STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of:	:	
MOHAMMED KHALID A/K/A KHALID BUTT (T/A LITTLE PAKISTAN DELI),	:	
Petitioner,	:	DOCKET NO. PR 12-045
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, both dated December 12, 2011,	:	RESOLUTION OF DECISION
- against -	:	
THE COMMISSIONER OF LABOR,	:	
Respondent.	:	

APPEARANCES

Calvin Barrett, Esq., for petitioner.

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

WITNESSES

Mohammed Khalid, Safdar Zaidi, and Sulman Mushatiq for petitioner.

Faisar Uddin, Fisar Quershi, and Guillermo Avalos, Labor Standards Investigator, for respondent.

WHEREAS:

On February 9, 2012, petitioner Mohammed Khalid a/k/a Mohammed Butt (T/A Little Pakistan Deli) filed a petition with the Industrial Board of Appeals (Board) seeking review of two orders issued against him by the Commissioner of Labor (Commissioner) on December 12, 2011. The Commissioner filed an answer on June 12, 2012.

Upon notice to the parties, a hearing was held on May 23, 2014 in New York, New York before Board member and designated hearing officer J. Christopher Meagher, Esq. Each party

was afforded a full opportunity to present documentary evidence, examine and cross-examine witnesses, and make statements relevant to the issues.

The first order (minimum wage order) demands compliance with Article 19 of the Labor Law and payment to the Commissioner of $53,798.71 in minimum wages due and owing to employees Fisar Uddin, Fisar Quershi, Safdar Zaidi and Sulman Mushatiq for the period from January 4, 2009 to October 23, 2010, interest at the rate of 16% calculated to the date of the order in the amount of $14,959.78, liquidated damages in the amount of $13,449.68, and a civil penalty in the amount of $53,798.71, for a total amount due of $136,006.88.

The second order (penalty order) under Articles 5 and 19 of the Labor Law assesses petitioner civil penalties of $1,000.00 for failure to keep and/or furnish true and accurate payroll records during the period from January 4, 2009 through October 23, 2010 (Count 1); $1,000.00 for failure to provide employees at least twenty-four hours of rest in any calendar week during the same period (Count 2); $1,000.00 for failure to provide each employee a complete wage statement with every payment of wages during that period (Count 3), and; $1,000.00 for failure to post a minimum wage poster on or about October 14, 2010 (Count 4), for a total penalty of $4,000.00.

The petition alleges that the orders should be vacated because: (1) the employees worked at most five days and forty hours per week and were at all times paid at or above minimum wage, and; (2) petitioner maintained and furnished adequate payroll records and wage statements, provided at least one day of rest each calendar week, and displayed the required minimum wage poster.

SUMMARY OF EVIDENCE

Petitioner Mohammed Khalid is the owner and operator of a delicatessen named "Little Pakistani Deli" located on Second Avenue in Manhattan.

DOL's Investigation

On July 1, 2010, claimants Fisar Uddin and Fisar Quershi filed claims for unpaid minimum wages with the Department of Labor (DOL) stating that they were employed by petitioner as clerks at the Deli from January 4, 2009 to June 28, 2010 and December 12, 2009 to June 1, 2010 respectively. Claimants stated that they worked seven days per week, 12 hours per day, and were given one meal break of 15 minutes each day. They were paid a flat rate of $8.00 per hour for all hours worked and did not receive any extra pay for overtime. Claimants authenticated their claim forms and testified that they accurately stated the hours they worked and the wages they were paid during the periods of their claims. Uddin said his shift was 6:00 p.m. to 6:00 a.m., except for the last month when he worked 8:00 p.m. to 8:00 a.m. Quershi said he worked 6:00 p.m. to 6:00 a.m.

Labor Standards Investigator Guillermo Avelos testified concerning DOL's investigation of the claims that resulted in the orders under review. Various documents and reports from the

investigative file were submitted into evidence, including a "contact log" recorded by the investigators on a on-going basis describing the investigation.

