

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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 In the Matter of the Petition of: :
 :
 MUHAMMAD W. QURESHI AND SUNSHINE :
 GRILL & RESTAURANT, INC. :
 :
 Petitioners, :
 :
 To Review Under Section 101 of the Labor Law: :
 An Order to Comply With Article 19 of the Labor Law :
 and an Order Under Article 19 of the Labor Law, both :
 dated December 27, 2013, :
 :
 - against - :
 :
 THE COMMISSIONER OF LABOR, :
 :
 Respondent. :
 -----X

DOCKET NO. PR 14-004

RESOLUTION OF DECISION

APPEARANCES

Kaufman Dolowich & Voluck, LLP (David A. Tauster of counsel), for petitioners.
Pico P. Ben-Amotz, General Counsel, NYS Department of Labor (Larissa C. Bates of counsel), for respondent.

WITNESSES

Muhammad Qureshi, Ashi Qureshi, Rekha Shrestha, and Walter Vasques for petitioners.
Labor Standards Investigator Albert Zeng for respondent.

WHEREAS:

The petition in this matter was filed with the Industrial Board of Appeals (Board) on January 10, 2014, and amended on February 21, 2014, and seeks review of two orders issued by the Commissioner of Labor (Commissioner or respondent) on December 27, 2013 against petitioners Muhammad W. Qureshi (a/k/a Ashi Wasim Quereshi)¹ and Sunshine Grill & Restaurant, Inc. The Commissioner filed his answer on March 20, 2014.

¹ Ashi Wasim Quereshi is petitioner Muhammad W. Quereshi's wife. The parties stipulated at hearing to modify the orders to remove her name from the orders.

Upon notice to the parties, a hearing was held in this matter on March 6, 2015, 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, and make statements relevant to the issues.

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 Blanca Saavedra and Walter Vasques in the amount of \$96,631.45 for the time period from July 26, 2009 to February 19, 2013, with interest continuing thereon at the rate of 16% calculated to the date of the order in the amount of \$15,077.03, liquidated damages in the amount of \$24,157.86, and assesses a civil penalty in the amount of \$96,631.45, for a total amount due of \$232,497.79.

The order under Article 19 (penalty order) assesses a \$400.00 civil penalty for violating Labor Law § 661 and 12 NYCRR 137-2.1 by failing to keep and/or furnish true and accurate payroll records for each employee from July 26, 2009 to December 31, 2010; a \$400.00 civil penalty for violating Labor Law § 661 and 12 NYCRR 146-2.1 by failing to keep and/or furnish true and accurate payroll records for each employee from January 1, 2011 to February 19, 2013; a \$400.00 civil penalty for violating Labor Law § 661 and 12 NYCRR 2.2 by failing to give each employee a complete wage statement with every payment of wages from July 26, 2009 to December 31, 2010; a \$400.00 civil penalty for violating Labor Law § 661 and 12 NYCRR 146-2.3 by failing to give each employee a complete wage statement with every payment of wages from January 1, 2011 to February 19, 2013; an \$800.00 civil penalty for violating Labor Law § 661 and 12 NYCRR 146-2.4 by failing to post in a conspicuous place notices issued by the Department of Labor summarizing the Minimum wage provisions, wages and hours laws, tip appropriations, illegal deduction provisions and any other laws that the Commissioner shall deem appropriate; and an \$800.00 civil penalty for violating Labor Law § 661 and 12 NYCRR 146-2.5 by failing to pay an hourly rate of pay to covered employees from January 1, 2011 to February 19, 2023 [sic]; for a total due of \$3,200.00.

For the reasons set forth below, we modify the wage order to reduce the wages due to \$0.00, the civil penalty to \$432.80, and the liquidated damages to \$108.20. We affirm the penalty order.

