

STATE OF NEW YORK  
INDUSTRIAL BOARD OF APPEALS

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 In the Matter of the Petition of: :  
 :  
 YOOK WAH CHU AND LUCKY HORSE (NY) :  
 CORP. (T/A FULTON CHEF), :  
 :  
 Petitioners, :  
 :  
 To Review Under Section 101 of the Labor Law: :  
 An Order to Comply with Article 19 and an Order :  
 Under Articles 5, 6 and 19 of the Labor Law, both :  
 dated July 28, 2011, :  
 :  
 - against - :  
 :  
 THE COMMISSIONER OF LABOR, :  
 :  
 Respondent. :  
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DOCKET NO. PR 11-308

RESOLUTION OF DECISION

**APPEARANCES**

The Law Firm of Hugh H. Mo, P.C. (Hugh H. Mo, Esq. and Pedro Medina, Esq. of counsel) for petitioners.

Pico Ben-Amotz, General Counsel, NYS Department of Labor (Paul Piccigallo, Esq. of counsel), for respondent.

**WITNESSES**

Yook Wah Chu, for petitioners.

See Eng Lim and Wei Sha, Labor Standards Investigator, for respondents.

**WHEREAS:**

On September 28, 2011, petitioners Yook Wah Chu and Lucky Horse (NY) Corp. (T/A Fulton Chef) filed a petition to review two orders that the Commissioner of Labor (Commissioner or DOL) issued against them on July 28, 2011. The respondent filed a motion to dismiss for failure to state a cause of action for which relief may be granted on November 1, 2011. The Board denied the motion to dismiss on July 13, 2012, and the respondent filed an answer on August 2, 2012.

The first order under review is an order to comply with Article 19 of the New York Labor Law (minimum wage order) and originally directed petitioners to pay \$65,858.98 in unpaid wages owed to claimants See-Eng Lim, Chun Yang, and Fam Ah Moon during the period from January 5, 2004 to September 28, 2008, with interest at the rate of 0%<sup>1</sup> calculated to the date of the order at \$37,736.04, 25% liquidated damages in the amount of \$16,464.74, and a 100% civil penalty of \$65,858.98, for a total due of \$185,918.74.

Respondent amended the order during the hearing to remove claimant Fam Ah Moon, and the minimum wage owed was reduced to \$50,931.46, liquidated damages assessed at 25% were reduced to \$12,732.87, interest assessed at 16% was reduced to \$29,182.81, and the 100% civil penalty was reduced to \$50,931.46, for a total due in the amended minimum wage order of \$143,778.59.

The second order issued under Article 19 (penalty order) directs the petitioners to pay \$3,500.00 in civil penalties based on: (1) the failure to pay wages not later than seven calendar days after the end of the week in which the wages were earned (\$1,000.00) for the period January 5, 2004 to September 28, 2008; (2) the failure to keep and/or furnish the requisite payroll records, for the same period covered by the minimum wage order (\$1,000.00); (3) the failure to provide employees at least 30 minutes off for the noon day meal when working a shift of more than six hours extending over the noon day meal period (11:00 a.m. to 2:00 p.m.), for the period July 18, 2007 to September 28, 2008 (\$500.00); and (4) the failure to provide wage statements to employees with every payment of wages, for the same period covered by the minimum wage order (\$1,000.00).

The petition challenges the minimum wage order by alleging that (1) the claimants did not work for the petitioners for the specified periods or hours they claimed; (2) the claimants falsely identified the wages they were paid and the petitioners' alleged failure to provide a meal break; (3) petitioner Yook Wah Chu was not individually liable; and (4) the order incorrectly found that the petitioners did not maintain true and accurate payroll records. The petition also contests the civil penalties and interest in the minimum wage order and the penalty order.

Upon notice to the parties, hearings were held in New York, New York on August 6, and September 15, 2014 before Administrative Law Judge Jean Grumet, 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.

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<sup>1</sup> While the minimum wage order indicates that the \$37,736.04 interest assessed constituted "interest at 0.0%," the \$37,736.04 interest assessed was actually calculated at the statutory rate of 16%, and 0.0% was a typographical error. There was no prejudice to the petitioners from the typographical error, which we find harmless error, (*see, Matter of Richard Tagliarino, Nancy Hayden and Talent Tour USA, Ltd.*, PR 11-338 p 2 fn 1 [August 7, 2014]), and the typographical error was corrected when the minimum wage order was reduced when Moon's claim was withdrawn, and DOL counsel stated that "[t]he interest assessed at sixteen percent will be reduced from \$37,736.04 to \$29,182.81."

## SUMMARY OF EVIDENCE

### *Testimony of Petitioner Yook Wah Chu*

Petitioner Yook Wah Chu was the owner of Lucky Horse, a corporation doing business as Fulton Chef or Wing He. Fulton Chef was a restaurant that operated in New York, New York from 2003 to 2008. Chu was the restaurant's sole owner and chef. He supervised employees, gave instructions, paid, hired and fired them. The restaurant's hours of operation were from 11:00 a.m. to 11:00 p.m., and there were two shifts: one from 11:00 a.m. to 10:00 p.m. and the second from 12:00 noon to 11:00 p.m. The restaurant seated 100 people, and petitioners generally employed 11 employees, including 2 delivery persons.

