

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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 In the Matter of the Petition of: :
 :
 JUAN DIAZ AND 191 FOOD CORP. (T/A FINE :
 FARE SUPERMARKET), :
 :
 Petitioners, :
 :
 To Review Under Section 101 of the Labor Law: :
 An Order to Comply with Article 19 of the Labor Law :
 and an Order Under Article 19 of the Labor Law, both :
 dated October 14, 2010, :
 :
 - against - :
 :
 THE COMMISSIONER OF LABOR, :
 :
 Respondent. :
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DOCKET NO. PR 10-396

RESOLUTION OF DECISION

APPEARANCES

Bryer & David (Marvin M. David of counsel), for petitioners.

Pico Ben-Amotz, Acting Counsel, New York State Department of Labor (Larissa C. Bates of counsel), for respondent.

WITNESSES

Juan Diaz for the petitioners.

Victor Burgos; Labor Standards Investigator Favio Escudero; Senior Labor Standards Investigator Joyce Chan, for the respondent.

WHEREAS:

The petition for review in the above-captioned case was filed with the Industrial Board of Appeals (Board) on December 13, 2010. Upon notice to the parties a hearing was held on February 22, 2013 in New York, New York, before Devin A. Rice, Associate Counsel to the Board and the designated Hearing Officer in this proceeding. Counsel for the respondent appeared by video from Albany. 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 written summations.

The order to comply with Article 19 (wage order) under review was issued by the respondent Commissioner of Labor (Commissioner) against the petitioners on October 14, 2010. The wage order directs compliance with Article 19 and payment to the Commissioner for minimum wages due and owing to Victor Burgos in the amount of \$56,199.49 for the time period from July 10, 2004 through March 15, 2008, with interest continuing thereon at the rate of 16% calculated to the date of the wage order, in the amount of \$29,038.97, together with liquidated damages of 25% in the amount \$14,049.87, and assesses a 100% civil penalty in the amount of \$56,199.49, for a total amount due of \$155,487.82.

The order under Article 19 of the Labor Law (penalty order) was issued against the petitioners on the same date. The penalty order imposes a \$2,000.00 civil penalty against the petitioners for violating Labor Law § 661 and 12 NYCRR 142-2.6 for failing to keep and/or furnish true and accurate payroll records for each employee from on or about March 2, 2008 through March 15, 2008

SUMMARY OF EVIDENCE

Testimony of Juan Diaz

Juan Diaz testified that he is the president of 191 Food Corp., a grocery store located in New York, New York doing business as Fine Fare. Diaz testified that although he knows who the claimant, Victor Burgos, is, he never hired him to do any work at Fine Fare. According to Diaz, starting in 2007 or 2008, the claimant started occasionally appearing at Fine Fare attempting to bag and deliver groceries for customers. Diaz told him several times to leave the premises because he was not an employee of the company, and the claimant always left when told to do so. Diaz testified that the claimant attempted to bag groceries at Fine Fare "quite often" and that he always reminded him that he was not allowed to bag or make deliveries. Diaz never called the police on the claimant because when he asked him to leave, he always left.

On cross-examination, Diaz testified that over the course of a couple years, the claimant "would come in maybe a week and try to, you know, stay for a week or so and then he would disappear for months and then he would show up again and try to do the same thing again." Diaz explained that he was not always at the store and that he understood that the claimant sometimes came in the late evening when Diaz was not there. On redirect examination, Diaz testified that he saw no reason to call the police on the claimant, because the claimant always quit the premises when asked.

Testimony of Victor Burgos

The claimant, Victor Burgos, testified through a Spanish interpreter, that he knows Juan Diaz from Fine Fare. Burgos testified that Diaz was the owner of Fine Fare and that he supervised the store in the evening and during the daytime was only present "very briefly." Burgos further testified that "of course" Diaz was his supervisor.

