

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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In the Matter of the Petition of: :

EVANGELIS GRITSIPIIS AND APOSTOLOS :
GRITSIPIIS AND PAUL'S PIZZA, INC. :

Petitioners, :

DOCKET NO. PR 11-045
(OTC No. 11-00021)

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 7 and 19 of the Labor :
Law, both dated January 12, 2011, :

RESOLUTION OF DECISION

- against - :

THE COMMISSIONER OF LABOR, :

Respondent. :
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APPEARANCES

Law Offices of Stewart Lee Karlin P.C. (Stewart Lee Karlin of counsel), for the petitioners.

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

Lorelei Salas, Legal Director, Make the Road New York (Julia Dietz of counsel), for the claimants.

WITNESSES

Evangelia Gritsipis, Apostolos Gritsipis, and Chris J. Canaras for the petitioners; Samaniego Jara, Eugenio Mario Valencia, and USDOL Wage & Hour Investigator Nelcy Aguedelo for the respondent.

WHEREAS:

The petition in this matter was filed with the Industrial Board of Appeals (Board) on February 22, 2011, and seeks review of two orders issued by the Commissioner of Labor (Commissioner or respondent) against petitioners Evangelia Gritsipis, Apostolos Gritsipis, and Paul's Pizza, Inc. on January 12, 2011. Upon notice to the parties a hearing was held on June 11, July 11, and September 10, 2013, 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, to make statements relevant to the issues, and to file legal briefs

The first order on appeal is an order to comply with Article 19 of the Labor Law (wage order), which finds that the petitioners failed to pay minimum wages in the amount of \$54,682.02 to claimants Octavio Dilch, Luis Heriberto Jara, and Eugenio M. Valencia from January 1, 2003 to July 25, 2010. The order further finds interest due at the rate of 16% calculated to the date of the order, in the amount of \$12,582.60, imposes liquidated damages (25%) in the amount of \$13,670.51, and assesses a civil penalty (100%) in the amount of \$54,682.02, for a total amount due of \$135,617.15.

The second order on appeal is an order under Articles 7 and 19 of the Labor Law (penalty order). The penalty order imposes a \$500.00 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 July 21, 2003 through July 25, 2013, a \$10,000.00 civil penalty for violating Labor Law § 215 by penalizing Eugenio Mario Valencia for cooperating with the respondent during the course of an investigation during the period from on or about August 1, 2010 through November 30, 2010, and a \$500.00 civil penalty for violating Labor Law § 661 and 12 NYCRR 142-2.7 by failing to give each employee a complete wage statement with every payment of wages from on or about July 21, 2003 through July 25, 2010, for a total amount due of \$11,000.00.

The petition alleges, *inter alia*, that (1) Evangelia Gritsipis is not an employer under the Labor Law, (2) the petitioners paid the appropriate wages and overtime to the claimants, and (3) the respondent's investigator was biased and improperly received gratuities from a claimant¹. The respondent filed an answer on April 21, 2011 denying the allegations contained in the petition.

SUMMARY OF EVIDENCE

I. Petitioner's Evidence

Petitioner Evangelia Gritsipis testified that Paul's Pizza is a pizzeria owned by her husband, petitioner Apostolos Gritsipis. She stated that her role in the business is to sell pizza and collect money from customers. Ms. Gritsipis testified that she does not hire, fire, or pay employees, and is not involved in "running" the restaurant. Ms. Gritsipis maintained that she is a part-time employee at Paul's Pizza and that she receives a weekly salary of \$300.00.

Ms. Gritsipis is familiar with the two claimants and knows them as "Luis" and "Mario." She testified that Mr. Jara (Luis) worked from 11:00 a.m. to 9:00 p.m. six days per week. She further testified that the petitioners paid Mr. Jara \$530.00 a week in cash which she believed was minimum wage plus overtime. According to Ms. Gritsipis, Mr. Jara took a one hour meal break each day in the back of the kitchen. Ms. Gritsipis testified that Mr. Valencia (Mario) worked 12:00 p.m. to 9:00 p.m. six days per week. He took an hour off for lunch each day and received \$560.00 per week in wages. Ms. Gritsipis explained that Mr. Jara was paid the the same every

¹ No evidence was presented at the hearing regarding this allegation.

week even if he came in late or took a long lunch. She is not familiar with the pizzeria's payroll records and testified that there is no time clock at Paul's Pizza.