Claimant Lim was employed as a delivery person from September 2003 to sometime in 2008. Lim worked 48 hours per week: Mondays through Fridays from 11:00 a.m. to 3:00 p.m. and from 5:00 p.m. to 10:00 p.m. and on Saturdays from noon to 4:00 p.m. and from 6:00 p.m. to 11:00 p.m. Lim's salary was \$1,000.00 per month: he was paid \$500.00 in cash on the 15<sup>th</sup> and 30<sup>th</sup> of each month. Lim was provided with two meals per day and took two half hour breaks. The restaurant provided lunch to its staff from 2:30 to 3:00 p.m. and dinner from 9:30 to 10:00 p.m. Lim was given two weeks paid vacation each year, and was also given an annual bonus of \$300.00 in 2004, and \$500.00 each year from 2005-2008. Lim earned \$400.00 per week in tips, which Chu knew because he sometimes asked Lim how much he earned in tips and Lim responded "[a]t least four hundred or sometimes more." Chu first calculated an hourly wage for Lim in 2008, when Labor Standards Investigator Sha investigated the restaurant. At that time, Chu concluded that Lim was earning \$4.85 per hour for 40 hours and time and a half at \$7.275 for eight additional overtime hours, for a total of \$252.20 per week. Chu testified he still owes Lim "approximately more than two thousand" for the five-year period he worked, based on these calculations.

Claimant Yang was employed as a delivery person during approximately 2007-2008. Yang worked eight hours per day on Mondays through Fridays, and eight hours on Sundays, and his salary was \$650.00 per month. Yang was paid in cash twice a month on the 15<sup>th</sup> and 30<sup>th</sup> of each month. He was provided with two meals per day, and received a \$300.00 bonus in 2008. Yang earned \$400.00 in tips per week. Lim and Yang "shared [an] equal amount of tips . . . . Around \$400 a week. It could be more or less." Chu has had contact with Yang since 2008, and at one point asked him about the investigation in this matter. Yang told Chu that he "would not continue" but Chu "wasn't sure what that meant" and they never discussed the issue again.

Claimant Moon was employed for not more than six months in 2004, and did not work in 2007-2008 as indicated in his claim. Moon worked six days per week, and earned a salary of \$700.00 per month which was paid in cash semi-monthly. Moon worked the same hours as Lim during weekdays, and also worked one day on the weekend, but Chu could not remember if it was Saturday or Sunday, "but normally two people should cover each other."

The delivery staff's wages conformed to the DOL's minimum wage and employees worked eight hours per day six days per week with no variations. Chu did not provide wage statements to employees, did not keep payroll records, had no written agreements regarding bonuses or vacations, and although he handed out several hundreds of dollars in tips each week, kept no records of tips earned by employees.

Petitioners entered into the record “notes” of Lim and Yang’s absences which Chu testified he based on a calendar that he kept during the claimants’ employment, but discarded in 2011 during the DOL investigation “because I thought I no longer needed” it. The notes list how many days and half days Lim and Yang were absent each month, and usually the specific dates of full-day absences. For example, the notes state that in January 2004, Lim was absent on “17, 19, 20 (1/2 day)” for a total of 2 1/2 days, and in July 2004 on “3, 5, 31 (1/2 day), Wed., Thurs. (1/2 day)” for a supposed total of “7 days.” In some instances, Chu “forgot to write down the specific day” of a full-day absence, and he stated that “Normally for half days, I don’t really record the specific day, so it’s only on the day of the pay day that I will do a quick note.” On cross-examination, Chu admitted that he did not have any documents that indicated the daily hours worked by employees. According to Chu’s notes, Lim was absent 42 ½ days in 2004, 45 ½ days in 2005, 43 ½ days in 2006, 70 days in 2007 (when, according to the notes, Lim “Asked for leave” in October) and “40 days, 9 days left early” in 2008. Lim’s four-year total was “242 days 45 hours left early.” Yang’s purported total was “31 days did not go to work 7 hours left early.”

When Chu paid employees, he had them sign receipts that listed the date and the amount paid to them. The receipts included bonuses, but did not list tips. While the receipts did not show hours worked, Chu knew that there were eight-hour shifts and employees “mostly” did not work overtime. Chu brought to the hearing copies of receipts including what he claimed were receipts signed by Lim for the periods January through September 2004, November 2006 through May 2007, and December 31, 2007 through September 2008. Because these documents were provided for the first time at the hearing and were not provided pursuant to the respondent’s Demand for a Bill of Particulars nor during the pre-hearing exchange of documents, and because their authenticity was disputed, the Hearing Officer granted the DOL’s motion to preclude introduction of the receipts in evidence.

