STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of:	
JOAQUIN TURCIOS AND KORONA USA HOLDING CORP. (T/A KORONA NIGHT CLUB),	
Petitioners,	DOCKET NO. PR 11-198
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 issued April 20, 2011,	RESOLUTION OF DECISION
- against -	
THE COMMISSIONER OF LABOR,	
Respondent.	

APPEARANCES

Joaquin Turcios, *pro se* for Korona USA Holding Corp. (T/A Korona Night Club),

Pico Ben-Amotz, Acting Counsel, NYS Department of Labor (Jessie Hahn, of counsel), for respondent.

WITNESSES

Joaquin Turcios, for the petitioner.

Manuel Cruz, Brenda Lara, and Jeremy Kuttruff, Senior Labor Standards Investigator, for the respondent.

WHEREAS:

This proceeding was commenced when the petitioners Joaquin Turcios (Turcios) and Korona USA Holding Corp. (Korona) (together, petitioners) filed a petition with the Industrial Board of Appeals (Board) on June 28, 2011. The order to comply with Article 6 (wage order) under review was issued by the respondent Commissioner of Labor (Commissioner) on April 20, 2011, and directs payment to the Commissioner for wages due and owing to claimants Manuel Cruz and Brenda Yamileth-Larin Lara in the amounts of $1,619.65 and $3,200.00 respectively, with interest continuing thereon at the rate of 16% calculated to the date of the wage order, in the amount of $1,231.70, and assesses a 100% civil penalty in the amount of $4,819.65, for a total amount due of $10,871.00.

The order under Article 19 of the Labor Law (penalty order) imposes a $500.00 civil penalty for violating Labor Law § 661 and 12 NYCRR 137-2.1 for failing to keep and/or furnish true and accurate payroll records for each employee from on or about May 24, 2009 through September 16, 2009.

The petition alleges that the orders are not reasonable and valid because neither claimant was an employee: claimant Cruz was a customer who "would occasionally offer help with things such as taking out the garbage and I would provide monetary compensation for any assistance, but he was not an employee," and claimant Lara requested employment "but at the time I was unable to hire her because the business was not doing well."

Upon notice to the parties, a hearing was held in this matter on September 17, 2013, in Hicksville, New York, before Jean Grumet, Esq., Member 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 make statements relevant to the issues.

SUMMARY OF EVIDENCE

Testimony of Petitioner, Joaquin Turcios

Petitioners operated a night club in Hempstead, New York, which closed in September 2009 due to non-payment of rent. Petitioners rented the premises, furnished it with a bar, tables, chairs, and a sound system, operated by Turcios and his brother, Oscar, who was a part owner in the business. The night club was open seven nights per week from 9 p.m. to 3 a.m. Petitioners employed four employees: Turcios, his brother, and two others, all of whom tended the bar. Turcios hired, fired and set schedules for them, but kept no written records. Although petitioners declared the two non-family members as employees on their tax returns, they did not declare all the people who worked at the night club "because they were not all employees, and most of them, if I would have asked, they didn't have any papers."

Neither claimant was an employee, had no "real salary" and would "just come in from time to time." Five to six dancers, who also served drinks (the night club did not serve food), worked solely for "tips" paid by petitioners, consisting of half of the price of the drinks they sold; petitioners kept the other half. The dancers started work at "11, 12 [t]here was not a set time" and worked until 2:30 a.m., when the customers started leaving. Claimant Lara worked at the club for a year, had no set days of work, and usually worked two or three days per week for three or four hours each of those days. Turcios "sometimes...did and sometimes...didn't" kept track of the time she would arrive, but kept no records of the days she worked. He did not know how much Lara received in tips.

While security was necessary when the night club first opened because there was business, there was no longer any need for security once the business began to fail. Claimant Cruz, who was a customer, sometimes helped the night club's security guard and when he did, Turcios would pay Cruz $50.00 in cash. Cruz worked three hours per day, two or three days per week. When asked on cross-examination, "You were paying him, but you did not consider him your employee?" Turcios responded "No, he wasn't there on a regular basis," but later testified: "He would assist me, He helped me, He worked for me."