Burgos testified that his first day of work was May 10, 2004. On cross-examination, he was clear that he had a specific recollection of this exact date because that was the date that "he went in." He testified variously that this was the first day that he met Diaz and that he did not

Speak to Diaz that day because a manager, Juan Enrique, was there. Burgos inquired of Juan Enrique whether he could do bagging at the store and Juan Enrique told him to "go in and work." Diaz was present at the store that evening but Burgos did not speak to him that night and "mostly" did not speak to him while working at Fine Fare. Burgos testified that he recalled one occasion when Diaz told the "group" not to make deliveries with the supermarket's carts, but rather to use their own carts. Burgos could not recall Diaz having given him any other instructions. According to Burgos, Diaz never asked him to leave the premises.

Burgos testified that he packed and delivered groceries at Fine Fare. He stated that he worked Monday through Friday from 10:00 a.m. to 8:30 p.m., Saturday from 10:00 a.m. to 9:30 p.m., and Sunday from 10:00 a.m. to 8:30 p.m. The claim form Burgos filed with DOL, however, lists his start time Monday through Friday as noon, not 10:00 a.m. The claim form also lists his ending time on Saturday as 8:00 p.m., not 9:30 p.m., and his ending time on Sunday as 8:00 p.m., not 8:30 p.m. Burgos testified that a DOL investigator filled out the claim form for him, explained the contents to him, and that when he signed it he "thought that [DOL] would help [him] . . . in accordance with what [he] told them."

Burgos testified that his last day of work at Fine Fare was March 12, 2008, that he quit because of "repression" and that he was not being paid. Burgos testified that he was never paid anything for his work at Fine Fare except for the small tips that he earned from customers and that he never asked to be paid because he "thought they would give [him] something, some help for work."

On cross-examination, Burgos testified that he had made a similar claim against a different supermarket in the same neighborhood prior to starting work at Fine Fare. Burgos explained that when he started at Fine Fare, he expected he would be paid a salary and that after three months he became aware that he was not going to be paid. Burgos continued to work because he thought that the petitioners would eventually pay him. Burgos further testified that Diaz never offered him a salary and that his only income was from small tips given to him by customers. The tips ranged from \$10.00 to \$25.00 per day and could be more on weekends. Burgos supported himself on these tips.

Testimony of Labor Standards Investigator Favio Escudero

Labor Standards Investigator Favio Escudero testified that he was assigned to investigate Fine Fare after DOL received Burgos' claim. Escudero explained that there had been a previous complaint against the petitioners which had been resolved prior to Burgos' claim, so his role was limited to calculating the wages due to Burgos and then handing the information to Senior Investigator Joyce Chan so she could contact Diaz. Escudero did not investigate the prior complaint and did not make a visit to Fine Fare as part of his investigation of Burgos' claim.

Escudero testified that he calculated the wages due to the claimant based on the information provided in the claim form, and that prior to issuing the wage order, he revised the calculation to a lower amount because of information he had received from Senior Investigator Joyce Chan indicating that Burgos had taken time off for vacations. Escudero made a further adjustment prior to issuance of the orders because "there was a conflict with time . . . due to Mr. Burgos filed a complaint against another supermarket and it overlapped, that is why we went back into the calculations and took out a month." This changed Burgos' start date from May 10,

2004 to July 10, 2004. Finally, Escudero testified that he spoke with the claimant several times and each time the claimant informed him that he worked at Fine Fare seven days per week only for tips.

Testimony of Senior Labor Standards Investigator Joyce Chan

Senior Labor Standards Investigator Joyce Chan testified that there had been a prior complaint against the petitioners. At the time that Burgos filed his claim, the prior case had already been resolved. Chan assigned the new claim to Escudero to complete. Chan stated that a compliance conference was scheduled and Burgos and Diaz were requested to come to DOL's offices. Burgos came to the meeting but left when Diaz did not show up on time. Diaz eventually came to the conference late and explained to Chan that he knew the claimant as an individual who hung around inside the store and assisted customers with their bags. Chan did not ask whether Diaz requested the claimant to leave the store when he found him there.

Chan testified that the bookkeeper told her that the claimant had taken vacation twice in the year 2005 and 2007. Chan further testified that "since she indicated that [Burgos had taken vacation] I assumed that he was an employee because she had records of that."

FINDINGS AND CONCLUSIONS OF LAW

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

The Petitioner has the burden to show that the Orders are invalid or unreasonable (State Administrative Procedure Act § 306 [1]; Labor Law § 101, 103; 12 NYCRR 65.30).

