STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of: JI SUNG YOO AND KUM KANG INC. (T/A KUMGANGSAN), Petitioners, To Review Under Section 101 of the Labor Law: An Order to Comply with Article 19, and an Order under Articles 5, and 19 of the Labor Law, issued April 22, 2011, - against - THE COMMISSIONER OF LABOR, Respondent.	DOCKET NO. PR 11-174 RESOLUTION OF DECISION

APPEARANCES

Ji Sung Yoo, *pro se* petitioner, and for petitioner Kum Kang Inc.

Pico Ben-Amotz, Esq., Acting Counsel, NYS Department of Labor (Jeffrey Shapiro of counsel), for respondent.

WITNESSES

Ji Sung Yoo, for petitioners.

Senior Labor Standards Investigator Grace Tai, for respondent.

WHEREAS:

On June 13, 2011, petitioners Ji Sung Yoo and Kum Kang Inc. (petitioners) filed a petition to review two orders that the Commissioner of Labor (Commissioner) issued against them on April 22, 2011. The respondent filed its answer on July 27, 2011.

The first order under review is an Order to Comply with Article 19 of the New York Labor Law (Wage Order) and directs petitioners to pay $555,973.03 in unpaid wages owed to 66 employees, $144,080.37 in interest, $138,993.38 in liquidated damages, and $1,111,946.06 in civil penalties for a total due of $1,950,992.84.

The second order was issued under Articles 5, and 19 (Penalty Order) and directs petitioners to pay $6,000 in civil penalties based on: (1) the failure to provide wage statements to employees with every payment of wages for the period of February 4, 2011 through February 10, 2011 ($2,000); (2) the failure to provide at least 24 consecutive hours of rest in any calendar week for the same time period ($2,000); and (3) the failure to keep and/or furnish the requisite payroll records for the same time period ($2,000).

The petition alleges that the audit of wages due, conducted by the Department of Labor (DOL), was based on "erroneous figures," and that much less is due. In its answer, DOL alleges that petitioners' employees were paid on a salary basis which did not compensate them at the minimum wage rate or provide a premium for the overtime hours worked and that the audit conducted was based on the time and payroll records provided by petitioners.

In response to a Demand for Bill of Particulars, petitioners specified that it was alleging that the Wage Order was unreasonable and invalid due to the fact that DOL based its audit on the fact that only two meals and meal periods were provided each day when in fact three meals and three meal periods were provided so that an additional 30 minutes and an additional meal allowance of $2.10 per day should be deducted from the audit.

Petitioners were represented by counsel until the day of the hearing when counsel withdrew in writing, and petitioner Yoo stated that he instructed counsel not to appear at the hearing.

Upon notice to the parties, a hearing was held on October 10, 2013, 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, and to make statements relevant to the issues.

I. SUMMARY OF EVIDENCE

Petitioner Yoo testified that he has operated his restaurant for 16 years and that it is open seven days per week and 24 hours per day. During the period of July 1, 2005 to February 11, 2010, the period in question in these proceedings, he employed approximately 80 workers. Half of his employees worked in the kitchen and half were wait staff. Time records were kept of the hours worked by staff and employees were paid on a weekly basis, sometimes in cash and sometimes by check. Three meals were provided to the employees each day. A half hour was given for breakfast and dinner, and there would be a three hour lunch break from 2:00 p.m. to 5:00 p.m. every day. During the three hour break each day employees would go to the gym to exercise or take English lessons. Mr. Yoo was present at the restaurant as needed but usually five days per week.

Senior Labor Standards Investigator (SLSI) Grace Tai testified that a DOL investigation was commenced in 2010 after a minimum wage complaint was filed by one of petitioners' employees. SLSI visited the restaurant and, along with two other investigators, observed 35 people working and interviewed 14. The employees indicated that they worked 12 hour shifts and that the wait staff received a daily salary while the kitchen staff received a weekly salary.