During petitioners’ direct case, Chu testified that he provided LSI Sha with receipts for Lim and Yang, but could not remember the exact date or time. On cross-examination, Chu testified that he met with LSI Sha twice at the restaurant and once at the DOL, and that “I brought [the receipts] to the Department of Labor office after meeting [Sha] two times.” Chu later testified that “I suppose the one that I met was not Mr. Sha,” that “I do not remember the person that I handed the document to,” and that while he “did pass the document to the investigator,” it was not Sha but a female investigator Chu spoke with at the DOL office and while Chu explained to her what document he was submitting, “I don’t have her name.” He also testified during cross-examination that he did not clearly remember “whether I gave the document to Investigator Sha at the second time meeting in my restaurant, or maybe I came up later to the office of the Department of Labor to submit those documents . . . . It’s been a long time, I don’t remember.”

#### *Testimony of Claimant See Eng Lim*

Petitioners employed Lim as a delivery person from January 2004 to 2008. He worked Mondays through Fridays from 11:00 a.m. to 10:00 p.m. and Saturdays from 12:00 noon to 11:00 p.m., and was paid \$500.00 in cash semi-monthly on the 15<sup>th</sup> and 30<sup>th</sup> of each month. Lim never received a wage statement. Lim earned \$180.00 per week in tips. He did not work and was not paid for Thanksgiving, New Year’s Day, Christmas, July 4, Presidents’ Day and Labor Day. Lim denied receiving any paid vacation, and testified that he received a \$20.00 annual

bonus each year. Lim was provided with three meals per day, except when the chef was too busy to make breakfast. He had no pre-set meal time, ate in between delivering orders, and had to stop eating a meal when an order needed to be delivered. Lim estimated that when he got to sit down for a meal, he took no more than 20 minutes to eat. Lim did not have scheduled breaks. When not making deliveries, including from 3:00 to 5:00 p.m., Lim handed out menus to passersby on the street while a second delivery person delivered the orders. Lim almost never took days off except on a Saturday when he could find a replacement. He specifically denied taking 42 days off during 2004, or 242 days between 2004 and 2008.

Lim testified that claimant Yang also worked as a delivery person during 2007 through 2008. Yang's hours were Mondays through Fridays from 12:00 noon to 11:00 p.m., and Sundays from 12:00 noon to 11 p.m. Yang and Lim shared tips except on the weekends, when they worked alone. Typically orders were paid for with credit cards and the tip amount was on the credit card receipt. At the end of the day, Lim and Yang would split the amount of tips indicated on the credit card receipts.

Each time Lim was paid, he signed a notebook that listed his name, the date, and the amount received. There were no specific hours listed in the book, only the dollar amount he earned for the pay period. When shown the purported copies of receipts petitioners brought to the hearing, Lim testified he recognized his signatures, but that the receipts appeared to be modified from what he had signed, including that what he signed had been on lined notebook paper, and his signatures had originally been uniform rather than "going towards different directions." Although given the opportunity to provide the original notebook at the second hearing day, petitioners did not do so. Their counsel stated "[t] he book was lost."

#### *Claim of Chun Yang*

Yang's July 30, 2008 sworn claim filed with the DOL states that he was hired by Fulton Chef on September 1, 2007 and was still working as of the date of the claim. He earned \$650.00 per month, paid in cash. Yang worked Sundays through Fridays from 12:00 noon to 11:00 p.m., was provided with two free meals, took two 10-minute meal breaks, and earned \$200.00 per week in tips. He listed no time off for absences, holidays or vacations.

#### *Testimony of Senior Labor Standards Investigator Wei Sha*

LSI Sha was the primary investigator in this matter and he identified various documents and reports from the investigative file that were submitted into evidence, including a "contact log" recorded by the investigators on an on-going basis describing the investigation.

LSI Sha testified that on October 2, 2008, he conducted a field visit to petitioners' business and left a written request for payroll and time records and a Notice of Revisit advising Chu that DOL would conduct a second inspection on October 7, 2008. Sha revisited the restaurant on October 7, 2008, met with Chu, and requested payroll and time records listing the daily and weekly hours, rate of pay, and deductions taken. Chu told Sha that petitioners did not keep any payroll or time records.

Sha issued petitioners a preliminary recapitulation of wages due to claimants Lim and Yang on October 14, 2008. Because the petitioners did not provide payroll records, Sha based

the recapitulation on the information provided by the employees in their claims filed with the DOL. On December 2, 2008, Sha met with Chu at the DOL's offices to discuss the DOL's findings. Following that meeting, Sha faxed petitioners' attorney revised underpayment calculations for settlement purposes, which credited the petitioners with a third meal credit and recomputed the underpayment calculations for both Lim and Yang based on a 60-hour work week and 43 weeks worked per year. Sha testified that the final calculations, based on Lim and Yang's claims, which listed a 66-hour workweek for 52 weeks per year, were accurate, and took into consideration the holidays that Lim stated he did not work. The DOL's final calculations also credited petitioners with two meal allowances per day, credited the petitioners with the maximum tip allowance for restaurant service employees, and provided claimants with an additional hour of pay per day at minimum wage for hours worked beyond 10 in a workday.

In the absence of adequate records showing that the employees were paid the wages claimed by petitioners, the Commissioner issued the orders under review on July 28, 2011. A July 8, 2008 document entitled "Background Information – Imposition of Civil Penalty" indicates that the minimum wage order included a 100% civil penalty. LSI Sha testified that having been the main investigator on this matter, he believed the imposition of the 100% civil penalty was reasonable based on factors including the petitioners' lack of good faith and the size of the business.

