

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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 In the Matter of the Petition of: :
 :
 YAT SAM CHANG A/K/A KELLEY Y. CHAN :
 AND KAM FOOK CHEONG AND JIA & JAE, INC. :
 (T/A HUNAN VILLAGE), :
 :
 Petitioners, :
 :
 To Review Under Section 101 of the Labor Law: :
 An Order to Comply With Article 6 and an Order to :
 Comply With Article 19 and an Order Under Articles :
 6 and 19 of the Labor Law, all dated September 15, :
 2011, :
 :
 - against - :
 :
 THE COMMISSIONER OF LABOR, :
 :
 Respondent. :
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DOCKET NO. PR 11-334

RESOLUTION OF DECISION

APPEARANCES

Eaton & Van Winkle LLP (Bruce Feffer of counsel) and Law Office of Brian L. Greben (Brian L. Greben of counsel), for petitioners.

Pico P. Ben-Amotz, General Counsel, NYS Department of Labor (Jeffrey G. Shapiro and Robyn Henzel of counsel), for respondent.

WITNESSES

Senior Labor Standards Investigator Rashid Allen for petitioners.

Wing Kwang Tse, Fook Teng Chia, and Yeok Lan Lin, for respondent.

WHEREAS:

The petition in this matter was filed with the Industrial Board of Appeals (Board) on October 25, 2011, and seeks review of three orders issued by the Commissioner of Labor (Commissioner or respondent) on September 15, 2011 against petitioners Yat Sam Chang a/k/a Kelley Y. Chan and Kam Fook Cheong and Jia & Jae, Inc. The Commissioner filed his answer on December 23, 2011.

Upon notice to the parties a hearing was held in this matter on May 14 and September 11, 2014, in New York, New York, before Devin A. Rice, Associate Counsel to 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, make statements relevant to the issues, and file post-hearing briefs.

The order to comply with Article 6 (tip appropriations order) under review directs compliance with Article 6 and payment to the Commissioner for tip appropriations due and owing to three employees in the amount of \$14,581.00 for the time period from June 6, 2006 to September 2, 2008, with interest continuing thereon at the rate of 16% calculated to the date of the order, in the amount of \$7,354.19, and assesses a civil penalty in the amount of \$29,162.00, for a total amount due of \$51,097.19.

The order to comply with Article 19 (wage order) under review directs compliance with Article 19 and payment to the Commissioner for unpaid minimum wages due and owing to 46 employees in the amount of \$99,639.53 for the time period from June 6, 2006 to September 18, 2009, with interest continuing thereon at the rate of 16% calculated to the date of the order, in the amount of \$61,005.96, liquidated damages in the amount of \$24,909.96, and assesses a civil penalty in the amount of \$199,279.06, for a total amount due of \$384,834.51.

The order under Articles 6 and 19 (penalty order) assesses a \$1,000.00 civil penalty against petitioners for violating Labor Law § 191 (1) (a) by failing to pay wages weekly to manual workers not later than seven calendar days after the end of the week in which the wages were earned during the period from on or about June 6, 2006 through September 18, 2009; a \$1,000.00 civil penalty for violating Labor Law § 661 and 12 NYCRR 137-2.1¹ by failing to keep and/or furnish true and accurate payroll records for each employee for the period from on or about June 6, 2006 through September 18, 2009; a \$1,000.00 civil penalty for violating Labor Law § 196-d by collecting and distributing tips and/or withholding part of the tips collected for employees during the period from on or about June 6, 2006 through September 18, 2009; a \$1,000.00 civil penalty for violating Labor Law § 661 and 12 NYCRR 137-2.2² by failing to give each employee a complete wage statement with every payment of wages from on or about June 6, 2006 through September 18, 2009; and a \$1,000.00 civil penalty for violating Labor Law § 661 and 12 NYCRR 137-2.3³ by failing to post the Labor Department's Minimum Wage poster on or about October 16, 2008, for a total amount due and owing of \$5,000.00.

