

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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In the Matter of the Petition of: :
 :
ANGELO GEORGES AND GR JANUARY CORP. :
(T/A MICHAEL'S RESTAURANT), :
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Petitioners, : DOCKET NO. PR 14-157
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To Review Under Section 101 of the Labor Law: : RESOLUTION OF DECISION
An Order to Comply With Article 19 of the Labor :
Law and an Order Under Article 19 of the Labor Law, :
both dated June 25, 2014, :
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- against - :
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THE COMMISSIONER OF LABOR, :
 :
 :
Respondent. :
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APPEARANCES

Hoffman and Associates (Andrew S. Hoffman and John Raffé of counsel), for petitioners.

Pico Ben-Amotz, General Counsel, New York State Department of Labor (Jake A. Ebers of counsel), for respondent.

WITNESSES

Angelo Georges, for petitioner.

Felix Luna and Amber Odierno, Labor Standards Investigator, New York State Department of Labor, for respondent.

WHEREAS:

The petition for review in this matter was filed with the Industrial Board of Appeals (Board) on August 1, 2014, and seeks review of two orders issued by the New York State Department of Labor (DOL, Commissioner, or respondent) against petitioners Angelo Georges and GR January Corp. (T/A Michael's Restaurant) on June 25, 2014. The Commissioner answered the petition on September 23, 2014.

Upon notice to the parties a hearing was held in this matter on December 16, 2014 in New York, New York, before Michael A. Arcuri, member of the Board, and the designated hearing officer in this proceeding. Each party was afforded a full opportunity to present

documentary evidence, to examine and cross-examine witnesses, make statements relevant to the issues and file post-hearing briefs. The respondent made a motion to dismiss after petitioners rested, alleging they had not made a prima facie case upon which the Board could determine the orders were invalid or unreasonable. The hearing officer reserved decision and respondent presented his case. After reviewing the record, we deny the motion to dismiss, finding the petitioners raised sufficient issues of fact and law.

The order to comply with Article 19 (wage order) under review directs compliance with Article 19 and payment to the Commissioner for wages due and owing to Felix Luna in the amount of \$7,410.00 for the time period from January 8, 2008 to July 2, 2009, with interest continuing thereon at a rate of 16% calculated to the date of the order in the amount \$5,908.51, and assesses liquidated damages of 25% in the amount \$1,852.50, and a civil penalty of \$7,140.00, for a total amount due of \$22,311.01.

The order under Article 19 (penalty order) assesses a \$1,000.00 civil penalty against the petitioners for violating Labor Law Section 661 and 12 NYCRR 137-2.1 by failing to keep and/or furnish true and accurate payroll records for each employee from January 8, 2008 through July 2, 2009.

The petition alleges the orders are invalid or unreasonable because claimant did not work the hours and time periods set forth in the wage order, petitioner Angelo Georges was not personally liable as an employer under the Labor Law, and the orders are barred by the statute of limitations and laches.

SUMMARY OF EVIDENCE

Petitioners' Evidence

Testimony of Angelo Georges

Petitioner Angelo Georges was the owner of Michael's Restaurant in Long Island City, New York during the relevant time period. Georges testified that he was the individual at Michael's Restaurant responsible for paying the employees, including the claimant, Felix Luna, and that he would customarily pay the employees in cash.

Georges further testified that all of his employees, including the claimant, worked 40-hour weeks and that the claimant worked on and off at the restaurant over the course of several years, working five days per week. Georges further testified that he was not sure when the claimant began working at the restaurant, but that he last worked there about seven years ago, in 2007.

Georges he did not keep records of the hours worked by claimant, but rather attempted to compile the requested records, after the fact, when DOL requested them during its investigation. Georges testified that due to delay by DOL, too much time had elapsed for him to recall the specific facts and therefore he was not able to rebut the allegations made by the Commissioner. Georges also explained that due to the amount of time the DOL had allowed to pass after the claim was filed against him, it was impossible for him to adequately prepare his case because he

was no longer able to call other employees of the restaurant that would have been able to confirm that claimant was no longer working for petitioners during the period covered by the order.