### **STANDARD OF REVIEW AND BURDEN OF PROOF**

When a petition is filed, the Board reviews whether an order issued by the Commissioner is "valid and reasonable" (Labor Law § 101 [1]). A petition must state "in what respects [the order on review] is claimed to be invalid or unreasonable," and any objections not raised shall be deemed waived (*Id.* § 101 [2]). The Labor Law provides that an order of the Commissioner shall be presumed valid (*Id.* § 103 [1]). If the Board finds that the order, or any part thereof, is invalid or unreasonable it shall revoke, amend or modify the same (*Id.* § 101 [3]). Pursuant to Board Rules of Procedure and Practice 65.30 (12 NYCRR 65.30): "The burden of proof of every allegation in a proceeding shall be upon the person asserting it." Therefore, the burden is on the petitioners to prove by a preponderance of the evidence that the orders are not valid or reasonable. (*See State Administrative Procedures Act § 306; Matter of Angello 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). We affirm the minimum wage and penalty orders, and find petitioners' evidence submitted at the hearing insufficient to meet their burden of proof.

#### **Yook Wah Chu Is An Employer**

A threshold issue to be determined is whether petitioner Chu was an employer of the claimants within the meaning of the New York Labor Law.

Under Article 19 of the Labor Law, “employer” is defined as including “any individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons acting as an employer” (Labor Law § 651 [6]). An “employee” is described in the statute as “any individual employed or permitted to work by an employer.” (Labor Law § 651 [5]). Furthermore, to be “employed” means that a person is “permitted or suffered to work” (Labor Law § 2 [7]).

Like the New York Labor Law, the federal Fair Labor Standards Act (FLSA) defines “employ” to include “suffer or permit to work” (29 U.S.C. § 230 [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. (*Matter of Yick Wing Chan v. New York State Industrial Board of Appeals*, 120 AD 3d 1120 [1<sup>st</sup> Dept. 2014]; *Bonito v Avalon Partners, Inc.*, 106 AD3d 625, 626 [1<sup>st</sup> Dept 2013]; *Matter of Maria Lasso and Jaime M. Correa, Sr. and Exceed Contracting Corp.*, PR 10-182 [April 29, 2013], *aff’d sub nom. Matter of Exceed Contracting Corp., et al v Industrial Board of Appeals*, 2015 NY App LEXIS 2219 [1<sup>st</sup> Dept March 19, 2015]; *Chung v New Silver Palace Rest., Inc.* 272 FSupp 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 explained the “economic reality test” used for determining employer status:

“[T]he 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 the 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).

No one of these factors is dispositive; the purpose of examining them is to determine economic reality based on a “totality of circumstances” (*Id.*).

Chu was the restaurant’s sole owner, he hired and fired employees, supervised and controlled their schedules, gave employees their work instructions, disciplined employees and controlled their conditions of employment, determined their rate and method of payment, and maintained employee records. On these facts, we find that Chu was an employer and is personally liable under the Labor Law.

#### The Petitioners Failed to Maintain Required Records

An employer’s obligation to keep adequate employment records is found in Labor Law §§ 195 and 661 as well as in the New York Code of Rules and Regulations (NYCRR). 12

NYCRR 137-2.1<sup>2</sup> provided that weekly payroll records maintained and preserved for six years must show for each employee, among other things, the name and address; wage rate; number of hours worked daily and weekly, including the time of arrival and departure for each employee working a spread of hours exceeding 10; amount of gross wages; deductions from gross wages; allowances, if any, claimed as part of minimum wages; and money paid in cash. Employers are required to keep such records open to inspection by the Commissioner at the place of employment (*Id.*). 12 NYCRR 137-2.2 further provided that every employer 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 was petitioners’ responsibility to keep accurate records of the hours worked by and the amount of wages paid to their employees, and to provide employees with a wage statement every time they were paid. This required recordkeeping provides proof to the employer, the employee, and the Commissioner that the employee has been properly paid.

In the present case, Chu acknowledged that petitioners neither kept payroll records, nor provided wage statements to employees. Chu claimed that he maintained twice-a-month receipts of cash wages (but not tips) paid to employees, and a calendar on which he listed employees’ monthly absences, though not always the specific date. These documents do not constitute legally sufficient payroll records because they do not list employees’ wage rates, daily and weekly hours and meal allowances.

We credit LSI Sha’s testimony that neither the records Chu claims to have maintained, nor indeed, any records, were provided to DOL during the investigation. The contact log containing a contemporaneous record of case activity, states “ER did not provide any records,” which corroborates LSI Sha’s testimony. Petitioners, in fact, did not supply DOL with records even after being repeatedly directed to do so prior to the hearing. In a July 31, 2012 Demand for a Bill of Particulars, respondent requested all payroll records maintained for each claimant as well as all records previously furnished to DOL for each claimant, including the date and person to whom they were furnished. In response, petitioners furnished only Chinese-language lists of absences for Lim and Yang, translations of which were the “notes” described in Chu’s testimony at the hearing. At a January 13, 2014 pre-hearing conference, petitioners also agreed to supply respondent with all exhibits they intended to introduce, including a certified English translation of non-English documents.<sup>3</sup> Petitioners stated that they would rely on the documents provided pursuant to the Bill of Particulars as their hearing evidence.