SUMMARY OF EVIDENCE

DOL's Investigation

On or about October 12, 2012, the Department of Labor (DOL) received a claim from Blanca Saavedra alleging she worked at Sunshine Grill & Restaurant making salads and washing dishes from September 16, 2011 to September 30, 2012. Saavedra's claim alleges she was never paid, "[employer] stated your payment is the room I give you," and that she was provided free lodging on the second level of the restaurant. She claims she worked 72 hours per week from September 16, 2011 to September 30, 2011, and notes attached to her claim form, which were apparently written by a DOL investigator, allege she worked long hours each week, never the same hours, and worked both at Sunshine Grill & Restaurant and as a housekeeper at petitioner

Muhammad W. Quereshi's residence. The investigator's notes include a detailed chronology of Saavedra's alleged working hours as a housekeeper at the Quereshi residence, stating she worked from 5:00 a.m. to 12:00 a.m., and that even at midnight "all the chores, it was not that I finished them, but that I took a break to sleep for a while in order to start at 5 am, and then two or three times at 7 pm."

Labor Standards Investigator Albert Zeng testified he was assigned by DOL to investigate Saavedra's claim. He was not present when the claim was filed, and does not know which investigator Saavedra originally spoke to when she filed it. Once assigned to the claim, Zeng made a field visit to Sunshine Grill & Restaurant with a senior investigator. Zeng attempted to interview two employees. One refused to be interviewed. Zeng was able to interview the other employee present at the time, Walter Vasques. Vasques informed Zeng that he spoke only a little bit of English, stating that he speaks and reads Spanish. Zeng, who understands some Spanish, conducted the interview in English by presenting Vasques an interview sheet with questions written in both English and Spanish.

Zeng testified that Vasques did not understand some of the terms so he pointed to them in the Spanish translation of the form. Based on Vasques' responses, Zeng was able to complete the form. Zeng stated that Vasques never said he did not understand the questions being asked.

Zeng wrote on the interview sheet that Vasques started working at Sunshine Grill & Restaurant in July 2009. Zeng testified that "I asked him when he started working and also point to the Spanish translation to him and he provided me the date." Zeng could not recall whether the date was provided in Spanish or English, but testified he would have understood if it had been said in Spanish.

Since the employer provided no payroll records, Zeng prepared computation sheets of the wages owed by petitioners to Saavedra and Vasques. He explained that "[f]or Ms. Blanca Saavedra, I got the information based on the claim form she filed with the Department of Labor. Mr. Vasques, I got those information from his interview sheet."

When asked why DOL determined Saavedra worked less hours per day than the 19 ½ she alleged in her claim form, Zeng testified that "we were assuming that subtract some of the hours for rest. She cannot continuously work 19 and a half hours every day for that long period. There must be time that she might take some rest." When questioned about discrepancies between Saavedra's claim and the assumptions DOL used to calculate her unpaid wages, Zeng stated that he could not "remember how the hours came," and speculated he must have spoken to the claimant to get information on the days and hours she worked, although he could not specifically recall talking to Saavedra. Zeng did not prepare the paperwork for the orders or recommend the civil penalty amount.

Petitioners' Evidence

Testimony of Muhammad Qureshi

Petitioner Muhammad Qureshi testified he was the owner of Sunshine Grill & Restaurant from 2005 to 2013. The restaurant was open seven days a week from 9:00 a.m. to 10:00 p.m. Qureshi testified that Blanca Saavedra worked for petitioners for seven or eight weeks from July

to September 2012. Saavedra worked as a dishwasher from 10:00 a.m. to 6:00 p.m. on Saturdays and Sundays for a salary of \$125.00 per week, and was terminated because she was “on the phone all the time.” Qureshi denied that Saavedra ever worked as a domestic employee in his residence, stating that she only visited his home twice to pick up old clothes the Qureshis were donating to her.

Qureshi stated that he met Saavedra when one of his employees referred her to him as a potential tenant for a room he had available to rent above the restaurant. Qureshi rented the room to Saavedra for \$400.00 a month, and eventually offered her a job at the restaurant when he learned she was unemployed. Qureshi testified that there was no agreement to provide the apartment instead of paying wages.

Qureshi testified that Walter Vasques worked for petitioners from January 25, 2013 to February 20, 2013. Vasques worked as a baker 6 days per week, 11 hours per day for a weekly salary of \$550.00. Qureshi testified that Vasques signed a release of his claims against petitioners in exchange for \$2,000.00.

Qureshi did not keep records of the hours Saavedra and Vasques worked or the wages he paid to them.

Testimony of Ashi Qureshi

Qureshi’s wife, Ashi Qureshi, who never worked at her husband’s restaurant, testified she met Saavedra on two occasions when she came to the Qureshis’ residence to pick up donated clothes and baby toys. Saavedra never worked at the Qureshis’ home.