Ms. Gritsipis testified that she was not present at the pizzeria when Mr. Jara was fired. She stated that Mr. Gritsipis is the only person at the pizzeria with the authority to fire employees. She testified that she did not discuss firing Mr. Jara with her husband, and further denied that she directed her husband to fire Mr. Jara.

Petitioner Apostolos Gritsipis testified that he is the sole owner and officer of Paul's Pizza, Inc. He further testified that he is the only one at the pizzeria with authority to hire and fire employees and set wage rates. He explained that nobody else at Paul's Pizza has authority to hire, fire, or determine wage rates.

Mr. Gritsipis testified that Mr. Valencia, who he calls "Mario", worked at Paul's Pizza for "many years", and was not fired, but left on his own. Mr. Gritsipis testified that Mr. Valencia worked Tuesday through Sunday from 12:00 p.m. to 9:00 a.m. with Mondays off, which was his schedule for the entire duration of his employment at Paul's Pizza. Mr. Gritsipis paid Mr. Valencia \$560.00 per week and also "paid his taxes."

Mr. Gritsipis testified that Mr. Jara, who he knows as "Luis," also worked at Paul's Pizza. Mr. Gritsipis does not recall when Mr. Jara started working at the pizzeria, but testified his last day was in 2009. Mr. Jara worked from 11:00 a.m. to 9:00 p.m. six days a week and was off on Sundays. This was Mr. Jara's schedule during the entire time he worked for Paul's Pizza. Mr. Gritsipis stated that Mr. Jara was paid \$350.00 a week plus taxes. Mr. Gritsipis fired Mr. Jara because his "behavior was not proper and he was not good at the register." According to Mr. Gritsipis, money was often missing from the cash register and he warned Mr. Jara that if it continued, he would be fired. Mr. Gritsipis testified that it was his decision to fire Mr. Jara, and that Ms. Gritsipis was not present at the time.

Mr. Gritsipis testified that Messrs. Valencia and Jara took time off for vacation while working at Paul's Pizza. Mr. Jara took vacation two to three times a year for approximately a week each time. Mr. Valencia took less time off than Mr. Jara. There are no records of the vacations taken by the claimants, and they were always paid the same weekly salary even if they were absent or late. Paul's Pizza kept no records of the hours the claimants worked. They simply had to show up on time – one at 11:00 a.m. and the other at Noon.

Chris J. Canaras testified that he is the accountant for Paul's Pizza. He dealt only with Mr. Gritsipis, who he testified was the corporate officer who "signed all of the papers." According to Mr. Canaras, the claimants were paid in cash. One was paid for 40 hours a week at \$7.25 an hour, and the other was paid for 30 hours a week at \$7.25 an hour. Mr. Canaras stated that the claimants were paid the same amount each week, and he does not know whether they worked overtime.

II. Respondent's Evidence

Claimant Samaniego Jara (Luis) testified that he started employment at Paul's Pizza in 1997 and worked there until 2009, when he was fired. He originally found the job through Mr. Gritsipis' brother, Peter, who he knew as "Pedro." According to Mr. Jara, when he was hired,

Peter translated what Mr. Gritsipis said about the schedule and work from Greek to Spanish. Mr. Jara stated that Peter was not a decision maker in the business. Mr. Jara testified that during the relevant time period he worked from 10:00 a.m. to 9:00 p.m. seven days a week, and was not provided an uninterrupted 30 minute break during his shift. Mr. Jara further testified that Mr. Valencia (Mario) worked from 11:00 a.m. to 9:00 p.m. six days a week. Mr. Jara's salary was \$400.00 per week "straight" at the time he was fired. On cross-examination Mr. Jara denied that he regularly took Thursdays off, and stated he was absolutely certain his salary was \$400.00 per week, and denied that there was any agreement to be paid minimum wage.