While Chu claimed he provided the DOL with the receipts for payments to Lim and Yang during the investigation, the evidence indicates the contrary. After initially stating on direct examination he provided LSI Sha with copies of the receipts, but could not remember the exact date or time, on cross-examination Chu first testified that “I suppose the one that I met was not Mr. Sha” but an unidentified “female investigator,” and later, that he did not know to whom he gave the documents. At the hearing, when petitioners sought to introduce copies of receipts

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<sup>2</sup> The regulations applicable to the orders under review were set forth in the Minimum Wage Order for the Restaurant Industry at 12 NYCRR Part 137. As of January 1, 2011, all restaurant and hotel industries are covered by the Hospitality Wage Order (12 NYCRR Part 146).

<sup>3</sup> Despite this specific direction at the pre-hearing conference, petitioners furnished a translation of Chu’s notes only at the second hearing day, and even then the translation was not certified.

signed by Lim, Lim testified that the copies of the receipts appeared to be altered from the originals; petitioners, however, never produced the original receipts. Similarly, the “notes” of employee absences on which petitioners sought to rely were based, according to Chu, on a calendar he discarded while well aware of the pending DOL investigation “because I thought I no longer needed” it. We do not find Chu’s vague and shifting testimony regarding the documents to be credible. We find that such belatedly submitted evidence, prepared in response to the DOL’s investigation and not in the regular course of business, and without providing the original documents that supposedly underlie it, is unreliable and lacks probative value.

### The Burden of Proof In the Absence of Employee Records

An employer that failed in its statutory obligation to keep records bears the burden of proving that the disputed wages were paid. Labor Law § 196-a provides:

“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”

As stated in *Matter of Mid-Hudson Pam Corp. v Hartnett*, (156 AD2d 818, 821 [3<sup>rd</sup> 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” (See also *Matter of Garcia v Heady*, 46 AD 3d 1088 [3d Dept 2008]; *Matter of Bae v IBA*, 104 AD3d 571 [1<sup>st</sup> Dept 2013]; *Matter of Ramirez v Commissioner*, 110 AD3d 901 [2d Dept 2013]; *Matter of Mohammed Aldeen*, PR 07-093 [May 20, 2009], *aff’d sub nom. Matter of Aldeen v Industrial Appeals Bd.*, 82 AD3d 1220 [2d Dept 2011]).

In *Anderson v Mt. Clemens 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; see also *Reich v Southern New England Telecommunications Corp.*, 121 F3d 58, 67 [2d Cir 1997])

[damages that “might have been somewhat generous” reasonable in light of the evidence and “the difficulty of precisely determining damages when the employer has failed to keep adequate records”]).

### The Petitioners Failed to Meet Their Burden of Proof

In the present case, in the absence of required employer records, the DOL properly relied on Lim and Yang’s sworn claims and at the hearing Lim credibly testified consistently with those claims. Petitioners, as discussed above, submitted no credible documentary evidence to contradict the claims. Nor did they submit any other evidence sufficient to meet their burden. Although Yang did not testify, we give no weight to petitioners’ argument that the Board should reject his claim for that reason. Petitioners made no attempt to subpoena Yang as a witness, and the Board has repeatedly held that where an employer fails to maintain required records, the DOL may use the best available evidence, including only the claimant’s sworn claim form, to calculate back wages. (See, e.g. *Angello v. National Finance Corp.*, 1 AD3d 850; *Matter of Stanley A. Warszkcki*, PR 08-113 [July 28, 2010]; *Matter of Thomas Schneider and Jim Celli and TNT Transportation*, PR 10-300 [June 4, 2012]). Yang’s claim was additionally corroborated by Lim’s credible testimony.

We give no credence to petitioners’ claims of employee absences beyond those LSI Sha testified were already taken into account in the minimum wage order, nor do we credit Chu’s testimony that petitioners provided employees with a two-week paid vacation, which Lim denied. The “notes” of absences on which petitioners rely are legally insufficient because they do not indicate the employees’ daily or weekly hours, or in the case of half-day absences, the actual day of the week that an employee was considered absent. The documents were not contemporaneously kept, by Chu’s own admission were created after the fact from a calendar he discarded during the investigation, and were contradicted by the weight of credible evidence.

In the absence of time records, we also do not credit Chu’s testimony that claimants worked only eight hours almost every day without exception, with a purported unpaid meal break from 2:30 to 3:00 immediately followed by another unpaid break from 3:00 to 5:00 p.m., and then by still another, hour-long unpaid meal break starting at 9:00 to 9:30 p.m. shortly before his work day ended. Lim credibly testified that he had no set meal times, usually spent no more than 20 minutes eating, and had to stop if an order was to be delivered – consistent with both his and Yang’s sworn claims. Lim also credibly testified that during slow hours including from 3:00 to 5:00 p.m. each afternoon, he worked passing out menus on the street to drum up business, while another delivery person was available for deliveries.