Testimony of Walter Vasques

Walter Vasques testified that he worked for one month at Sunshine Grill & Restaurant. He testified variously that he started working on January 25, 2009, was not certain it was 2009, and that he started working at the restaurant in 2012. Vasques worked six days a week from 8:00 a.m. to 7:00 or sometimes 8:00 p.m. His work consisted of warming up the ovens and baking bread.

Vasques acknowledged having spoken to a DOL investigator at the restaurant; however, he testified that at the time he did not understand English and did not know what the investigator was asking. He also acknowledged that he signed a release of his claims against petitioners, and that they paid him \$2,000.00 when he signed the form, which he believes was a fair amount. Although Vasques can read only a “little bit” of English, he testified that he understood what the release form says even though it was never translated into Spanish for him.

Testimony of Rekha Shrestha

Rekha Shrestha testified she worked for six or seven years at Sunshine Grill & Restaurant. She worked at the front counter five days a week, eight hours per day. Shrestha testified that Saavedra started working in July and worked for “maybe” eight weeks. Shrestha testified that Saavedra worked on weekends as a dishwasher. Shrestha testified that Vasques also worked at the restaurant. She testified he made pita bread. She thinks he worked five days

a week and started in January, but does not remember the date. Shrestha testified that Vasques only worked at the restaurant for a short time, “maybe” two or three weeks, and that she stopped working at the restaurant in July 2013.

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):

A) Burden of proof

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).

B) The wage order is modified

DOL determined based on its investigation that petitioners owe Blanca Saavedra \$30,578.05 in unpaid minimum wages for the period from September 16, 2011 to September 30, 2012, and Walter Vasques \$66,053.40 in unpaid minimum wages for the period from July 26, 2009 to February 19, 2013. Based on the record, these amounts are unreasonable and must be modified.

The petitioners admitted they kept no wage and hours records for Saavedra and Vasques. In the absence of payroll records, petitioners bear the burden of proving that the disputed wages were paid (Labor Law § 196-a; *Angello v Natl. Fin. Corp.*, 1 AD3d 850, 851 [3d Dept 1989]; *Heady v Garcia*, 46 AD3d 1088 [3d Dept 2007]). As the Appellate Division stated in *Matter of Mid Hudson Pam Corp v Hartnett*, 156 AD2d 818, 821 [3d 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 calculation to the employer” (*see also Matter of Bae v Industrial Board of Appeals*, 104 AD3d 571 [1st Dept 2013], *cert denied* 2013 NY Slip Op 76385 [2013]). The petitioners have the burden of showing that the minimum wage order is invalid or unreasonable by a preponderance of the evidence of the specific hours that the employees worked and that they were paid for those hours, or other evidence that shows the Commissioner’s findings to be invalid or unreasonable (*Matter of Ram Hotels, Inc.* Board Docket No. PR 08-078 [October 11, 2011]). Where no wage and hour records are available, DOL is “entitled[d] to make just and reasonable inferences and use other evidence to establish the amount of underpayments, even though the results may be approximate” (*Hy-Tech Coatings v New York State Dept. of Labor*, 226 AD2d 378, [(1st Dept 1996], *citing Mid-Hudson Pam Corp.*; *see also Matter of Bae v Industrial Board of Appeals*, 104 AD3d 571); however, this approximation must have a rational basis (*Matter of Schepanski v Roberts*, 133 AD2d 757, 758 (2d Dept 1987); *Matter of Kong Ming Lee et al.*, Board Docket No. PR 10-293 at p. 16 [April 10, 2014]). For the reasons set forth below, we find that the approximation of the hours worked and wages owed made by the Commissioner is not supported by the record.

Petitioners, who had the initial burden of proof in this proceeding, presented evidence casting doubt on the respondent's calculation of the wages due to Saavedra and Vasques. Qureshi testified that Saavedra only worked at the restaurant two days a week for seven or eight weeks in 2012, and denied that she worked for him as a domestic employee at his residence. He also testified that Vasques worked from January 25, 2013 to February 20, 2013, not from July 26, 2009 to February 19, 2013 as determined by respondent.