The petition alleges the orders are invalid or unreasonable because Kam Fook Cheong has never held any ownership interest or control over Jia & Jae, Inc., and is therefore not liable as an employer. The petition also alleges that Yat Sam Chang and Jia & Jae, Inc. complied with or made a good faith effort to comply with respondent's investigation, did not willfully violate the Labor Law, did not employ the number of employees determined by respondent, and that the civil penalty imposed by DOL is unduly harsh and burdensome.

The respondent, at the conclusion of the petitioners' presentation, filed a motion to dismiss on the ground that petitioners failed to meet their burden of proof to show the minimum wage and penalty orders counts 1, 2, 4, and 5 are invalid or unreasonable. Respondent's motion

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

² *Id.*

³ *Id.*

to dismiss does not cover the tip appropriations order. We grant the motion to dismiss and affirm the wage order. The tip appropriations order is modified, and the penalty order is affirmed.

SUMMARY OF EVIDENCE

A) Petitioners' evidence

Testimony of Rashid Allen

Petitioners called only one witness to testify, Senior Labor Standards Investigator Rashid Allen. Allen testified that he reviewed DOL's investigation of petitioners after it was completed and prepared the paperwork necessary to issue the orders under review. Allen did not visit the petitioners' restaurant, Hunan Village, at any point during the investigation, although he explained that two DOL investigators did visit the restaurant. Allen did not personally observe any of the violations DOL found petitioners had committed.

Allen testified regarding several documents contained in DOL's investigative file. A claim was filed with DOL on behalf of Wai Hing Chan. Wai Hing Chang's claim alleges he worked six days a week as a waiter for the petitioners from September 2006 to October 2007, was paid a monthly salary of \$300.00, received his wages semi-monthly, and earned \$400.00 a week in tips. Allen testified that the question on the claim form regarding whether petitioners took tips from employees was not answered.

A claim filed on behalf of Fook Teng Chia alleges Fook Teng Chia worked six days a week for petitioners as a waitress from July 2007 to September 2008 for \$10.00 to \$15.00 a day plus \$400.00 a week in tips. The claim form does not indicate petitioners took tips from Fook Teng Chia.

Allen identified "field interview notes" of interviews of Jenny Chen and Shirley Liang conducted by DOL. The interview notes indicate Jenny Chen and Shirley Liang worked for petitioners and received tips. The notes for Jenny Chen do not indicate whether tips were taken from her by petitioners, and the notes for Shirley Liang are unclear, but appear to indicate her tips were not taken. Allen also identified a "makeshift field interview sheet" containing information about Kean Lin, which Allen testified is "not really" a type of document usually kept and maintained in a DOL investigative file. The interview sheet for Kean Lin indicated he received tips. It does not indicate his tips were taken by petitioners. Similar interview sheets for Saw Heok Tan and Tack Fatt Eu indicate they worked for petitioners and received tips, but do not indicate their tips were taken by petitioners.

B) Respondent's evidence

Testimony of Wing Kwong Tse

Wing Kwong Tse testified he worked as a waiter and bartender for petitioners. Petitioners Kam Fook Cheong and Yat Sam Chang supervised Tse's work by directing him to clean, set tables, wrap won tons, handle the peas, break ice, and other things waiters need to do. Wing Kwong Tse identified the claim form he filed with DOL, and testified the information on

the claim form accurately reflected the hours he worked. When working as a bartender, Wing Kwong Tse was required to share a portion of his tips with Kam Fook Cheong. Wing Kwong Tse testified he does not know the amount in tips that was taken.

Wing Kwong Tse explained that he did his best to keep track of the tips left by each customer, but was unable to keep count when the restaurant was busy. Wing Kwong Tse stated that when tips are collected from tables, they are put in a container, and “at the end of the day we count a total then we share the tips.” The tips in the container are shared among the wait staff. Petitioners do not take money from the container. Wing Kwong Tse alleges tips were only taken from him by petitioners when he worked as a bartender, not when he worked as a waiter.