Labor Law Article 19 requires every employer to pay each of its covered employees the minimum wage in effect at the time payment is due, which during the time period covered by the wage order was \$5.15 per hour in 2004, \$6.00 an hour in 2005, \$6.75 an hour in 2006, and \$7.15 an hour in 2007-2008 (See Labor Law § 652 [1]; 12 NYCRR 137-1.2). The Minimum Wage Order for the Restaurant Industry permitted a service employee who earned a sufficient hourly amount in tips (\$1.65 in 2004, \$1.90 in 2005, \$2.15 in 2006, and \$2.30 in 2007-2008) to be paid a lower hourly wage (\$3.50 in 2004, \$4.10 in 2005, \$4.60 in 2006 and \$4.85 in 2007-2008 [12 NYCRR 137-1.2 and 137-1.3]). An employer must also pay every covered employee overtime at a wage rate of 1 1/2 times the employee’s regular rate of pay for all hours worked in excess of 40 in a given work week (12 NYCRR 137-1.3).

It is undisputed that petitioners paid a monthly salary of \$1,000.00 to Lim and \$650.00 to Yang.<sup>4</sup> During the investigation, Chu claimed that he calculated Lim's wages based on a six day/48 hour workweek, and that Lim's \$1,000.00 monthly salary was equivalent to a \$4.85 basic hourly rate for 40 hours and an overtime rate of \$7.275 for 8 additional hours, resulting in weekly pay of \$252.20 for the 48-hour workweek. Chu acknowledged that Lim was underpaid, but claimed the underpayment was "only about \$500 a year."

Lim would still have been underpaid even if Chu's calculation, including its erroneous assumption that employees worked only 48 hours per week, were accepted. While Lim was paid \$1,000.00 per month or \$12,000.00 per year, based on Chu's calculation, he should have been paid \$13,114.40 per year (\$252.20 x 52 weeks). This discrepancy was likely based on Chu's ignoring the fact that the claimants were paid twice a month (24 times per year) rather than every two weeks (26 times per year).

Lim and Yang worked identical hours and were both purportedly paid the same hourly minimum wage. Based on Chu's faulty calculations, the annual underpayment for Yang would have been over \$6,000.00: Yang was paid \$650.00 per month or \$7,800.00 per year, compared with the same \$13,114.40. More fundamentally, the calculation – even apart from being based on the assumption, which we have rejected, that employees worked only 48, rather than the 66 hours that we find Lim and Yang actually worked, was also flawed for other reasons.

While the DOL's case contact log confirms that petitioners' counsel asserted in December 2008 "that overtime pay was included in the employee's salary," Chu admitted that his calculation of Lim's weekly wage was done after the fact, not in the ordinary course of business. Notably, Chu did not even claim that employees actually *were* working for a \$4.85 per hour basic rate and receiving time and a half for eight weekly overtime hours. Although petitioners' after-the-fact calculation was based on a \$4.85 per hour rate, Chu clearly testified that each claimant actually earned a monthly salary: \$1,000.00 for Lim and \$650.00 for Yang. An employer is not permitted to "back in" to an hourly rate through an after the fact calculation in order to claim that part of the workers' pay was actually an overtime premium (*Cf. Matter of L.R.H. Supermarket Inc. (T/A C-Town)*, PR 05-035 [Mar. 26, 2008] [rejecting after-the-fact calculation to establish supposedly acceptable pay rate]). Rather, as the Board explained in *Matter of Cayuga Lumber, Inc.*, PR 05-009 (Sept. 26, 2007), "governing federal and state law require that in the absence of an explicit, mutual agreement that a salary provides for a premium 'stepped-up' rate for overtime hours, the regular rate . . . is computed by dividing the weekly salary by the number of hours worked. The premium wage that is due for all overtime hours is then computed by multiplying the overtime hours by half of the regular rate." (*See also, e.g., Doo Nam Yang*, 427 FSupp 2d 327, 335 n. 10 [SDNY 2005]; *Giles v. City of New York*, 41 FSupp2d 308, 316-317 [SDNY 1999] *Matter of York Furniture Centers, Inc. d/b/a York Furniture Gallery*, PR 06-081 [Aug. 27, 2009]). For this reason, as well as because we find petitioners' employees worked 66 hours per week rather than 48, petitioners' argument based on Chu's calculation is unworthy of credence.

Still another fatal flaw in petitioners' calculation is that the petitioners miscalculated the overtime rate for tipped restaurant service workers. The Minimum Wage Order for the Restaurant Industry at 12 NYCRR 137-1.4 stated that allowances for tips shall not exceed \$1.65

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<sup>4</sup> Moon was paid \$700.00 per month.

per hour during 2004 and 2005, \$1.90 per hour during 2006, and \$2.30 per hour thereafter during the relevant period. When an employer is taking a “tip credit” toward the basic minimum wage, overtime must be calculated by first multiplying the employee’s regular rate of pay by one and one half, and then deducting the tip credit (*See, e.g., Copantitla v Fiskardo Estiatorio, Inc.*, 788 F Supp 2d 253, 291-292 [SDNY 2011]). For example, in 2007-2008, the basic minimum wages was \$7.15 per hour and the tip allowance for service employees was \$2.30 per hour. The regular overtime rate was \$10.725 ( $\$7.15 \times 1.5$ ) and the tipped overtime rate was \$8.43. Petitioners may not first subtract the tip allowance and then calculate the overtime rate because this would result in their receiving a higher than allowable tip allowance. For this reason, too, the calculation proffered by Chu was flawed.

