STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of:	:	
ALESSANDRO ALTIGIERI AND BACI DA ROMA LLC (T/A CARBONE RESTAURANT),	:	
Petitioners,	:	DOCKET NO. PR 15-008
To Review Under Section 101 of the Labor Law: An Order to Comply with Article 19, an Order to Comply with Article 6, and an Order Under Article 19 of the Labor Law, all dated November 6, 2014,	:	RESOLUTION OF DECISION
- against -	:	
THE COMMISSIONER OF LABOR,	:	
Respondent.	:	

APPEARANCES

DiPasquale Law Group, New York (*James D. DiPasquale* of counsel), for petitioners.

Pico P. Ben-Amotz, General Counsel, NYS Department of Labor, Albany (*Roya Sadiqi* of counsel), for respondent.

WITNESSES

Petitioner Alessandro Altigieri, Daniel Cruz-Mendez, and Gustavo Galindo-Castillo, for petitioners.

Yssmar Peralta and Labor Standards Investigator Dawn Hughes, for respondent.

WHEREAS:

On January 9, 2015, petitioners Alessandro Altigieri and Baci Da Roma (T/A Carbone Restaurant) filed a petition with the Industrial Board of Appeals seeking review of three orders issued by respondent Commissioner of Labor on November 6, 2014. The Commissioner answered on May 4, 2015.

Upon notice to the parties, a hearing was held on January 25, 2016, and continued on March 21, 2016, in New York, New York, before Vilda Vera Mayuga, Chairperson of the Board and designated hearing officer in this proceeding. The parties were afforded a full opportunity to present documentary evidence, examine and cross-examine witnesses, and make statements

relevant to the issues. After petitioners' direct case, respondent moved to dismiss the petition for review on grounds that petitioners failed to establish a prima facie case or otherwise meet their burden of proof that the orders are invalid or unreasonable. For reasons discussed below, we grant respondent's motion and dismiss in total the petition for review.

The order to comply with Article 19 of the Labor Law (minimum wage order) directs payment of minimum wages due and owing to claimant Yssmar Peralta in the amount of $30,037.70 for the period from October 9, 2008, through October 2, 2010, and directs payment of minimum wages due and owing to claimant Heriberto Torres in the amount of $676.44 for the period from October 25, 2010, through December 25, 2010. The order assesses interest continuing thereon at the rate of 16% calculated to the date of the order in the amount of $19,866.66, 25% liquidated damages in the amount of $7,678.54, and a 100% civil penalty in the amount of $30,714.14. The total amount due is $88,973.48.

The order to comply with Article 6 of the Labor Law (wage order) directs payment of unlawful tip appropriations due and owing to claimant Peralta in the amount of $2,439.84 for the period from October 9, 2008, to October 2, 2010, and assesses interest continuing thereon at the rate of 16% calculated to the date of the order in the amount of $1,579.68, 25% liquidated damages in the amount of $609.96, and a 100% civil penalty in the amount of $2,439.84. The total amount due is $7,069.32.

The order under Articles 19 of the Labor Law (penalty order) assesses a civil penalty in the amount of $1,000.00 for each of the following counts for the period from October 9, 2008, through November 15, 2010: (1) violation of Labor Law § 661 and 12 NYCRR 137-2.1 by failing to keep and / or furnish true and accurate payroll records for each employee; and (2) violation of Labor Law § 661 and 12 NYCRR 137-2.2 by failing to provide each employee complete wage statements with every payment of wages. The total amount due is $2,000.00.[1]

The petition contends that the orders under review as they relate to claimant Yssmar Peralta are unreasonable or invalid because (1) until June 29, 2009, Peralta was an independent contractor and (2) at all times during the claim period, petitioners paid Peralta all wages due and owing. Petitioners have waived all other issues or objections pursuant to Labor Law § 101 (2). As discussed below, we grant respondent's motion to dismiss the petition in its entirety for petitioners' failure to make a prima facie case upon which we can find the orders unreasonable or invalid.