Avelos testified that on October 14, 2010 he conducted an inspection of petitioner's business where he interviewed two employees who were present and recorded their answers in interview reports entered in DOL's file. Each employee communicated with him in English without difficulty and signed his interview report. Safdar Zaidi stated that he had been working at the Deli as a manager for seven months, from 8:00 a.m. to 8:00 p.m. each day, seven days per week, and was given a half hour meal break each day. He was paid $7.50 per hour and $625 net per week. Sulman Mushatiq stated that he had been working as a counter clerk for one and one-half months, from 8:00 a.m. to 8:00 p.m. each day, seven days per week, and was given a half hour meal break each day. He was paid $7.00 per hour and $350 net per week. Avelos noted in a report that Zaidi said the Deli was open 24 hours a day, seven days per week, with the employees working two shifts of 12 hours each.

Avelos testified that the Deli was not a large space and that he inspected the entire store and did not see a minimum wage poster. As petitioner was not present, he left a "Notice of Revisit" advising him that DOL would conduct a second inspection on October 28, 2010 where he was requested to produce payroll records of all employee hours worked and wages paid from 2008 to the present. The records were to include time cards, payroll registers, bank statements, cancelled checks, cashbooks, employee names, addresses, and dates of employment, and quarterly tax filings (NYS 45's).

On November 1, 2010, Avelos conducted a second inspection and spoke with petitioner. Petitioner produced some payroll journals for 2009 and 2010 and copies of wage statements for eight of the weeks requested. No daily or weekly time records were provided. The statements showed each employee working exactly 40 hours per week. Petitioner stated that prior to 2009 he did not keep records because he did not have any employees and the Deli was not open 24 hours a day. Petitioner indicated that the journals and wage statements were the only records he had.

After reviewing petitioner's payroll records, Avelos determined that the records were insufficient to establish the hours worked and wages paid petitioner's employees. On March 10, 2011, he issued petitioner a recapitulation of wages due based on an audit drawn from the information provided by the employees in their claims and interviews. In the absence of adequate records showing that the employees were paid the wages claimed, the Commissioner issued the orders under review on December 12, 2011.

Petitioner's Evidence

Petitioner Mohammed Khalid testified that the Deli is open seven days a week from 6:00 a.m. to 12:00 p.m., and sometimes to 2:00 a.m. Uddin and Quershi worked four hours each day, five days per week, and one week each month worked six days. Family members filled in during the hours that claimants did not work. On cross-examination, petitioner clarified that when claimants started they worked 20 hours per week and after they became experienced worked 40. Whatever hours they worked he wrote down at the end of the week and gave to his accountant to

prepare payroll. Petitioner did not produce these time records during the investigation or at hearing.

Petitioner submitted payroll journals prepared by his accountant listing gross and net wages paid Uddin for the payroll weeks from January 4 to April 14, 2009 and Quershi from December 19 to 26, 2009. The journals do not list any daily or weekly hours. Petitioner also submitted wage statements for Uddin from January 31 to July 11, 2010 and Quershi from December 27, 2009 to May 29, 2010. The statements show each claimant paid $8.00 per hour and working exactly 40 hours each week. Two wage statements for Mushatiq were submitted for the weeks ending October 2 and 16, 2010. The statements show he worked exactly 40 hours each week and was paid $7.25 per hour. No payroll records were submitted for Zaidi.

Responding to DOL's finding that a minimum wage poster was not posted in the Deli on October 14, 2010, petitioner explained that the poster was displayed on the back of a wall but where every worker could see it. Petitioner submitted a picture showing a "2011" DOL poster placed in the same spot as the one displayed on DOL's inspection in October of 2010.

Safdar Zaidi testified that he is petitioner's cousin and works as a counter clerk at the Deli. He is sometimes paid for his work and sometimes works for free just to help out. He recalled that he was interviewed by a DOL investigator in 2010 and acknowledged that he signed the interview report recorded in DOL's file. He told the investigator he was paid $7.50 per hour and $625.00 per week and provided him with his address and cell phone number. He may have said he worked seven days per week from 8:00 a.m. to 8:00 p.m. each day, but could not remember. It may have been because he was doing extra duties for someone who was sick at the time.