Petitioners also sought to show that the minimum wage order was overstated through two arguments based on claimed or real settlement discussions: first, that Yang was already paid in a settlement in which the DOL was not involved, second, that respondent should be limited to seeking wages reflected in calculations exchanged during settlement discussions. These arguments, too, must be rejected. Chu testified that he has had contact with Yang since 2008, and at one point asked him about the investigation in this matter. Yang told Chu that he “would not continue” but Chu “wasn’t sure what that meant” and they never discussed the issue again. LSI Sha testified that Yang never contacted the DOL to say that a private settlement had been reached, and petitioners provided no evidence of payment of Yang’s claim. Even if a supposed non-DOL settlement between petitioners and Yang could be recognized as binding, there is no evidence that one ever occurred.

A worker cannot waive rights under the Minimum Wage Act and thereby bar DOL enforcement of the law (*See e.g., Labor Law § 663[1]; Padilla v. Manlapaz*, 643 F Supp 2d 302, 311 [SDNY 2009] [“settled law that an employee may not waive the protections of the Labor Laws”]; *American Broadcasting Co. v. Roberts*, 61 NY2d 244, 250 [1984] [recognizing “the Legislature’s ability to foreclose waiver of the provisions of the Labor Law,” specifically including the Minimum Wage Act]; *Brooklyn Savings Bank v. O’Neil*, 324 US 697, 704 [1945] [rights conferred on workers by federal Fair Labor Standards Act “may not be waived or released if such waiver or release contravenes the statutory policy”]).

Petitioners’ argument that respondent should be limited to seeking wages reflected in calculations exchanged during settlement discussions is also without merit. LSI Sha acknowledged on cross-examination by petitioners’ counsel that during settlement discussions he prepared calculations based on the assumption that employees worked 60 rather than 66 hours per week and 44 rather than 52 weeks per year. In his closing statement, counsel argued that based on those calculations, almost \$17,000.00 in underpaid wages might be owed to Lim but respondent should be precluded from seeking more. However, Sha testified that those calculations were prepared for settlement purposes and that in the absence of required records or other evidence from the employer, he considered the DOL’s final calculation based on employee claims more accurate. That respondent discussed a potential settlement for less than the full amount of its claim and prepared calculations in the course of doing so does not disprove the claim.

A final argument advanced by petitioners was that respondent’s amendment of the minimum wage order at the hearing to withdraw the Commissioner’s original finding that claimant Fam Ah Moon was underpaid called the entire order in question. Moon’s claim filed

with DOL stated, and the original minimum wage order found, that he worked for petitioners and was owed wages for a period in 2007-2008. At the hearing, claimant Lim testified that Moon worked for petitioners in 2004 and 2005, and was fired in 2005, after which Moon worked for other restaurants. For his part, Chu testified that while employed by petitioners. Moon - whom Chu knew by the name "Fan Ming" - worked for petitioners for not more than half a year during 2004. Chu stated that Moon worked six days per week; earned a salary of \$700.00 per month, paid semi-monthly; worked the same hours as Lim on Mondays through Fridays and like Lim, also worked one weekend day.

Thus, it was undisputed that Moon worked for petitioners during the relevant period for a semi-monthly salary that, based on statutes and precedent discussed above, almost certainly established he was underpaid, even though based on Lim's and Chu's testimony, the dates and amounts stated in the original minimum wage order were mistaken. Petitioners' counsel stated that respondent "chose the right way" by withdrawing its claim concerning Moon following Lim's testimony in light of the discrepancy concerning the dates of Moon's employment between that testimony and the original order. We find that respondent's decision to do so does not call into question the validity of the amended order, much less meet petitioners' burden of proof.

#### Spread of Hours

The Restaurant Wage Order provided that any restaurant employee whose workday is longer than 10 hours shall receive one hour's pay at the basic minimum hourly rate before allowances, in addition to the minimum wages otherwise required (12 NYCRR 137-1.7). Spread of hours is the interval between the beginning and the end of an employee's workday, which includes working time, time off for meals, and intervals off duty. Having found that claimants Lim and Yang worked 11 hours per day, six days per week, we find that the calculation of spread of hours in the DOL's calculations of Lim and Yang's owed wages was reasonable.

#### Meal Breaks and Meal Allowances

The petition alleged that the claimants falsely claimed that the petitioners failed to provide a meal break. Lim credibly testified that he was not given a set meal break, and had to eat between deliveries. We do not credit Chu's testimony that the delivery employees were provided with set meal breaks.