Respondent's Evidence

Testimony of Felix Luna

The claimant, Felix Luna, testified Georges hired him in 2000 to work as a "Grillman" at the restaurant, that he was supervised and paid exclusively by Georges, and that Georges never gave him a wage statement with his pay. Luna further testified that he always worked 10 hours per day, six days per week, working weekdays from 11:00 a.m. to 9:00 p.m., and on weekends from 9:00 a.m. to 9:00 p.m., with Tuesdays off. Luna testified he was given one hour for lunch on weekdays and 30 minutes for lunch on weekends.

Luna testified he had a good relationship with Georges, and never complained to him about his pay. Luna filed a claim with DOL on June 2, 2010 and stopped working for the petitioner in July 2009. Luna testified, he was told by a DOL representative, at the time he filed his claim, that he should be patient because the investigation could take some time.

Testimony of Labor Standards Investigator Amber Odierno

DOL Labor Standards Investigator Amber Odierno testified about DOL's investigation of petitioners and its calculation of wages owed to claimant. Investigator Odierno testified that she did not use the records submitted to the DOL by the petitioners' attorney to calculate the underpayment because they were incomplete. Instead, she relied on the claim filed by Luna.

Investigator Odierno testified that the DOL calculated the claimant's underpayment from January 8, 2008 through July 2, 2009, based on the six year statute of limitations, for recovery of unpaid wages against an employer. She further testified that she calculated that Luna had worked 59 hours per week during that time period, and was underpaid \$5.00 per hour for 19 hours of overtime worked per week.

Investigator Odierno explained that three and one-half years elapsed between the date Luna filed his claim with DOL on June 2, 2010, and January 9, 2014, the date the DOL notified petitioners of the claim. This delay was due to a backlog of investigations in DOL's New York City office.

ANALYSIS

Burden of Proof

The Board's Rules provide that "every allegation of a proceeding shall be upon the person asserting it" (12 NYCRR 65.30). The petitioners' burden of proof in this matter is to establish by a preponderance of 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).

Employer Status

The individual petitioner, Angelo Georges, alleges he is not claimant's employer, and therefore not liable under the orders. "Employer" as used in Article 19 of the Labor Law includes "any individual . . . acting as an employer" (Labor Law § 651 [6]) and "employee" includes "any individual employed or permitted to work by an employer" in any non-exempt occupation (Labor Law § 651 [5]). "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 § 203 [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), the Second Circuit Court of Appeals stated that 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]).

The claimant credibly testified without rebuttal that Georges hired him and supervised his work, and Georges, himself, testified that he paid the claimant. Georges, therefore, is claimant's employer as a matter of economic reality.

Penalty Order

The penalty order finds that petitioners were requested to provide payroll records for the claimant for the period January 8, 2008 through July 2, 2009. The Commissioner determined that petitioners violated Labor Law § 661 and 12 NYCRR 137-2¹ by failing to keep and/or furnish true and accurate payroll records for each employee, and assessed a \$1,000.00 civil penalty.

Article 19 of the Labor Law requires employers in the restaurant industry to maintain records of, among other things, the daily and weekly hours worked by each of employee and the amount of the gross and net wages paid (Labor Law § 661; 12 NYCRR 137-2.1), and to provide

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

to each employee with each payment of wages a statement listing hours worked, rates paid, gross wages and net wages paid (12 NYCRR 137-2.2).

Georges testified that he did not keep or maintain contemporaneous records of when or how long the claimant worked at the restaurant, but rather attempted to create them in response to DOL's investigation, and Investigator Odierno testified that the records presented by petitioners were incomplete and did not comply with the records keeping requirements. Based on this, DOL's determination that petitioners violated Labor Law § 661 and 12 NYCRR 137-2.1 is reasonable and the penalty order is affirmed.

Wage Order

The wage order finds that petitioners failed to properly pay overtime wages to claimant in the amount of \$7,410.00 for the time period from January 8, 2008 to July 2, 2009. The amount of unpaid wages determined by DOL was based on the claim filed by Luna because, as discussed above, petitioners failed to maintain required wage and hour records.