Sulman Mushatiq testified that he has been employed at the Deli for four years, working eight hours per day, five days per week. He is paid $8.00 an hour. He recalled having been interviewed by an investigator in 2010 and that he signed the interview report recorded in DOL's file. He had been working at the Deli for approximately a month and a half when the interview took place. Mushatiq acknowledged that he told the investigator he worked 8:00 a.m. to 8:00 p.m., seven days a week, and it was because he had just started and was in training. He could not recall what his wage rate was at the time.

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 commissioner under the provisions of this chapter" (Labor Law 101 § [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]). An order issued by the Commissioner shall be presumed "valid" (*id.* § 103 [1]).

A petition that challenges such order shall "state ... in what respects [the order] is claimed to be invalid or unreasonable" (*id.* § 101[2]). Any objection "not raised in such appeal shall be deemed waived" (*id.*).

The Board's Rules provide that "the burden of proof" of every allegation in a proceeding "shall be upon the person asserting it" (12 NYCRR § 65.30). The burden is by a preponderance of evidence (State Administrative Procedure Act § 306 [1]).

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 65.30.

Petitioner Failed to Meet His Burden of Proof to Establish That He Paid His Employees Their Wages Due

The Labor Law requires employers to maintain payroll records that include, among other things, its employees' daily and weekly hours worked, wage rate, gross and net wages paid, and any allowances claimed as part of the minimum wage (Labor Law §§ 195 and 661, 12 NYCRR § 137-2.1).[1] Employers are required to keep such records open to inspection by the Commissioner or a designated representative at the place of employment (*id.*). Employers are further required to furnish each employee a statement with every payment of wages listing the hours worked, rates paid, gross and net wages, and any allowances claimed as part of the minimum wage (Labor Law § 661 and 12 NYCRR § 137-2.2). The required recordkeeping provides proof to the employer, the employee, and the Commissioner that the employee has been properly paid.

In the absence of accurate records required by the Labor Law, the Commissioner may draw reasonable inferences and calculate unpaid wages based on the "best available evidence" drawn from employee statements or other evidence, even though the results may be approximate (*Matter of Mid-Hudson Pam Corp. v Hartnett,* 156 AD2d 818, 820-21 [3d Dept. 1989]; *Ramirez v Commissioner of Labor,* 110 AD3d 901 [2d Dept. 2013]).

In a proceeding challenging such determination, the employer must come forward with evidence of the "precise" amount of work performed or with evidence to negate the reasonableness of the inferences to be drawn from the employees' evidence (*Anderson v Mt. Clemens Pottery,* 328 U.S. 680, 688 [1949]; *Mid-Hudson Pam Corp.*, 156 AD2d at 821). Given the interrelatedness of wages and hours, the same burden shifting applies to wages and requires the employer to prove the "precise wages" paid or to negate the inferences drawn from the employee's statements (*Doo Nam Yang v ACBL Corp.,* 427 FSupp2d 327, 332 [SDNY 2005]; *Matter of Gattegno,* PR 09-032 [December 15, 2010]). Labor Law § 196-a provides that where an employer fails "to keep adequate records . . . the employer in violation shall bear the burden of proving that the complaining employee was paid wages, benefits and wage supplements."

[1] 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. The wage order was repealed and replaced by the Wage Order for the Hospitality Industry at 12 NYCRR Part 146, effective January 1, 2011.

The Court in *Mt. Clemens Pottery* further described the nature of evidence the employer must provide to meet its burden to establish the "precise" amount of work performed: "Unless the employer can provide *accurate estimates* [of hours worked], it is the duty of the trier of facts to draw whatever reasonable inferences can be drawn from the employees' evidence as to the amount of time spent in these activities in excess of the productive working time" (*id.* at 693 [emphasis supplied]; *Matter of Mohammed Aldeen,* PR 07-093 [May 20, 2009] [employer burden to provide "accurate estimate" of hours worked to overcome approximation drawn by Commissioner], *aff'd. sub nom, Matter of Aldeen v Industrial Board of Appeals*, 82 AD3d 1220 [2d Dept. 2011]).