Petitioners provided DOL with time records for the years 2007, 2008 and 2009. Where there were time records, they were used by DOL to determine the number of hours each employee worked. Payroll records were provided for 2007 on and these were also used for the DOL audit.

Most of the time records did not indicate the time taken for meal breaks or any other breaks. However, based on employee interviews, petitioners were credited with one hour of meal breaks per day for the kitchen staff; and two hours for the wait staff (one hour for meals and one hour for an afternoon break). None of the employees confirmed petitioners' allegation that they had a three hour afternoon break. Petitioners were also given an allowance for two meals per day and a one week vacation per year prior to September 2009 per the petitioners' vacation policy. In addition, the wait staff was given a tip allowance.

The 200% civil penalty in the Wage Order was based in part on the fact that petitioners had a prior Labor Law violation.

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]).

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 -

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, § 137-2.1[1] provides, in pertinent part:

[1] As of January 1, 2011, all restaurant and hotel industries are covered by the Hospitality Wage Order (12 NYCRR 146).

"(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) occupational classification and wage rate;
(4) the number of hours worked daily and weekly, ...;
(5) the amount of gross wages;
(6) deductions from gross wages;
(7) allowances, if any, claimed as part of the minimum wage;
(8) money paid in cash; and
(9) student classification.
" . . .
"(e) Employers...shall make such records...available upon request of the commissioner at the place of employment."

§ 137-2.2 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 or provide statements of wages to employees as required under this chapter, 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." (2011)

In addition, in the absence of required employee records, DOL may issue an order to comply based on employee complaints and interviews. 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."

B. Meal Allowances.

The Minimum Wage Order for the Restaurant Industry provides that an employer is entitled to an allowance for meals it furnishes to its employees at a certain rate but that an "allowance for more than two meals shall not be permitted" on any day (12 NYCRR § 137-1.9 [a] [3]).

C. Calculation of Unpaid Wages Due.

DOL has calculated the unpaid wages due based on the records produced by petitioners and, where records were not available, on the claims and employee interviews that it received. This is a reasonable basis for the calculation. Allowances were given to the employer for tips and meals and the number of hours worked was reduced each day for meal periods even though they were not reflected on the time cards. Although petitioners argue that they are entitled to an additional meal allowance since they provided three meals per day, the Minimum Wage order provides that no more than two meal allowances may be taken.

Petitioners also argue that more time should have been deducted from hours worked since the employees received a three hour break in the afternoon from 2:00 p.m. to 5:00 p.m. However, the time records do not reflect this break and therefore, DOL relied on the information that it received from the employees that at most there was a one hour break in the afternoon for the wait staff and the kitchen staff received no break. Given the failure of the petitioners to keep accurate time records, it was reasonable for DOL to rely on employee statements.

D. The Civil Penalty is upheld.

The order imposes a 200% civil penalty against the petitioners. Senior Labor Standards Investigator Tai testified that this penalty was assessed in part due to the fact that there was a previous violation. Labor Law § 218 (1) provides, in part:

> "If the commissioner determines that an employer has violated a provision of article six (payment of wages), article nineteen (minimum wage act). . . or a rule or regulation promulgated thereunder, the commissioner shall issue to the employer an order directing compliance therewith. . . . In addition to directing payment of wages, benefits or wage supplements found to be due, and liquidated damages in the amount of one hundred percent of unpaid wages, such order, if issued to an employer who previously has been found in violation of those provisions, rules or regulations, or to an employer whose violation is willful or egregious, shall direct payment to the commissioner of an additional sum as a civil penalty in an amount not to exceed double the total amount of wages, benefits, or wage supplements found to be due."(2011)

Since petitioners had a previous violation, the Civil Penalty of 200% of the wages due is affirmed.

II. The Penalty Order is Affirmed in full.

Petitioners were cited $6,000 for three violations of the Labor Law. Petitioners failed to allege or prove any defense to this order and therefore, 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 financial services pursuant to section fourteen-a of the banking law per annum from the date of the underpayment to the date of payment."(2011) 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.

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, otherwise 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 New York, New York, on
February 27, 2014.