STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of:	
ZI QI CHAN A/K/A ZI QI CHEN AND JASON TONG A/K/A ZHI RONG TANG AND HENRY FOODS INC.	
Petitioners,	DOCKET NO. PR 10-060
To Review Under Section 101 of the Labor Law: An Order to Comply with Article 19 and an Order under Articles 7 and 19 of the Labor Law, issued January 25, 2010.	RESOLUTION OF DECISION
- against -	
THE COMMISSIONER OF LABOR,	
Respondent.	

APPEARANCES

Yuen Roccanova Seltzer & Sverd P.C. (Steven Seltzer, Esq. of counsel), for petitioners.

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

WITNESSES

Zhi Rong Tang (aka "Jason Tang"); Chang Guang Jiang; Yuan Xiong Zou; Augustin Saldana Cruz (aka "Agustin Saldano"); Celerino Mata (aka "Celerino Primitivo"); Jose Mendez, Labor Standards Investigator; Gerard Capdevielle, Senior Labor Standards Investigator; and Isidro Armando Sedano Alcantar (aka "Isidro Armando Sedrano")

WHEREAS:

On February 19, 2010, Petitioners Zi Qi Chan, Jason Tong and Henry Foods, Inc. (Petitioner) filed a Petition to review two Orders to Comply that the Commissioner of Labor (Commissioner) issued against them January 25, 2010. The Petition was amended March 26, 2010.

The first order is an Order to Comply with Article 19 of the New York Labor Law (Wage Order) and directs Petitioner to pay $110,250.11 in unpaid wages owed to six

employees, $24,164.49 in interest, and $110,250.11 in civil penalties for a total of $244,664.71.

The second Order was issued under Articles 7 and 19 (Penalty Order) and directs Petitioner to pay $4,000.00 in civil penalties based on: (1) the failure to keep and furnish the requisite payroll records ($1,000); (2) the failure to provide wage statements to employees with every payment of wages ($1,000); and (3) the retaliatory discharge of employee Victor Alba after complaints were lodged with the Commissioner on or about March 11, 2009 ($2,000).

The Petition alleges that the unpaid wage audit "was full of mistakes and flaws" and that some of the employees listed were not employed by the petitioner, the wages and period of employment were overstated and that the civil penalties are unreasonable because the Commissioner did not consider all the factors necessary in determining the penalties.

In her Answer dated November 10, 2010, the Commissioner alleges that on or about February 17, 2009, the Petitioner's employees Celerino Primitivo and Marco Lazcano filed Minimum Wage/Overtime Complaints with the Department of Labor (DOL) alleging that they had been employed by the Petitioner's food distribution operation; that they had been paid a flat salary for all hours worked, even hours in excess of forty (40) per week; that they had not been compensated at time plus one half of their regular rate of pay for those hours in excess of forty per week; and that this underpayment went back at least six years.

Upon notice to the parties, a hearing was held on March 13, 2012, in New York City before Anne P. Stevason, Chairperson of 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, to make statements relevant to the issues and to file post-hearing briefs.

I. SUMMARY OF EVIDENCE

Petitioner Henry Foods, Inc. operates as a restaurant food wholesaler and is currently located at 497 Meserole Street, Brooklyn, New York. Jason Tang testified that the company was started by his late father in-law and operated in Chinatown for a number of years at Henry Street. Around 2003, the warehouse operation was established at Meserole Street. Eventually, the Henry Street location was closed. Tang testified that the business had approximately 15 to 18 employees in 2003, and increased to 24 to 25 employees between 2003 and 2009. The business operates trucks which deliver food to its customers; and each truck has a driver and at least one driver's helper to load at the warehouse and off-load the merchandise at the customer's location. Tang characterized the company as a small business with many larger competitors.

Tang admitted that the business failed to keep time and payroll records and that some wages are due the employees.

The business generally operates out of the Meserole Street warehouse six days a week Monday through Saturday but it did operate seven days a week when necessary to

meet business demand. Tang testified that the warehouse generally operated from 5:00 a.m. or 5:30 a.m. until usually 3:00 p.m. or sometimes to 4:00 p.m. Claimant Isidro Sedrano testified that he and his brother Arturo Sedrano were driven to work each day by Jason Tang and usually arrived to start by 4:30 a.m. The first food deliveries would begin arriving at 4:00 a.m. While there is some conflict in the testimony as to the working hours of individual workers, there was evidence that the business generally operated Monday through Saturday from between 4:30 – 5:30 a.m. until sometime after 3:00 p.m. when the last trucks returned to the warehouse.