Testimony of Fook Teng Chia

Fook Teng Chia testified she worked as a waitress for petitioners. She filed a claim with DOL, which accurately reflects the hours per week she worked at Hunan Village. She stated that Kam Fook Cheong and Yat Sam Chang supervised her work. Fook Teng Chia testified that there was only one instance she could remember that petitioners required her to share her tips with management.

Testimony of Yeok Lan Lin

Yeok Lan Lin testified she worked as a waitress at Hunan Village. She filed a claim against petitioners, which she testified accurately reflected the hours she worked at the restaurant. Her claim form indicates she was required to share tips with management, which she explained “means that we needed to share the tips with the boss [Kam Fook Cheong].” Yeok Lan Lin testified that Kam Fook Cheong and Yat Sam Chang took one share of the tips in the container each night after the tips were divided by the waiters. She clarified that Kam Fook Cheong and Yat Sam Chang only took tips when they helped the waiters, and further clarified that “when the time was busy, [Kam Fook Cheong] would take twenty dollars to buy some snacks for the chefs.”

ANALYSIS

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):

Respondent’s motion to dismiss granted in part; wage order affirmed

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 65.30). The respondent moved to dismiss the petition with respect to the wage and penalty orders at the close of petitioners’ evidence. Because the petitioners have the burden of proof, we consider only the evidence presented by petitioners when deciding a motion to dismiss made at hearing (*Matter of Jay Metz et al.*, PR 09-390 [June 4, 2012]). Since petitioners produced no evidence to rebut the respondent’s finding that they failed to pay \$99,639.53 in minimum wages to 46 employees from June 6, 2006 to September 18, 2009, respondent’s motion to dismiss is granted with respect to the allegations the wage order is invalid or unreasonable. The wage order is affirmed.

The motion to dismiss is also granted with respect to the allegations counts 1, 2, 4, and 5 of the penalty order are invalid or unreasonable, because petitioners failed to offer any evidence to prove they paid wages not later than seven calendar days after the end of the week in which the wages were earned, kept true and/or accurate payroll records for each employee, failed to give a complete wage statement with every payment of wages, and failed to post a minimum wage poster. The motion is denied with respect to the allegation that the petitioners did not withhold tips collected for employees, because petitioners presented some evidence, as discussed below, on this issue. The motion is also denied with respect to count 3 of the penalty order which imposes a \$1,000.00 civil penalty for withholding tips earned by employees.

The tip appropriations order is modified

Labor Law § 196-d provides:

“No employer or his agent or an officer or agent of any corporation, or any other person shall demand or accept, directly or indirectly, any part of the gratuities, received by an employee, or retain any part of a gratuity or of any charge purported to be a gratuity for an employee nor to the sharing of tips by a waiter with a busboy or similar employee.”

Respondent determined following his investigation of petitioners that petitioners unlawfully required three employees – Fook Teng Chia, Yeok Lan Lin, and Wing Kown Tse– to share tips with them in violation of Labor Law § 196-d.

“Employer” as used in Articles 6 and 19 of the Labor Law means “any person, corporation 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 “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 § 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” (*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) (*see also Matter of Chan v Industrial Bd of Appeals*, 120 AD3d 1120 [1st Dept 2014]), the Second Circuit Court of Appeals stated 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 presented no evidence to contradict respondent’s determination they are employers, and several claimants credibly testified to the control the petitioners exercised over them. Respondent’s determination that petitioners are employers is reasonable.

Since employers are prohibited by Labor Law § 196-d from requiring employees to share gratuities with them, petitioners, who have the burden of proof in this proceeding, must show they did not require Fook Teng Chia, Yeok Lan Lin, and Wing Kown Tse to share tips with them or otherwise appropriate their gratuities.