SUMMARY OF EVIDENCE

Testimony of Petitioner Alessandro Altigieri

Petitioner Alessandro Altigieri testified that he is the owner of Carbone Restaurant. In 2008, the restaurant had two to three employees, depending on the time of year. In a typical day, the restaurant would have one person waiting on the restaurant's five tables, while two staff members worked in the kitchen.

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

Altigieri first met claimant Peralta in approximately September or October 2008. That same year, because of his difficulty speaking English, Altigieri asked Peralta, who speaks English, Italian, and Spanish, if she could "help [him] initially at the restaurant with the phone or translate the language." Altigieri testified that Peralta would answer the telephone, converse with clients, and help with other tasks around the restaurant as needed. Altigieri further testified that he was "trying to encourage [Peralta] and teach her a job. . . . It's not just to bring a plate and take it back, it's about learning and knowing a menu."

Peralta was a student; when she had "free time" she would come to the restaurant to "help" for two-to-three hours. At other times she would work five or six hours "very often." She had no set schedule—"she would come in and leave as it was convenient for her." Altigieri would pay Peralta by check for time worked, but he would sometimes give her money in cash. Altigieri accompanied her to open a bank account in her name in which to deposit checks he issued to her.

In 2009 and 2010, Peralta worked as a waitress. The restaurant had a daily lunch shift from "midday" to 4:00 p.m. and a dinner shift from 4:00 p.m. to 11:00 p.m. The restaurant was closed on Sundays. In 2009, Peralta would work weekly two to three shifts. There were periods in which Peralta would not work in the restaurant for two to three months while she had exams or attended to other personal matters. After interpersonal difficulties between Altigieri and Peralta in October 2009, Peralta did not return to work at the restaurant for "four or five months." In 2010, Peralta started working at the restaurant again. She would "take a few shifts some days," but she was also working in other restaurants. Peralta quit her employment at the restaurant in approximately October 2010.

Testimony of Daniel Cruz-Mendez

Daniel Cruz-Mendez testified that he worked at Carbone Restaurant as "kitchen help" for seven years ending in December 2011. He worked weekly between five or six days for between 38 and 40 hours mostly during the day on weekdays.

Cruz-Mendez first met Peralta when she began working at the restaurant as Altigieri's "interpreter" in approximately 2007. She also helped Altigieri with "paperwork." Altigieri described Peralta as a "helper," noting that if the restaurant was busy, she would "lend us a hand" by placing orders or helping the waiters. Peralta was sometimes at the restaurant "every day." At other times she was at the restaurant two or three days weekly. Cruz-Mendez never saw Peralta work as a waitress nor did he see Altigieri pay her when Altigieri paid the other employees. Cruz-Mendez last saw Peralta at the restaurant in approximately September 2010. Cruz-Mendez acknowledged that he had no personal knowledge of whether Altigieri kept records regarding Peralta's hours worked. Neither was Cruz-Mendez responsible for setting the schedules for Carbone's employees nor did he have personal knowledge of these schedules.

Testimony of Gustavo Galindo-Castillo

Gustavo Galindo-Castillo testified that he works for Altigieri as a dishwasher at Carbone Restaurant. Galindo-Castillo also prepares food, does food deliveries, and cleans. He began working for petitioners in 2008. He works a fixed, forty-hour schedule and is unaware of other

employees' schedules. His schedule varies between working the day and evening shifts. In addition to his regular salary, Galindo-Castillo would receive "some percentage" from tips, which was included in his paycheck. His paychecks would specify what portion of the check was regular salary and what portion was tips.

Galindo-Castillo met Peralta when she began "helping out" at the restaurant as an "interpreter/translator." Peralta would translate documents and interpret interactions between customers and Altigieri. Galindo-Castillo would speak with Peralta about whether deliveries had arrived and food delivery orders as they came into the restaurant. He explained that Peralta did not "work" at the restaurant: "she used to come, she used to eat, drink, sometimes get trained and go." Galindo-Castillo testified that Peralta could not serve customers because she had "no experience." He saw her at the restaurant once or twice weekly for "a few hours."