Qureshi's testimony was corroborated by the testimony of other witnesses. Vasques, although his testimony was far from forthcoming, denied that he started working for petitioners in July 2009, stating that he started in 2012 and only worked for petitioners for a month. Rekha Shrestha, a former employee of the petitioners, testified that Saavedra worked one or two days per week for "maybe" eight weeks, and that Vasques worked for a short time, "maybe" two or three weeks. Qureshi's wife, Ashi Qureshi, confirmed that Saavedra never worked at the Qureshi residence.

The petitioners having put forth evidence contesting the respondent's findings, the burden then shifted to the Commissioner to rebut the petitioners' evidence, which he failed to do. While ordinarily in the absence of required payroll records employee statements may form the basis for calculating unpaid wages, the statements of Saavedra and Vasques are not reliable. Saavedra failed to appear and testify although petitioners' attorney subpoenaed her, and DOL's investigator conceded that he did not believe her claim form was credible. Vasques' testimony contradicted his statement to DOL and was not sufficiently rebutted by respondent. The wage order must be modified.

On the record before us, we find that based on the testimony at hearing, that Blanca Saavedra worked 16 hours a week for 8 weeks for petitioners as a dishwasher from July to September 2012 for a weekly salary of \$125.00. The applicable minimum wage for the restaurant industry was \$7.25 an hour in 2012 (12 NYCRR 146-1.2 [2012]). There is no credible evidence she worked as a domestic employee at the Qureshi residence. Since Saavedra's regular rate of pay² was more than the required minimum wage, and she worked less than 40 hours a week, we find no wages are due to Saavedra.

We find Walter Vasques worked 66 hours a week for the petitioners for one month in 2013.³ The applicable minimum wage for the restaurant industry in 2013 was \$7.25 an hour (12 NYCRR 146-1.2 [2013]). Qureshi testified he paid Vasques \$550.00 a week, which is the only evidence we have of Vasques' salary. We find, therefore, that Vasques' regular rate of pay was \$8.33,⁴ and his overtime rate was \$12.50 an hour (12 NYCRR 146-1.4). Vasques was underpaid \$108.20 per week under Article 19.⁵ Because Vasques acknowledged he received a \$2,000.00 payment from petitioners to settle the matter, we offset that amount against the wages owed and find petitioners owe Vasques no wages.

² Saavedra's regular rate of pay was \$7.81 an hour (12 NYCRR 146-3.5).

³ Testimony, although consistent that Vasques worked for only a month, was not clear as to whether he worked in 2012 or 2013. Because DOL interviewed Vasques in 2013, we find he worked for petitioners in 2013.

⁴ \$550.00 a week divided by 66 hours (12 NYCRR 146-3.5).

⁵ Under Article 19, petitioners should have paid Vasques \$658.20 per week which is the sum of 40 regular hours at \$8.33 (\$332.20) and 26 overtime hours at \$12.50 (\$325.00). Petitioners owe him the difference between \$658.20 and the \$550.00 per week they actually paid him.

Civil Penalty

The wage order assesses a 100% civil penalty against the petitioners. Labor Law § 218 (1) provides in relevant part that:

“If the commissioner determines that an employer has violated a provision of . . . article nineteen (minimum wage act) . . . or a rule or regulation promulgated thereunder, the commissioner shall issue to the employer an order directing compliance therewith, which shall describe particularly the nature of the alleged violation In addition to directing payment of wages . . . found to be due . . . such order, if issued to an employer who previously has been found in violation of those provisions, rules or regulations, or to an employer whose violation is willful or egregious, shall direct payment to the commissioner of an additional sum as a civil penalty in an amount not to exceed double the total amount of wages . . . found to be due 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 basis of the employer to believe that its conduct was in compliance with the law, 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.”

The investigator who testified at the hearing was not the investigator who recommended the civil penalty or prepared the orders. The paperwork recommending the 100% civil penalty states as the basis for the penalty that petitioners did not pay Saavedra any wages and Vasques was not paid minimum wage and indicates that the size of the firm, good faith of the employer, gravity of the monetary violations and non-wage and recordkeeping violations disclosed during the course of the investigation were considered. We find that, although the respondent was incorrect concerning the extent of the violations, a 100% civil penalty is supported by the record because of petitioners’ failure to pay overtime to Walter Vasques and to comply with recordkeeping requirements. The petitioners did not show any evidence of good faith or that the failure to pay overtime was not willful. The 100% civil penalty is affirmed and reduced to 100% of the amount underpaid to Vasques not taking into account the third party settlement since it did not include respondent or in any way limit the Commissioner’s authority under the Labor Law to collect a civil penalty. A civil penalty of \$432.80 remains due.