Petitioner initially testified that claimants Uddin and Quershi worked four hours each day, five days each week, and one week each month worked six days. On cross examination he asserted that they started at 20 hours per week, later worked 40, and whatever hours they worked he wrote down and gave his accountant each week to prepare payroll. The Board has repeatedly held that general and conclusory testimony concerning the work schedules of employees is insufficient to meet an employer's burden of proof (*Matter of Michael Fischer*, PR 06-099 at pp. 3-4 [April 25, 2008]; *Matter of Young Hee Oh,* PR 11-017 at p. 12 [May 22, 2014]).

As proof of payment, petitioner submitted payroll journals and wage statements prepared by his accountant for three of the four employees covered by the wage order. No payroll records were submitted for Zaidi. The payroll journals cover only a small portion of the periods of time for which these employees are owed underpayments and do not show any daily or weekly hours worked. Likewise, the wage statements cover only a fraction of the relevant time periods and show each employee working exactly 40 hours each week. While petitioner claimed that his accountant prepared the wage statements from time records he provided him every week, he did not produce any of these records during the investigation or at hearing. The incompleteness, uniformity of hours, and absence of any daily or weekly time records demonstrate that petitioner's records are unreliable as an accurate estimate of the actual hours worked and precise wages paid (*Matter of Mohammed Aldeen, supra* at pp.12-13; *Matter of Kong Ming Lee,* PR 10-293 at pp. 16-17 [April 10, 2014]).

Petitioner also submitted the testimony of Safdar Zaidi and Sulman Mushatiq. Both of these employees testified consistently with the information they provided the investigator.[2] Zaidi's vague surmise that he might have been working 12 hours a day because he was filling in for someone else at the time is insufficient to overcome the Commissioner's calculation (*Matter of Mohammed Aldeen supra,* at pp. 14-15 [overly general and non-specific testimony of employee concerning his hours and wages, flawed by poor recollection, is insufficient to overcome Commissioner's approximation drawn from prior statement]).

It was petitioner's burden to provide contemporaneous payroll records establishing an accurate estimate of the hours worked and the precise wages paid his employees for their work, not the employees. In the absence of such records, the Commissioner may rely on the best available evidence and draw an approximation of those hours and wages owed from the

[2] While Mushatiq testified that he has worked eight hours per day throughout his employment, he acknowledged that he was in training at the time he was interviewed by DOL and told Avelos that he was working 12 hours per day. The order covers only this five-week period from September 12, 2010 to October23, 2010.

employees' written statements, even where imprecise (*Mt. Clements* Pottery, 328 U.S. at 687-88 ["The 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"]).

We find the evidence submitted by petitioner in this case failed to overcome the presumption favoring the Commissioner's calculation. In the absence of such proof, the Commissioner's determination of wages owed based on the best available evidence drawn from the employees' written claims and interview reports is reasonable and valid in all respects.

Interest

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." Banking Law § 14-A sets the "maximum rate of interest" at "sixteen per centum per annum."

Petitioner did not challenge the interest assessed in the wage order and the issue is thereby waived pursuant to Labor Law § 101 [2]. We find that the computations made by the Commissioner in assessing interest in the orders are valid and reasonable in all respects.

Liquidated Damages

Labor Law § 663 [2] provides that when any employee is paid less than the wage to which he is entitled, the Commissioner may bring administrative action against the employer to collect such claim, and the employer shall be required to pay the full amount of the underpayment "and unless the employer proves a good faith basis for believing that its underpayment of wages was in compliance with the law, an additional amount as liquidated damages." Such damages shall not exceed one hundred per cent of the total amount of wages found to be due.