SCOPE OF REVIEW AND BURDEN OF PROOF

A hearing before the Board is original in nature (Board Rules of Procedure and Practice [Board Rules] [12 NYCRR] § 66.1 [c]). The Labor Law provides that an order of the Commissioner is presumed valid (Labor Law § 103 [1]). The party alleging error bears the burden of proving every allegation in a proceeding (State Administrative Procedure Act § 306 [1]; Board Rule [12 NYCRR] § 65.30; *Angello v Natl. Fin. Corp.*, 1 AD3d 850, 854 [3d Dept 2003]). A petitioner must prove that the challenged order is invalid or unreasonable by a preponderance of evidence (Labor Law § 101 [1]; *Matter of Ram Hotels, Inc.*, PR 08-078 at 24 [Oct. 11, 2011]). Should the Board find the order or any part thereof invalid or unreasonable, the Board must revoke, amend, or modify the order (Labor Law § 101 [3]).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Board makes the following findings of fact and conclusions of law pursuant to Board Rule (12 NYCRR) § 65.39. Petitioners failed to meet their burden to establish that the orders are invalid or unreasonable. As discussed below, we affirm the orders in their entirety.

Petitioners' evidence at hearing consisted solely of the testimony of three witnesses. At the conclusion of petitioners' case, respondent moved to dismiss the petition on grounds that petitioners failed to establish a prima facie case or otherwise meet their burden of proving that respondent's orders are invalid or unreasonable. A motion to dismiss made at the close of a petitioner's case "succeeds or fails on the evidence presented by that party" (*Benson v Cuevas*, 288 AD2d 542, 543 [2001]); *Matter of Mirza*, PR 15-031 at 3 [Jan. 25, 2017]; *Matter of Metz*, PR 09-390 at 5 [May 30, 2012]). The Board must consider only evidence petitioners offered before respondent moved the Board to dismiss the petition (*see Benson*, 288 AD2d at 543).

Minimum Wage Order

Claimant Peralta was Petitioners' "Employee" and Not an Independent Contractor

The challenged portion of the minimum wage order finds that petitioners violated Article 19 of the Labor Law by failing to pay claimant Peralta the statutory minimum wage for work performed from October 9, 2008, through October 2, 2010 (*see* Labor Law § 652 [1]; 12 NYCRR 137-1.2). Petitioners contend that from the start of the claim period until June 29, 2009, when Peralta began working for petitioners as a part-time waitress, petitioners were not Peralta's employer because she was an independent contractor and paid as such. At issue is whether petitioners were claimant Peralta's employers during the claim period making them liable for wages due and owing to claimant. On the evidence before us, we find that petitioners' argument lacks merit.

An "employer" is defined in Article 19 of the Labor Law as "any individual, partnership, association, corporation, limited liability company, business trust, legal representative, or any organized group of persons acting as employer" (Labor Law § 651 [6]). "Employed" is defined as "permitted or suffered to work" (*id.* § 2 [7]). The Federal Fair Labor Standards Act (FLSA) also defines "employ" to include "suffer or permit to work" (29 USC § 203 [g]). The Labor Law and the FLSA follow the same test to determine the existence of an employment relationship (*Ansoumana v Gristede's Operating Corp.*, 255 F Supp2d 184, 189 [SDNY 2003]).