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Liquidated Damages

Labor Law § 663 (2) provides that a wage order issued by the Commissioner shall include liquidated damages in an amount of no more than 100% of the total underpayment found due unless the employer proves a good faith basis to believe the underpayment was in compliance with the law (*see also* Labor Law § 218 [1]). Respondent included 25% liquidated damages in the wage order. The petitioners presented no evidence they had a good faith basis to believe the underpayment to Walter Vasques was in compliance with the law. Liquidated damages in the amount of \$108.20 are due since the third party settlement between petitioners and Vasques did not operate to bar the Commissioner from collecting liquidated damages.

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 must be recalculated on the new principal amount of \$432.80. Because petitioners already paid Vasques \$2,000.00, interest may only be collected to the extent that it exceeds \$1,567.20.

The penalty order is affirmed

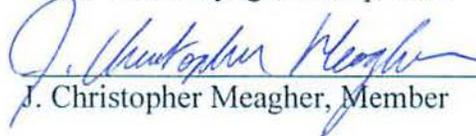
The penalty order under Article 19 assesses a \$400.00 civil penalty for violating Labor Law § 661 and 12 NYCRR 137-2.1 by failing to keep and/or furnish true and accurate payroll records for each employee from July 26, 2009 to December 31, 2010; a \$400.00 civil penalty for violating Labor Law § 661 and 12 NYCRR 146-2.1 by failing to keep and/or furnish true and accurate payroll records for each employee from January 1, 2011 to February 19, 2013; a \$400.00 civil penalty for violating Labor Law § 661 and 12 NYCRR 2.2 by failing to give each employee a complete wage statement with every payment of wages from July 26, 2009 to December 31, 2010; a \$400.00 civil penalty for violating Labor Law § 661 and 12 NYCRR 146-2.3 by failing to give each employee a complete wage statement with every payment of wages from January 1, 2011 to February 19, 2013; an \$800.00 civil penalty for violating Labor Law § 661 and 12 NYCRR 146-2.4 by failing to post in a conspicuous place notices issued by the Department of Labor summarizing the Minimum wage provisions, wages and hours laws, tip appropriations, illegal deduction provisions and any other laws that the Commissioner shall deem appropriate; and an \$800.00 civil penalty for violating Labor Law § 661 and 12 NYCRR 146-2.5 by failing to pay an hourly rate of pay to covered employees from January 1, 2011 to February 19, 2013; for a total due of \$3,200.00. These penalty amounts are within the limits for first time non-wage violations set forth at Labor Law § 218 and affirmed as reasonable because petitioners admitted they failed to keep payroll records for Saavedra and Vasques and did not give them wage statements with each payment of wages, presented no evidence that they posted required DOL notices, and the record showed petitioners paid Saavedra and Vasques a weekly instead of an hourly wage rate.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The orders are modified to remove "(a/k/a Ashi Wasim Quereshi)" as a liable employer.
2. The wage order is modified consistent with our decision to reduce the wages due and owing to \$0.00, the civil penalty to \$432.80, the liquidated damages to \$108.20, and to recalculate interest on the new principal amount of \$432.80 which may only be collected to the extent that interest exceeds \$1,567.20.
3. The penalty order is affirmed.
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

Absent

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
June 10, 2015.

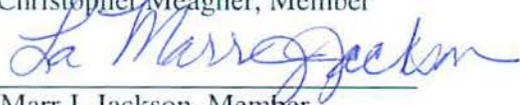


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3. The penalty order is affirmed.
4. The petition for review be, and the same hereby is, granted in part and denied in part.

Vilda Vera Mayuga, Chairperson

J. Christopher Meagher, Member



LaMarr J. Jackson, Member

Dated and signed by a Member
of the Industrial Board of Appeals
at Rochester, New York, on
June 10, 2015.

Michael A. Arcuri, Member

Frances P. Abriola, Member