Several employees credibly testified service employees pooled tips at Hunan Village. Petitioners failed to produce any records of the tips earned by their employees. Because petitioners failed to keep records of their employees’ tips, the Commissioner is permitted to calculate the amount of appropriated tips by using the best available evidence and to shift the burden of negating the reasonableness of the calculation to the petitioners (*Matter of Mid Hudson Pam Corp v Hartnett*, 156 AD2d 818, 821 [3d Dept 1989]; *Angello v Natl. Fin. Corp.*, 1 AD3d 818, 821 [3d Dept 1989]; *Heady v Garcia*, 46 AD3d 1088 [3d Dept 2007]); *see also Heng Chan v. Sung Yue Tung Corp.*, 12 Wage & Hour Cas. 2d [BNA] 507 [SDNY 2007]). The claim forms, tip appropriations questionnaires, and credible testimony of Fook Teng Chia, Yeok Lan Lin, and Wing Kwong Tse, establish that employees pooled tips at Hunan Village and petitioners at least sometimes took a share of their employees’ tips. Petitioners presented no proof of the amount of tips earned by the employees or the actual amounts appropriated and did not offer any other evidence to negate the inferences drawn by respondent; however, the tip appropriations orders must be modified based on the record where Fook Teng Chia testified she could only recall one instance where petitioners took tips from her making a determination that she is owed \$1,600.00 in appropriated tips unreasonable. The amounts respondent found due to Yeok Lan Lin and Wing Kwon Tse are affirmed since they were based on the claim forms and tip appropriations questionnaires, which is the best available evidence.

Civil Penalty

Respondent assessed a 200% civil penalty against petitioners. Labor Law § 218 (1) requires the Commissioner to impose a 200% civil penalty for willful or egregious violations. Because petitioners presented no evidence proving their practice of taking tips from employees was not willful or egregious, the 200% civil penalty is reasonable.

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 financial services 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 per centum per annum.” Interest is affirmed and prorated consistent with this decision.

Penalty Order

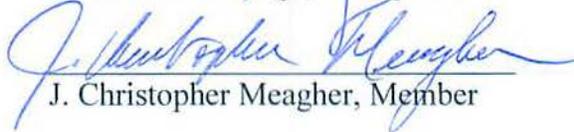
As discussed above, respondent’s motion to dismiss is granted, and counts 1, 2, 4, and 5 of the penalty order are affirmed. Count 3 of the penalty order finds petitioners violated Labor Law § 196-d by collecting and distributing tips and/or withholding part of the tips collected for employees during the period from on or about June 6, 2006 through September 18, 2009. Because we found petitioners violated Labor Law § 196-d and affirmed the tip appropriations order, we also affirm the \$1,000.00 civil penalty assessed by respondent against petitioners for violating Labor Law § 196-d (*see* Labor Law § 218 [1] [civil penalty not more than \$1,000.00 for a first violation where violation is for other than failure to pay wages, benefits or wage supplements]).

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The wage order is affirmed; and
2. The tip appropriations order is modified to reduce the appropriated tips due to \$12,981.00, the civil penalty to \$25,962.00, and to recalculate interest on the new principal; and
3. The penalty order is affirmed; and
4. The petition for review be, and the same hereby is, granted in part and denied in part.

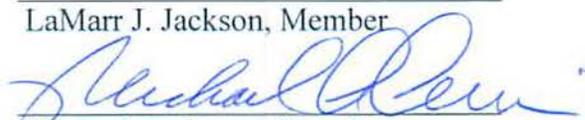


Vilda Vera Mayuga, Chairperson



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.

Section 14-A sets the "maximum rate of interest at sixteen per centum per annum." Interest is affirmed and prorated consistent with this decision.

Penalty Order

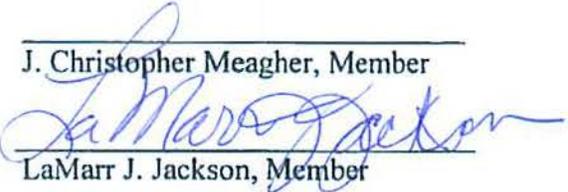
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Vilda Vera Mayuga, Chairperson

J. Christopher Meagher, Member



LaMarr J. Jackson, Member

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

Michael A. Arcuri, Member

Frances P. Abriola, Member