Tang testified that he paid the workers "the way they want" and that was in cash at a flat weekly pay rate. He kept no records of the workers' hours, lunch or other breaks or any other payroll records and admits that he owes some wages. The business operated for years without maintaining any records of hours worked by employees or providing its workers with any pay stub or other payroll record of their time worked and wages earned.

DOL initiated its investigation upon the filing of minimum wage/overtime complaints by Celerino Primitivo and Marco Lazcano on or about February 17, 2009, alleging underpayments going back at least six years. On February 24, 2009, the Respondent conducted an inspection of Petitioner's warehouse, during which the Respondent interviewed Claimants Victor Alba and Arturo Sedrano regarding hours worked and rates of pay. Those workers also claimed that they were paid a flat salary for all hours worked despite the fact that they routinely worked in excess of forty hours per week (60 hours and 72 hours respectively). The Respondent issued a Notice of Revisit wherein it was demanded that on March 10, 2009, the Petitioners were to have available for inspection all payroll records for the six years prior.

On February 25, 2009, Henry Food employees Celerino Matos, Agustin Saldano, and Isidro Armando Sedrano contacted the Respondent and stated that they, too, had worked over forty hours per week (57, 61.5 and 69 hours respectively) for the Petitioners and had not been paid time plus one half their regular rate of pay for hours worked over forty per week. When the Respondent returned on March 10, 2009, the Petitioners had no payroll records. In the absence of any accurate and reliable record of the hours worked by Claimants maintained by Petitioners in the normal course of business, the Respondent calculated the underpayment using the hours provided by the Claimants and issued the Orders to Comply based upon the information provided by Petitioner's employees. As the company was engaged in interstate trucking, the Respondent calculated the overtime rate at time plus one half of the minimum wage then applicable rather than at time plus one half of the regular rate of pay (12 NYCRR 142-2.2). The final calculation held that a total of six employees were owed overtime wages in the amount of $110,250.11.

Evidence concerning hours worked by the employees.

There is conflicting evidence with respect to the hours worked by the employees, the testimony and written statements of some of the employees regarding their hours worked, and the investigation and calculations by the DOL investigators. Except for Victor Alba, the parties agree on the periods of employment.

1. Victor Alba

At hearing, Tang testified that Alba, a driver's helper, worked only two to three weeks at Henry Foods in 2009, six days per week, 5:30 a.m. to 3:00 p.m., with a 20 to 25 minute lunch, at $450.00 per week. In its closing brief, Petitioners state that Alba worked six weeks.

Respondent based its calculation of the wages owed to Alba on his employee interview statement which provides that he worked from 5:00 a.m. to 3:00 p.m., six days per week at $450.00 per week. No meal periods were provided.

2. Marco Lazcano

Tang testified that Lazcano worked from 5:00 a.m. to 3:00 p.m., six to seven days per week and had a daily 20 minute meal break.

Lazcano filed a claim with DOL on September 17, 2009, stating that he worked six days per week, 5:00 a.m. to 5:30 p.m. and received no more than a 15 minute break for lunch and was paid $420 per week and then $450 per week. DOL calculated Lazcano's hours as 12.5 hours per day. There was testimony that although at times drivers needed to return late when there was snow or traffic, for the great majority of time, the trucks were returned by 3:00 p.m.

3. Celerino Primitivo Mata aka Celerino Primitivo

Tang testified that Primitivo worked six to seven days per week, 6:00 a.m. to 4:00 p.m. at a weekly salary of $460.00. He also testified that Primitivo left his employment with Henry Foods in 2004 for approximately 10 months and then left again in 2009 for 5 months. From 2003 to 2006 Primitivo had two days off per month and therefore, was working seven days per week except for 2 weeks every month.