Turcios did not receive any correspondence during the DOL investigation and the first time he heard about the claims was when he received the Orders, which were addressed to his current home address. When asked by the Hearing Officer how claimants were notified to come to work, he stated "they just arrived" and he never asked them to leave.

Testimony of Senior Labor Standards Investigator, Jeremy Kuttruff

Senior Labor Standards Investigator, Jeremy Kuttruff was one of the investigators assigned to this case and introduced the DOL investigatory file into the hearing record. The claim and attached documentation was sent to the petitioners three times with a request for records and/or payment. The first collection letter was addressed to petitioners' business address. When no response was received, it was re-sent three weeks later. After receiving no response to the second mailing, DOL mailed two separate collection letters to Turcios' home address (the same address to which the orders were later sent): one addressed to Turcios and the other addressed to Korona. None of the DOL's letters were returned as undeliverable.

Kuttruff recommended a $500.00 penalty for the records violation because petitioners did not respond to the DOL's letters and did not provide payroll records. He recommended a 100% penalty for the wage order because of petitioners' bad faith in ignoring DOL's letter and because a 100% penalty was commensurate with the amount of money still owed to the claimants.

Testimony of Claimant, Manuel Cruz

Cruz, who was originally a customer of the bar, worked as petitioners' security guard for 2½ years. When Turcios offered Cruz the job at the night club in 2007, Cruz left his landscaping job to work for petitioners. Turcios set Cruz' hours, which were 9 p.m. to 4 a.m. seven nights per week, and set his pay, which was $80.00 per day Mondays through Thursdays, and $100.00 per day on Fridays through Sundays. Turcios paid Cruz $620.00 in cash on Sundays for a 49 hour/ seven day work week.[1] Cruz considered Turcios to be his boss. The security guard job entailed working at the entrance of the bar and patting down customers to ensure that no weapons were brought into the bar. If Cruz found a weapon, usually a knife, he would confiscate it and return it to the customer when the customer left the bar. On weekends, an additional guard helped Cruz with security. Approximately fifteen waitresses worked during the week, and as many as 35 worked during the weekends. The petitioners' premises contained a bar, tables, a dance area, and billiard tables. Although Turcios did not keep track of Cruz' hours, he did write down the names of the waitresses and the time they arrived. The waitresses, who were required to drink with the customers, sold beer and other drinks and would make ½ the price of the price of each drink sold.

On a Thursday in September, 2009, Cruz went to work as usual, but found the bar was closed by the sheriff due to non-payment of rent. Cruz called Turcios many times to request the two and a half weeks of unpaid wages owed to him, but Turcios never returned his calls, so he filed a claim with DOL.

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[1] SLSI Kuttruff testified that when calculating the wages owed to Cruz, he calculated 40 hours per week at Cruz' regular rate, and nine hours at time and a half for overtime owed to Cruz in excess of 40 hours per week.

Testimony of Brenda Lara

When Lara was hired by Turcios to work as a waitress at petitioners' bar in August 2007, he told her that her pay rate was $40.00 per night plus tips, and that her hours were 9:30 p.m. to 4 a.m., and that she should "take very good care of the customers." Her duties as a waitress were to serve drinks, converse with, and dance with the petitioners' customers. The customer generally ordered a drink for himself and another for the waitress, and on a given night, ten to twelve men, sometimes less, bought her drinks. Depending on the customer, she would converse or dance for as little as ten minutes or as long as an hour. The drinks cost $10.00 - $20.00 each, and she would get a tip of ½ of the price of each drink she sold. She received the tip when the drink was served. Five to seven waitresses worked during the week and twelve to fifteen on weekends.

Lara was paid in cash on Sundays by Turcios. She was not given a receipt or wage statement. Turcios supervised her work, and she considered him her boss. When she first began working for petitioners, Turcios kept track of her hours in a notebook, but he later said: "since we were not on the books, that was a formality he did not have to do." When the business began failing, Turcios sometimes paid her $100 per week and other times, nothing. During the last four months, she was paid nothing, but she continued to work for petitioners because she was still earning tips.

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 (State Administrative Procedure Act § 306 [1]; Labor Law §§ 101, 103; 12 NYCRR 65.