Mr. Jara testified that Ms. Gritsipis worked at the store. She made pizzas until Peter arrived, and then, upon his arrival, worked at the counter taking care of customers. According to Mr. Jara, Ms. Gritsipis taught him how to make pizzas, with Peter interpreting. Mr. Jara testified that on his last day of work he had a disagreement with Ms. Gritsipis concerning a rest for time off, and was fired later that same day by Mr. Gritsipis. Mr. Jara observed Mr. and Ms. Gritsipis arguing in Greek, and later that day Mr. Gritsipis accused him of stealing money and fired him, although he had never been accused of that before. Mr. Jara does not know how the decision was made to fire him.

Claimant Eugenio Mario Valencia testified that he worked at Paul's Pizza from January 11, 2000 to October 18, 2010. Mr. Valencia had experience working in pizzerias so he received no training when he was hired, but testified that Ms. Gritsipis explained the schedule and salary to him. His schedule during the relevant time period was always 11:30 a.m. to 9:00 p.m. He worked six days a week during the winter, and seven days a week in the summer. Mr. Valencia's "flat salary" was \$420.00 per week when he started, which was eventually raised to \$560.00 per week by the time his employment ended, although he could not recall when his salary was raised. He was paid the same salary each week regardless of the number of hours he worked, and was not paid an overtime premium. Mr. Valencia further testified that he received no lunch break, and only had time each day for a quick break to eat a slice of pizza. Mr. Valencia testified that Mr. Jara always worked seven days a week.

Mr. Valencia testified that Ms. Gritsipis' role at the pizzeria was to tell the employees what to do. Specifically, she told the employees to take care of the customers and to make pizzas. Mr. Valencia further explained that Ms. Gritsipis told him when he could have days off.

Mr. Valencia was present the day Mr. Jara was fired. He heard Mr. Gritsipis tell Mr. Jara he was fired because money was missing. He also observed that Mr. Jara and Ms. Gritsipis had argued that day, but did not know what they had been arguing about.

Nelcy Aguedelo testified that she is employed by the United States Department of Labor as a Wage & Hour Investigator. She previously worked for the New York State Department of Labor as a Labor Standards Investigator where she was assigned to investigate a claim filed by a community organization, Make the Road New York, on behalf of Mr. Jara, alleging that Paul's Pizza did not properly compensate him. Mr. Jara's claim form, forwarded by Make the Road New York, alleges that he worked for Paul's Pizza from March 1, 1997 to July 20, 2009. The claim alleges that from 1999 to July 20, 2009, Mr. Jara worked from 10:00 a.m. to 9:00 p.m. seven days a week with a 15 minute break each day. The claim lists Mr. Jara's wages as \$360.00 per week, eventually raised to \$480.00 per week. Finally, Mr. Jara's claim states that Mr. Gritsipis is the owner of Paul's Pizza, and Ms. Gritsipis is the manager.

Ms. Aguedelo testified that she spoke to Mr. Jara about the claim. According to Ms. Aguedelo's notes of her conversation with Mr. Jara, he confirmed the allegations made in the claim. On July 21, 2010, Ms. Aguedelo visited the the pizzeria and interviewed two employees – Octavio Dilche and Mr. Valencia. Octavio Dilche, according to Ms. Aguedelo's interview notes, alleged that he started work at Paul's Pizza on July 15, 2009, works 11:00 a.m. to 9:00 p.m. six days a week (Thursdays off), and receives \$350.00 per week in wages. He stated that he was hired by Ms. Gritsipis and that she is his supervisor. Mr. Jara informed Ms. Aguedelo, according to her interview notes, that he had worked 11 years at Paul's Pizza. He said that he works from 11:30 a.m. to 9:00 p.m. six days a week (Mondays off), and is paid \$560.00 per week.