Primitivo filed a claim with DOL and testified for Petitioner at the hearing. He was also interviewed on-site. The statements were slightly different. However, at hearing he was only questioned about his two absences totaling 15 months and was not questioned regarding his hours or wages. Primitivo admitted to not working for the 15 months. Respondent calculated Primitivo's unpaid wages based on 9.5 hours per day, 6 to 7 days per week.

4. Augustin Saldana Cruz aka Augustin Saldana

Tang testified that Saldana worked from 6:00 a.m. to 4:00 p.m. seven days per week from 2003 to 2004, the first year of his employment and thereafter, worked from 5:30 a.m. to 3 or 4:00 p.m.

Saldana testified at the hearing that he started work at Henry Foods, Inc. in 2004. He stated that he worked six days a week Monday through Saturday and sometimes he worked seven days a week. His hours were generally 5:30 a.m. to 3:00 p.m. but he also worked a schedule of 6:00 a.m. to 4:00 p.m. As to lunch breaks, he testified that sometimes he had a

break of around 20 minutes but for an extended period of time he had no lunch break. In the DOL Field Investigation Notes from a phone interview of 2/25/09, Saldana's hours were recorded as 5:45 a.m. to 3:00 or 4:00 p.m. with no lunch period.

5. Isidro Sedrano

Tang first testified that I. Sedrano worked 6:00 a.m. to 4:00 p.m. for a period of time and then 5:30 a.m. to 4:00 p.m., six days per week. On rebuttal, however, he admitted that he drove both I. Sedrano and A. Sedrano to work and picked them up earlier than 5:00 a.m. and that the first food orders would start to come in at 4:00 a.m.

I.Sedrano testified at the hearing that he and his brother were driven to work by Tang and that they usually arrived at 4:30 a.m. and that they worked from 4:30 a.m. to 3:00 p.m., six days per week. I. Sedrano also testified that he stopped work at 1:00 p.m. the last 6 months of his employment. His employment ended in December 2009 or January 2010. Since the period of this audit only extends to the end of February 2009, the different schedule for the last 6 months is of no consequence. His salary began at $360 per week and was later raised to $410.00.

6. Arturo Sedrano

Tang testified that Arturo Sedrano worked six days per week, from 5:00 a.m. to 3:00 p.m. at a weekly salary of $520.00.

Based on his on-site interview, A. Sedrano maintained that he worked from 4:00 a.m. to 3 or 4:00 p.m., six days per week at a weekly salary of $520.00.

Chang Guang Jiang, who has been employed by Petitioner since 2006, and Yuan Xiong Zou, employed since 2003 or 4, testified on behalf of Petitioners that the hours of operation of the business were from 5:30 a.m. to 3:00 p.m. six days per week and every day all workers would receive a meal period of 30 to 40 minutes. They also testified that the warehouse usually closes at 3:00 p.m. but sometimes, rarely, trucks would arrive later if there was snow or traffic.

GOVERNING LAW

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 a Commissioner's order 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 the hearing to prove the allegations that are the basis for the claim that the order under review is invalid or unreasonable (Board 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"); State Administrative Procedure Act § 306; *Angelo v Natl. Fin. Corp.*, 1 AD 3d 850, 854 [3d Dept 2003]). It is therefore Petitioners' burden to prove, by a preponderance of the evidence, that Claimant's wages and miscellaneous expenses are not due and owing. It is also Petitioners' burden to prove, by a preponderance of evidence that the Civil Penalty is invalid or unreasonable.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Board makes the following findings of fact and conclusions of law pursuant to the provisions of Board Rule 65.39 (12 NYCRR § 65.39).

I. The Wage Order - Petitioners have admitted that they have failed to maintain required records and that wages are due.

A. An Employer's Obligation to Maintain Records

An employer's obligation to keep adequate employment records is found in Labor Law § 195 as well as in the New York Code of Rules and Regulations (NYCRR). Specifically, Title 12 of the NYCRR, § 142-2.6 provides, in pertinent part:

> "(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) the wage rate;
> (4) the number of hours worked daily and weekly, ...;
> (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;
> (9) net wages paid; and
> (10) student classification.
> " . . .
> "(d) Employers...shall make such records...available upon request of the commissioner at the place of employment."

