a demand that the employer pay the total amount found to be due and owing and a civil penalty based on the amount owing (Labor Law § 218 [1]). Petitioner did not submit evidence challenging the Commissioner's assessment of a 100% civil penalty in the Wage Order. We therefore affirm the civil penalty as valid and reasonable in all respects.

Penalty Order

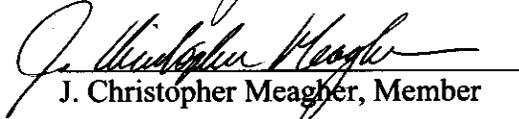
Petitioner did not submit evidence challenging the Commissioner's assessment of a \$500 penalty in the Penalty Order for failure to maintain payroll records. We therefore affirm the Penalty Order as valid and reasonable in all respects.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

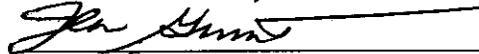
1. The Wage Order is affirmed;
2. The Penalty Order is affirmed; and
3. The Petition for review be, and the same hereby is, denied.



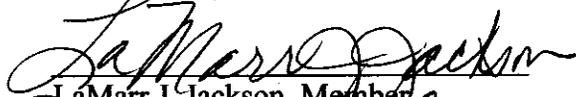
Anne P. Stevason, Chairman



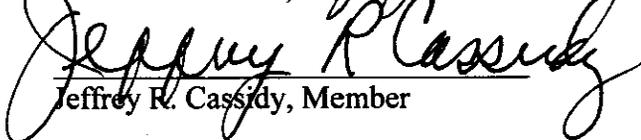
J. Christopher Meagher, Member



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
April 27, 2011.