Petitioners at hearing also claimed that they should be credited with three meal allowances rather than the two meal allowances provided in the DOL's calculations.<sup>5</sup> Chu testified that he provided claimants with two meals per day; Lim testified that when the chef was not busy, he was provided with three meals. New York law allows the cost of meals to be credited towards the minimum wage requirement only when certain preconditions are met. First, the employer is required to furnish each employee with a statement with every payment of wages listing allowances claimed, and second, the employer must maintain and preserve for not less than six years weekly payroll records which shall show the allowances claimed for each

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<sup>5</sup> The meal allowance during the relevant period was as follows: \$2.05 per meal from January 1 to December 31, 2005; \$2.30 per meal from January 1, 2006 to December 31, 2006; and \$2.45 per meal from January 1, 2007 to the end of the relevant period (12 NYCRR 137-1.9[a][1]).

employee (*Padilla v. Manlapaz*, 643 FSupp2d 302, 309-310 [SDNY 2009] [citations omitted]). Even if it is assumed (despite Chu's testimony that he only provided two meals per day) that petitioners could otherwise have been credited with a third meal allowance for days when the chef was not busy, since petitioners did not meet these "preconditions" for claiming an allowance, their challenge to the orders as they relate to a third meal allowance must be rejected.

### **The Minimum Wage Order is Affirmed**

We affirm the Commissioner's findings that claimants Lim and Yang worked a 66 hour work-week, as well as the method used to calculate their underpayment; that the claimants were entitled to spread of hours pay; that claimants were not provided with meal breaks; and that it was reasonable for the Commissioner to credit petitioners with two meal credits. We find that the Commissioner's order was reasonable and valid in all respects.

### **The Civil Penalties in the Minimum Wage and Penalty Orders Were Reasonable**

LSI Sha, who investigated the case, testified that the DOL considered the employer's lack of good faith and the size of the business in assessing the civil penalty in the minimum wage order. We find that the considerations and computations that the Commissioner was required to make in connection with the imposition of the 100% civil penalties assessed in the minimum wage order valid and reasonable in all respects.

We also affirm all four counts of the penalty order. As discussed above, petitioners failed to maintain required records or provide employees with wage statements. We credit Lim's testimony that he was not provided with a 30 minute break for the noon meal period and had to eat between deliveries. We also find that petitioners failed to pay employees no less than seven days after the week in which wages were earned. Chu testified that he still owes Lim more than \$2,000.00, and petitioners' attorney stated that Lim is owed \$16,982.27 minus some allowances. We find that the considerations and computations that the Commissioner was required to make in connection with the imposition of the civil penalties assessed in the penalty order are valid and reasonable in all respects.

### **Interest is Owed**

Labor Law § 219 (1) provides that when the Commissioner determines that wages are due, 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." As the Appellate Division recently stated in *Marzovilla v New York State Industrial Board of Appeals*, 2015 App Div LEXIS 3162 [3<sup>rd</sup> Dept April 15, 2015], "DOL is required to impose interest at the statutory rate." [citations omitted] We therefore affirm the imposition of 16% interest in the minimum wage order.

### **The Imposition of Liquidated Damages is Reasonable**

In addition to the civil penalty and interest, the Wage Order includes liquidated damages in the amount of 25% of the wages owed. Petitioners did not challenge the Commissioner's

determination to assess liquidated damages in the minimum wage order. The issue is thereby waived pursuant to Labor Law § 101 (2).

**NOW, THEREFORE IT IS HEREBY RESOLVED THAT:**

1. The wage order is affirmed as amended by Respondent during the hearing to remove claimant Fam Ah Moon, and the minimum wage owed was reduced to \$50,931.46, liquidated damages assessed at 25% were reduced to \$12,732.87, interest assessed at 16% was reduced to \$29,182.81, and the 100% civil penalty was reduced to \$50,931.46, for a total due in the amended minimum wage order of \$143,778.59; and
2. The penalty order is affirmed; and
3. The petition for review be, and the same hereby is otherwise dismissed.

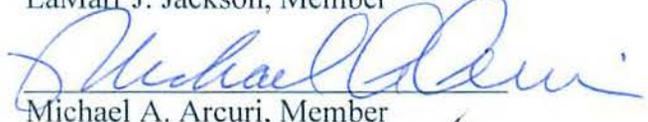


Vilda Vera Mayuga, Chairperson

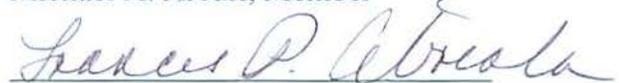


J. Christopher Meagher, Member

LaMarr J. Jackson, Member



Michael A. Arcuri, Member



Frances P. Abriola, Member

Dated and signed in the Office  
of the Industrial Board of Appeals  
at Albany, New York on  
April 29, 2015.

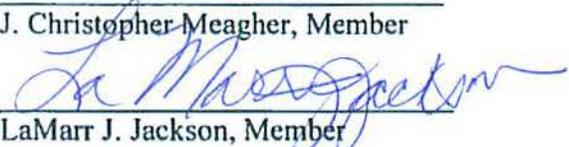
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Vilda Vera Mayuga, Chairperson

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J. Christopher Meagher, Member

  
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LaMarr J. Jackson, Member

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Michael A. Arcuri, Member

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Frances P. Abriola, Member

Dated and signed by a Member  
of the Industrial Board of Appeals  
at Buffalo, New York on  
April 29, 2015.