§ 142-2.7 further provides:

> "Every employer. . . shall furnish to each employee a statement with every payment of wages, listing hours worked, rates paid, gross wages, allowances, if any, claimed as part of the minimum wage, deductions and net wages."

Therefore, it is an employer's responsibility to keep accurate records of the hours worked by its employees and the amount of wages paid and to provide its employees with a wage statement every time the employee is paid. This required recordkeeping provides proof to the employer, the employee and the Commissioner that the employee has been properly paid.

Where an employee files a complaint for unpaid wages with DOL and the employer has failed in its statutory obligation to keep records, the employer bears the burden of proving that the employee was paid. Labor Law § 196-a provides, in relevant part:

> "Failure of an employer to keep adequate records, in addition to exposing such employer to penalties . . . shall not operate as a bar to filing of a complaint by an employee. In such a case the employer in violation shall bear the burden of proving that the complaining employee was paid wages, benefits and wage supplements."

In the absence of payroll records, DOL may issue an order to comply based on employee complaints and interviews. In the case of *Angello v. National Finance Corp.*, (1 AD3d 850, 768 NYS2d 66 [3d Dept. 2003]), DOL issued an order to an employer to pay wages to a number of employees. The order was based on the employees' sworn claims filed with DOL. The employer had failed to keep required employment records. The employer filed a petition with the Board claiming that the claims and therefore, the order, were overstated. In its decision on the petition, the Board reduced some of the claims. The court, on appeal, held that the Board erred in reducing the wages since the employer failed to submit proof contradicting the claims. Given the burden of proof in Labor Law § 196-a and the burden of proof which falls on the Petitioner in a Board proceeding, 12 NYCRR 65.30, "the burden of disproving the amounts sought in the employee claims fell to [the employer], not the employees, and its failure in providing that information, regardless of the reason therefore, should not shift the burden to the employees." *Id.* at 854.

In *Anderson v Mt. Clements Pottery Co.* (328 US 680, 687-88 [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."

Anderson further opined that the court may award damages to an employee, "even though the result be only approximate. . . [and] [t]he employer cannot be heard to complain that the damages lack the exactness and precision of measurement that would be possible had he kept records in accordance with the [recordkeeping] requirements of . . .the Act." (*Id.* at 688-89.) Wages may be found due even if it is based on an estimate of hours. (*Reich v*

Southern New England Telecommunications Corp., (121 F.3d 58, 67 [2d CA 1997] [finding no error in damages that "might have been somewhat generous" but were reasonable in light of the evidence and "the difficulty of precisely determining damages when the employer has failed to keep adequate records"]).

As the Appellate Division stated in *Matter of Mid-Hudson Pam Corp. v Hartnett*, (156 AD2d 818, 821 [3rd 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."

Article 19 of the Labor Law, known as the Minimum Wage Act, requires every employer to pay each of its employees in accordance with the minimum wage orders promulgated by the Commissioner (Labor Law § 652). The Minimum Wage Order for Miscellaneous Industries and Occupations, 12 NYCRR Part 142, requires an employer to pay a non-residential employee for overtime at a rate of 1 ½ times the employee's regular rate of pay for hours worked over 40 in a week (12 NYCRR 142-2.2). Since Petitioner's trucking business involves interstate trucking, its employees are only due overtime at the rate of 1.5 times minimum wage and DOL has calculated the wages due in that manner. (12 NYCRR 142-2.2).

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 the 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, June 11, 2011, *appeal pending*.)

B. Calculation of Unpaid Wages Due

DOL has calculated the unpaid wages due based on the claims and employee interviews that it received. This is a reasonable basis for the calculation since Petitioners have failed to keep or maintain time or payroll records. However, the hearing before the Board is *de novo* (Board Rule 66.1 [c]), and therefore, we must consider the testimony and evidence received at the hearing in making our determination whether to affirm, revoke or modify the Orders.

We find, in general, that DOL's Wage Order was a reasonable approximation of the hours worked by the employees and it was reasonable for the Commissioner to rely on that approximation to calculate back wages, even if possibly over-inclusive. To fault the order for its possible imprecision, even when caused by petitioners' failure to keep records, would reward the employer for its unlawful conduct. The following are the findings of the Board as to each employee. We make changes only where the totality of the evidence reflects a more accurate estimate of the hours.