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 at 851; *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.* 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).

In the absence of required payroll records, we find petitioners failed to meet their burden of proof to show that the calculation of unpaid wages made by respondent was unreasonable. The calculations were based on the claimant’s statement, which was the best available evidence, and was confirmed at hearing by his credible testimony.

We reject petitioners’ argument that the orders are barred by the statute of limitations and laches. Petitioners allege that the statute of limitations under Article 19 of the Labor Law is calculated from the date the orders are issued. However, Labor Law § 663 (3) provides that the statute of limitations is tolled from the date an employee files a complaint with DOL. Since the claim in this matter was filed on June 2, 2010, and the wages the Commissioner seeks to recover are well within the six year period preceding that date, the orders are not barred by the statute of limitations.

We likewise reject petitioners' argument that the orders are barred by laches. Petitioners allege that unreasonable administrative delay prejudiced the petitioners. While there is no dispute that DOL did not notify petitioners of Luna's claim until some three and a half years after it was filed, we find no prejudice to petitioners where the wages sought were earned within six years of the date petitioners were notified of the claim and within the statutory period for which petitioners were mandated to maintain records of the hours worked and wages paid to claimant (see *Matter of Aufrichtig et al.*, PR 11-260 [June 10, 2015]).

Liquidated Damages

Labor Law § 663 (2) provided at the time the minimum wage order was issued that unless the employer provides a good faith basis to believe its underpayment was in compliance with the law, the DOL may collect liquidated damages from the petitioners up to 100% of the amount of the underpayment that was found due. Petitioners presented no evidence to demonstrate that the liquidated damages assessed by DOL were unreasonable or that a good faith basis existed to believe its underpayment was in compliance with the law. The imposition of liquidated damages in the amount of 25% is affirmed.

Civil Penalty

Labor Law § 218 requires the Commissioner to assess a penalty in cases where he finds that an employer has violated a provision of Article 19. Here the wage order issued by the Commissioner assessed a civil penalty of 100%. Labor Law § 218 (1) provides in relevant part:

“In assessing the amount of the penalty, due consideration shall be given 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 the failure to comply with recordkeeping or other non-wage requirements”.

Petitioners objected to the appropriateness of the civil penalty. Because the Commissioner presented no evidence of the considerations used to assess the 100% civil penalty in the wage order, we revoke it.

Interest

Labor Law § 219 (1) provides that when the Commissioner determines that the wages are due, then the order directing payment shall include: “interest at a 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.” Therefore, the Board finds an assessment of interest at sixteen percent per annum to be fair and reasonable and affirms the findings of the Commissioner.

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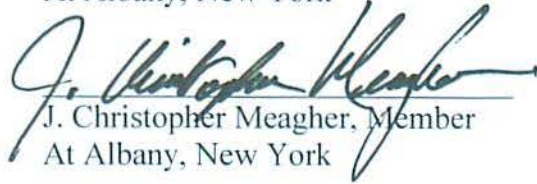
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NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The wage order is affirmed with respect to wages due, liquidated damages, and interest, and revoked with respect to the civil penalty; and
2. The penalty order is affirmed; and
3. The petition for review be, and the same hereby is, denied.



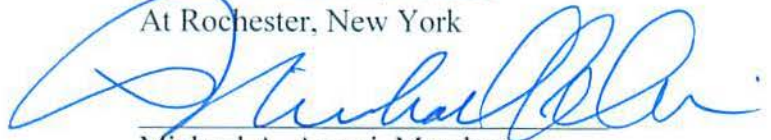
Vilda Vera Mayuga, Chairperson
At Albany, New York



J. Christopher Meagher, Member
At Albany, New York

Absent

LaMarr J. Jackson, Member
At Rochester, New York



Michael A. Arcuri, Member
At Albany, New York

Dated and signed by the Members
of the Industrial Board of Appeals
on October 28, 2015.