Claimants Cruz and Lara are Employees

The petitioners allege that the wage order is unreasonable on the ground that they never hired the claimants. We find Turcios' testimony on this issue was not credible and that the record amply demonstrates that the claimants were employed by Petitioners during the period of the claim.

"Employee" as used in Articles 6 and 19 of the Labor Law means any person employed for hire by an employer in any employment." (Labor Law § 190 [2]). "Employer" means "any person, corporation, limited liability company, or association, employing any individual in any occupation, industry, trade, business or service." (Labor Law § 190 [3]; *see also* Labor Law § 651 [6]). "Employed" means "permitted or suffered to work" (Labor Law § 2 [7]). The federal Fair Labor Standards Act (FLSA) also defines "employ" to include "suffer or permit to work" (29 USC § 203[g]). Because the statutory language is nearly identical, the Labor Law and the FLSA follow the same test to determine the existence of an employment relationship (*Ansoumana v Gristede's Operating Corp.*, 225 F Supp2d 184, 189 [SDNY 2003]). Indeed, the Supreme Court in discussing the broad definition of "employ" set forth in the FLSA has

observed that "[a] broader or more comprehensive coverage of employees ... would be difficult to frame" (*United States v Rosenwasser,* 323 US 360, 362 [1945]).

Claimants Cruz and Lara both credibly testified that Turcios hired them, set their rates of pay and work hours, determined the night club's hours and price of drinks and controlled the sound system. Turcios paid claimants their wages for the week in cash on Sundays. Lara's testimony that Turcios kept track of her hours in a notebook, but later decided "since we were not on the books, that was a formality that he did not have to do" was corroborated by Cruz and by Turcios' own testimony that he "sometimes" kept track of the time she arrived at work.

Turcios' admission that Cruz worked at the night club as a security guard three hours per day two to three days per week contradicted the petition's allegations that Cruz was merely a customer who "would occasionally offer help with things such as taking out the garbage." Likewise, while the petition alleged that petitioners could not afford to hire Lara, Turcios testified that she worked at the night club for a year, usually working two to three days per week for three to four hours per night and that "sometimes I did and sometimes I didn't" keep track of the hours she worked. Turcios variously and incredibly testified that neither claimant had a "real salary," they would "just come in from time to time," there was no set starting time for the dancers, and the dancers "just arrived" and were not told when to report to work.

Petitioners' supervision over the terms, manner, means and performance of the work performed by the claimants are consistent with their status as employees. Both Lara and Cruz credibly testified that they were hired by Turcios in 2007 and worked under his direction and control until the night club closed more than two years later. Lara's work serving drinks and dancing with customers and Cruz' services as a security guard were for the benefit of the petitioners' business.

Based on the totality of credible evidence, we find that the employer suffered or permitted the work of the claimants and is liable for unpaid wages under the Labor Law.

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[2] 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:

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

(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 an employees is paid. This required recordkeeping provides proof to the employer, the employee and the Commissioner that the employee has been properly paid.

Petitioners Violated Article 6 of the Labor Law by Failing to Pay Wages Due the Claimants

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 employer's payroll records, DOL may issue an order to comply based only on employee complaints. In the case of *Angello v National Finance Corp.*, 1 A.D.3d 850, 769 N.Y.S.2d 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 this case, given the lack of employer records, it was reasonable for DOL to rely on the estimate of wages due calculated by claimants on their claim forms per Labor Law § 196-a. We find that DOL's wage order was a reasonable approximation of the hours worked by the employees and affirm the wage order in its entirety.

Civil Penalty

The wage order assessed a civil penalty in the amount of 100% of the wages. 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."

E. Penalty Order

The penalty order found that the petitioners violated Labor Law § 661 and 12 NYCRR § 137-2.1 by failing to furnish true and accurate payroll records for each employee for the period from May 24, 2009 through September 16, 2009, and imposed a $500.00 civil penalty for such violation. Since petitioners failed to keep and/or furnish the required records, this penalty order is affirmed.

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NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The order to comply with Article 6 (wage order) is affirmed; and

2. The order under Article 19 (penalty order) is affirmed; and

3. The petition for review be, and the same hereby is, 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
January 16, 2014.