1. Victor Alba

We find that Alba worked 5:00 a.m. to 3:00 p.m., six days a week at the salary of $450.00, with no meal period. We find that Tang's testimony that Alba worked 2 to 3 weeks for the same hours was not sufficiently specific to carry Petitioner's burden of proof. In addition, it was inconsistent with the Petitioner's closing brief which admitted to 6 weeks of employment. Therefore, we find that Alba is owed $419.25, as found by DOL.

2. Marco Lazcano

We find, based on the consensus of credible evidence and testimony at hearing, that the usual hours of operation of the business' trucks were from 5:00 a.m. to 3:00 p.m., 6 days per week, with an occasional ending time of 5:30 p.m. when there was snow or traffic. Therefore, we find that the calculations for Lazcano should be at the rate of 60 hours per week with the exception of two weeks per year when it should be 75 hours per week, to account for snow or traffic. The rate of pay used in the calculations by DOL is affirmed. We, therefore, remand to DOL for a recalculation of wages due to Marco Lazcano.

3. Celerino Primitivo Matas

We find that the calculations made of Primitivo's hours and wages by the DOL to be reasonable except to the extent that Primitivo is found to have been absent from work for 10 months in 2004 and 5 months in 2008. Therefore Primitivo is owed $26,791.81 minus $4,600.01, which the Board calculates to be the wages found due during his 15 month absence from work, or $22,191.80.

4. Augustin Saldana

The Board finds that Saldana worked approximately 10 hours per day, 5:30 a.m. to 3:00 or 4:00 p.m., six to seven days per week. The calculations for Saldana should be redone to account for the fact that he worked 10 hours per day and not 10.25. The rates of pay used by DOL are affirmed, given the inconclusive testimony offered by Petitioners.

5. Isidro Sedrano

The Board finds that I. Sedrano worked from 4:30 a.m. to 3:00 p.m., 6 days per week, with no meal period. Since the DOL calculated I. Sedrano's unpaid wages based on an 11.5 hour day, the DOL must recalculate the wages owed based on a 10.5 hour day. The rates of pay used by DOL are affirmed.

6. Arturo Sedrano

A.Sedrano started work at the same time of day that his brother Isidro started, since they were both driven to work by Petitioner. We, therefore, find that A. Sedrano worked from 4:30 a.m. to 3:00 p.m., 6 days per week, or 10.5 hours per day and was paid a salary of $520. DOL's calculations should be redone accordingly.

C. The Civil Penalty is upheld.

The order imposes a 100% civil penalty against the petitioners. Senior Labor Standards Investigator Capdevielle testified that the penalty was determined after he considered various factors, such as size of the business, good faith, the gravity of the violation, any previous violations and the failure to comply with record keeping requirements. Given the fact that Petitioners were in violation of the minimum wage order for a number of years and had no time or payroll records, and DOL gave due consideration to the necessary factors, we uphold the 100% civil penalty. To the extent that the wages are modified, the civil penalty should be modified accordingly.

II. The Penalty Order is Affirmed in full.

Petitioners were cited $1,000 for failure to maintain and furnish payroll records; $1,000 for failure to provide wage statements with wages; and $2,000 for its retaliatory discharge of Alba. Petitioners have admitted that they failed to maintain records and provide wage statements.

Although at hearing, Petitioners contested the retaliatory nature of Alba's discharge, that issue is not raised in the petition, and pursuant to Labor Law § 101[2], any objection not raised in the petition is deemed waived.

The Board affirms the penalty order in full.

III. Interest is due.

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." Therefore, the interest imposed by the wage order is affirmed.

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NOW THEREFORE, IT IS HEREBY RESOLVED THAT

1. The Wage Order is modified and remanded to the Department of Labor for recalculation of wages due in accordance with this decision; and

2. The Penalty Order is affirmed; and

3. The Petition for review be, and the same hereby is, otherwise denied.

Anne P. Stevason, Chairperson

J. Christopher Meagher, Member

Jean Grumet, Member

LaMarr J. Jackson, Member

Absent

Jeffrey R. Cassidy, Member

Dated and signed in the Office
of the Industrial Board of Appeals
at New York, New York, on
March 20, 2013.