Petitioners employed the claimant

"Employer" as used in 19 of the Labor Law means in relevant part any individual or corporation acting as an employer (Labor Law § 651 [6]) and "employee" means any individual employed or permitted to work by an employer in any occupation (Labor Law § 651 [5]). "Employed" means "suffered or permitted to work" (Labor Law § 2 [7]). We are skeptical of the petitioners' version of events that the claimant simply showed up occasionally at the store and tried to work before being sent away, and find the credible evidence supports the respondent's finding that the petitioners employed the claimant in that they suffered or permitted him to work as a bagger at the grocery store they operated. The claimant, although much of his testimony on other points was confusing and contradictory, credibly testified that he bagged and delivered groceries for Fine Fare, was hired by one of Fine Fare's managers, was supervised by petitioner Juan Diaz, and that on at least one occasion was given instructions by Diaz. This evidences sufficient control over the petitioner to support a finding that the individual and corporate petitioners are employers under Article 19 of the Labor Law (*Herman v RSR Sec. Servs. Ltd.*, 172 F3d 132, 139 [2d Cir 1999]; *Matter of Yick Wing Chan et al.*, Docket No. PR 08-174 [October 17, 2012]). Furthermore, evidence in the record that the petitioners' bookkeeper maintained records of the claimant's days off for vacation strongly indicates an employment relationship since logic dictates that employers do not keep records of the vacations of individuals they do not employ.

The calculations of wages owed is reasonable

Having determined that the petitioners employed the claimant, they had an obligation as an employer to maintain and/or produce the records of the hours worked by the claimant and the wages he was paid (Labor Law § 661; 12 NYCRR 142-2.6). “When 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” (*Matter of Mid Hudson Pam Corp v Hartnett*, 156 AD2d 818, 821 [3d Dept 1989]; *see also* Labor Law § 196-a). It is undisputed that the petitioners did not maintain and/or produce legally required payroll records, nor did they offer any alternative to the calculations made by the respondent. We find that the claimant’s claim form as modified by the respondent based on information received during its investigation was the best available evidence and that under the circumstances, the wage order is reasonable.

Liquidated damages

The wage order includes liquidated damages in the amount of 25% of the wages owed. Labor Law § 663 (2) as it read when the wage order was issued provided in relevant part that:

“ On behalf of any employee paid less than the wage to which the employee is entitled under the provisions of this article, the commissioner may bring any legal action necessary, including administrative action, to collect such claim, and the employer shall be required to pay the costs, and unless the employer proves a good faith basis to believe that its underpayment was in compliance with the law, an additional amount as liquidated damages equal to twenty-five percent of the total of such underpayments found to be due the employee..¹”

The petitioners produced no evidence of a good faith belief that their wage and hour practices were in compliance with the law. Accordingly, we affirm the imposition of liquidated damages.

Civil penalty

The wage order assesses a 100% civil penalty. The Board finds that the considerations required to be made by the Commissioner in connection with the imposition of a 100% 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.”

¹ Labor Law 663 (2) was amended effective April 9, 2011 to increase the amount of liquidated damages to 100%.

The penalty order is affirmed

Since there is no dispute that the petitioners failed to maintain required payroll records for the claimant where they argued that they did not employ him, the penalty order is affirmed.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The wage order dated October 14, 2010, is affirmed; and
2. The penalty order dated October 14, 2010, is affirmed; and
3. The petition be, and the same hereby is, denied.



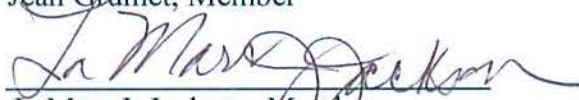
Anne P. Stevason, Chairman



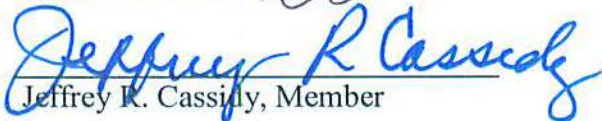
J. Christopher Meagher, Member



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
October 2, 2013.