Petitioner did not challenge the Commissioner's determination to assess liquidated damages in the wage order. The issue is thereby waived pursuant to Labor Law § 101 [2] and we affirm the determination as valid and reasonable in all respects.

Civil Penalty

Labor Law § 218, applicable during the claim periods in this case, provided that once the Commissioner determines that an employer has violated Article 6 or 19 of the Labor Law, he shall issue to the employer an order directing compliance therewith, which shall describe with particularity the nature of the violation. The statute also provided:

> "In addition to directing payment of wages, benefits or wage supplements found to be due such order, if issued to an employer who previously has been found in violation of those provisions [of

> the Labor Law], 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 equal to double the total amount found to be due. In no case shall the order direct payment of an amount less than the total wages, benefits or wage supplements found by the commissioner to be due, plus the appropriate civil penalty. Where the violation is for a reason other than the employer's failure to pay wages, benefits or wage supplements found to be due, the order shall direct payment to the commissioner of a civil penalty in an amount not to exceed one thousand dollars for a first violation, two thousand dollars for a second violation or three thousand dollars for a third or subsequent violation. In assessing the amount of the penalty, the commissioner shall give due consideration to the size of the employer's business, the good faith of the employer, the gravity of the violation, the history of previous violations and, in the case of wages, benefits or supplements violations, the failure to comply with recordkeeping or other non-wage requirements."

Petitioner did not challenge the civil penalty assessed in the wage order and the issue is thereby waived pursuant to Labor Law § 101 [2].

Penalty Order

Petitioner asserted that the penalty order is unreasonable because he maintained and furnished adequate payroll records and wage statements (Counts 1 and 3). However, petitioner failed to maintain daily and weekly time records for his employees and failed to provide them with complete and accurate wage statements for the majority of the payroll weeks covered by the order. No payroll records or wage statements of any kind were maintained for employee Safdar Zaidi.

Petitioner also asserted in the petition that he provided his employees at least one day of rest every week (Count 2). However, as we find above, the Commissioner's determination based on the employees' claims and interviews establishes that they worked seven days per week, and did not receive "at least twenty-four consecutive hours of rest in any calendar week" (Labor Law § 161).

Finally, petitioner claimed that he posted the required Minimum Wage Poster when the investigator visited the store on October 14, 2010 (Count 4). Labor Law § 661 requires that "Every employer shall post, in a conspicuous place in his establishment, notices issued by the Department of Labor about wage and hour laws . . . and other laws that the Commissioner shall deem appropriate." Petitioner's testimony that a poster was behind a wall, but nonetheless visible to his employees, does not meet the requirements of the statute that it be posted "in a conspicuous place in his establishment." We credit the investigator's testimony that he inspected the entire store and did not see a poster displayed.

We find that the considerations and computations the Commissioner was required to make in connection with the penalties assessed in the penalty order are valid and reasonable in all respects.

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 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 New York, New York on
January 28, 2015.

We find that the considerations and computations the Commissioner was required to make in connection with the penalties assessed in the penalty order are valid and reasonable in all respects.

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 dismissed.

Vilda Vera Mayuga, Chairperson

J. Christopher Meagher, Member

LaMarr J. Jackson, Member

Michael A. Arcuri, Member

Frances P. Abriola, Member

Dated and signed by a Member
of the Industrial Board of Appeal
at Rochester, New York, On
January 28, 2015.

We find that the considerations and computations the Commissioner was required to make in connection with the penalties assessed in the penalty order are valid and reasonable in all respects.

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 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
January 28, 2015.

We find that the considerations and computations the Commissioner was required to make in connection with the penalties assessed in the penalty order are valid and reasonable in all respects.

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 dismissed.

Vilda Vera Mayuga, Chairperson

J. Christopher Meagher, Member

LaMarr J. Jackson, Member

Michael A. Arcuri, Member

Frances P. Abriola, Member

Dated and signed by a Member
of the Industrial Board of Appeals
at Utica, New York, on
January 28, 2015.