Based on her investigation, Ms. Aguedelo concluded that the claimants had been underpaid. She further testified that since the petitioners advised her that they kept no wage and hour records, and records provided to her by Mr. Canaras were insufficient in so far as the hours were incorrect, she calculated the amount of wages owed to the claimants based on the claimants' statements. Ms. Aguedelo recommended a 100% civil penalty in this case because the petitioners did not keep accurate records.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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 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 (Labor Law § 101, 103; 12 NYCRR 65.30; *see also* State Administrative Procedure Act § 306 [1]).

Evangelia Gritsipis is an employer under the Labor Law

The petition alleges that petitioner Evangelia Gritsipis is not liable as an employer under the Labor Law. "Employer" as that term is used in Article 19 of the Labor Law means "any individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons acting as an employer" (Labor Law § 651 [6]). "Employed" means "suffered or permitted to work" (Labor Law § 2 [7]).

The federal Fair Labor Standards Act, like the New York Labor Law defines "employ" to include "suffer or permit to work" (29 USC § 203 [g]), and "the test for determining whether an entity or person is an 'employer' under the New York Labor Law is the same test . . . for analyzing employer status under the Fair Labor Standards Act" (*Chu Chung v The New Silver Palace Rest., Inc.*, 272 F Supp 2d 314, 319 n6 [SDNY 2003]).

In *Herman v RSR Sec. Servs. Ltd.*, 172 F3d 132, 139 (2d Cir 1999), the Second Circuit Court of Appeals stated that the test used for determining employer status by explaining that:

"Because the statute defines employer in such broad terms, it offers little guidance on whether a given individual is or is not an employer. In answering that question, the overarching concern is whether the alleged

employer possessed the power to control the workers in question with an eye to the ‘economic reality’ presented by the facts of each case. Under the ‘economic reality’ test, the relevant factors include whether the alleged employer (1) had the power to hire and fire employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records” (internal quotations and citations omitted). When applying this test, “no one of the four factors standing alone is dispositive. Instead the ‘economic reality’ test encompasses the totality of the circumstances, no one of which is exclusive.” (*Id.* [internal citations omitted]).

Petitioners Evangelia and Apostolos Gritsipis both testified that Ms. Gritsipis did not have authority to hire and fire employees, or to set wage rates. This evidence was uncontested. Nevertheless, those are not the only factors to be considered under the economic realities test when determining whether an individual is liable under the Labor Law as an employer. Mr. Valencia credibly testified that Ms. Gritsipis worked at the pizzeria and gave employees directions, including to take care of customers and to make pizzas. Mr. Valencia further testified that Ms. Gritsipis told him when he could take days off. We find based on this testimony, which was not rebutted, that Ms. Gritsipis supervised and controlled employee work schedules and conditions of employment by directing employees in their daily work and determining their days off, which is sufficient control under the circumstances to support the respondent’s finding that she is an employer.

The wage order is affirmed

Article 19 of the Labor Law, entitled “Minimum Wage Act” provides that every employer must pay each of its non-exempt employees a minimum hourly wage for each hour of work (Labor Law § 652 [1]), and of one and one-half of their regular hourly wage rate for hours worked over 40 in a week (12 NYCRR 137-1.3 [2008])².

It is undisputed that the petitioners did not maintain wage and hour records. In the absence of such 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 850, 854 [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*

² As of January 1, 2011, the restaurant industry is covered by the Hospitality Wage Order (12 NYCRR 146).

New York State Dept. of Labor, 226 AD2d 378, [(1st Dept 1996], *citing Mid-Hudson Pam Corp.; Matter of Ramirez c Commissioner of Labor*, 110 AD3d 901 [2d Dept 2013]). In this case, the Commissioner used the best available evidence, which was the claim form filed by Mr. Jara, and the employee interviews conducted by Ms. Aguedelo. The petitioners failed to meet their burden of proof to demonstrate that the calculations made by the respondent were unreasonable.

Mr. and Ms. Gritsipis each testified that Mr. Jara worked six days a week from 11:00 a.m. to 9:00 p.m. during the relevant time period. Mr. Gritsipis testified that Mr. Jara's salary was \$530.00 a week plus taxes, which was consistent with Ms. Gritsipis testimony that his salary was \$530.00 a week, and they both testified that he had an hour break each day. Mr. Jara's claim alleged that his final salary was \$480.00 which he confirmed to DOL during the investigation. He testified, however, that he was "absolutely certain" his final salary was \$400.00. Mr. Jara testified that he worked seven days per week with no break, which was corroborated by Mr. Valencia. In the absence of records of the hours Mr. Jara worked and the wages the petitioners paid him, we find that it was reasonable for DOL to find based on his claim form that he worked 77 hours a week, particularly where the petitioners' accountant, Mr. Canaras, testified that the weekly salary was based on 30 or 40 hours per week at \$7.25 an hour which is far less than the hours the Gritsipis admit Mr. Jara worked and calls into question the veracity and consistency of the petitioners' evidence. We also find that it was reasonable for the respondent to rely on Mr. Jara's contemporaneous statement that his final salary was \$480.00 irrespective of the fact that he testified to a lower amount at the hearing while the Gritsipis testified that his salary was higher than he alleged in his claim.

There is no dispute that Mr. Valencia's weekly salary was \$560.00, nor is there a great deal of dispute concerning his hours of work. Mr. and Mrs. Gritsipis each testified that Mr. Valencia worked six days a week from 12:00 p.m. to 9:00 p.m. with an hour break each day, for a total of 48 hours per week. Mr. Valencia, however, informed DOL during the investigation, and credibly testified at hearing, that during the relevant period he worked 11:30 a.m. to 9:00 p.m. six days a week without meal breaks, for a total of 57 hour per week. We find that in the absence of records of the hours Mr. Valencia worked and the wages the petitioners paid him, it was reasonable for DOL to calculate the wages owed to him based on his statement during the investigation, which was consistent with his testimony.

DOL interviewed Octavio Dilch at the pizzeria and found, based on his statement, that the petitioners owed him wages. The petitioners presented no evidence at hearing³ concerning Mr. Dilch, and therefore failed to meet their burden to prove that the respondent's findings with respect to Dilch were invalid or unreasonable.

Based on the above, we find that the petitioners failed to meet their burden of proof to show that the wage order was invalid or unreasonable, and affirm the respondent's determination that the petitioners owe \$54,682.02 in unpaid wages to Octavio Dilch, Luis Heriberto Jara, and Eugenio M. Valencia, plus statutory interest under Labor Law § 219 (1).

³ The affidavit of Octavio Dilch attached to the petition is not in evidence because it was not introduced at the hearing. Even had it been introduced, we note that although hearsay is permitted in administrative proceedings, such an affidavit would be given very little weight.

The civil penalty and liquidated damages are affirmed

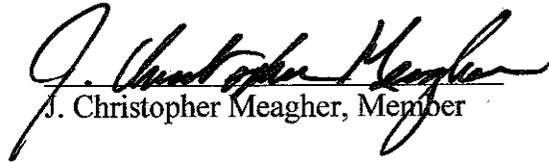
The wage order contains a civil penalty as well as liquidated damages. Since the petition does not raise any allegations, general, conclusory, or otherwise, regarding the validity and reasonableness of the civil penalty and liquidated damages, any such objection has been waived (Labor Law § 101 [2]), and the civil penalty and liquidated damages are, therefore, affirmed.

The penalty order is affirmed

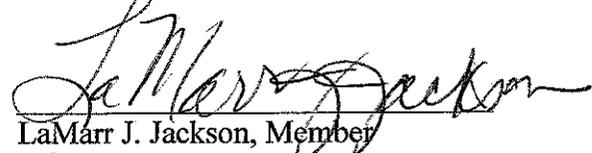
The petition also fails to raise any allegations regarding the validity and reasonableness of the penalty order. Therefore, any objection to the penalty order has been waived (Labor Law § 101 [2]). Accordingly, the penalty order is affirmed.

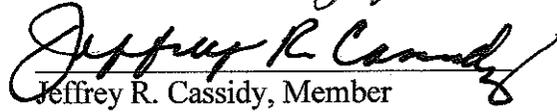
NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

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


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 22, 2014.