The ultimate inquiry into whether an individual is an independent contractor is whether such person depends on someone else's business or is in business for herself (*Matter of Lasso*, PR 10-182, p. 5 [Apr. 29, 2013], *aff'd sub nom. Matter of Exceed Contracting Corp. v IBA*, 126 AD3d 575 [1st Dept 2015]). Accordingly, we must determine whether claimant Peralta was "wearing the hat of an independent enterprise" (*id.*, PR 10-182, p. 5, quoting *Boston Bicycle Couriers, Inc. v Division of Employment & Training*, 778 NE2d 964 [Mass. App. Ct. 2002]). To make this determination, we must consider several factors known as the "economic reality test." They include: (1) the degree of control exercised by the employer over the worker; (2) the worker's opportunity for profit or loss and her investment in the business; (3) the degree of skill and independent initiative required to perform the work; (4) the permanence or duration of the working relationship, and; (5) the extent to which the work is an integral part of the employer's business (*Brock v Superior Care, Inc.*, 840 F2d 1054, 1058-59 [2d Cir 1988]; *Matter of Lasso*, PR 10-182 at 5 [citing *Brock* factors as test to determine independent contractor status under the Labor Law]). The test is based on the totality of circumstances and no one factor is dispositive; "[t]he ultimate concern is whether, as a matter of economic reality, the workers depend upon someone else's business for the opportunity to render service or are in business for themselves" (*Superior Care*, 840 F2d at 1059). In applying the factors, the reviewing court is to be mindful that "the remedial nature of the statute . . . warrants an expansive interpretation of its provisions so they will have the widest possible impact in the national economy (citation omitted)" (*Herman v RSR Security Services, Ltd.*, 172 F3d 132, 139 [2d Cir 1999]).

Applying this test to the present case, we find that, as a matter of economic reality, claimant Peralta was petitioners' employee and not an independent contractor, and petitioners are responsible for wages owed. We address each of the *Brock* factors in reverse order.

Claimant Peralta was an employee in part because her work was "part of the integrated unit of production" (*Rutherford Food Corp. v McComb*, 331 US 722, 729 [1947]). Petitioner Altigieri is the owner and operator of Carbone Restaurant. As such he employs a wait staff and a kitchen staff. Petitioner Altigieri testified that, beginning in 2008, he asked Peralta to assist him in the restaurant with answering the telephone, speaking with customers, and assisting with other tasks around the restaurant as needed. His testimony is supported by Cruz-Mendez's and Galindo-Castillo's testimony, who both identified Peralta as Altigieri's "interpreter," but noted that she would assist with other tasks around the restaurant. Cruz-Mendez explained that Peralta would also help with paperwork, and Galindo-Castillo noted that she would help with food orders and deliveries. While petitioners allege that Peralta's services were not part of the customary business of operating a restaurant, work can be integral to a business even if the work is just one component of the business (*see e.g. Matter of Dewey*, PR 14-099 at 8 [Mar. 2, 2016] ["While petitioner's primary business may be building residential homes, the financial accounting necessary to operate that business for which claimant was hired to perform work was sufficiently integral to its operation as to be evidence of her status as an employee"]). We find claimant Peralta's duties of answering the telephone, taking food and delivery orders, and translating and interpreting for petitioner Altigieri are sufficiently integral to operating a restaurant as to be evidence of claimant Peralta's status as an employee and not an independent contractor.

As to the permanence or duration of the working relationship, we find that the intermittent character of the working relationship among petitioners and claimant Peralta was not related to claimant's independent business initiative. Petitioner Altigieri explained that Peralta was a student and would work for him at the restaurant on her "free time" or when it was convenient for her based on her study schedule. Petitioners offered no evidence that the business relationship was on a project basis or otherwise limited in duration other than due to Peralta's schooling or failure of the business relationship. That the intermittence of the business relationship was not a function of "operational characteristics intrinsic to the industry" is further evidence of claimant's status as an employee (*Brock*, 840 F2d at 1060–61).

The absence of claimant Peralta exercising independent business skills, judgment, and initiative point further in the direction of her economic dependence. While claimant Peralta performed translation and interpretation for petitioner Altigieri, which ostensibly involves independent skill, he also testified that he was "teach[ing] her a job." This was supported by Galindo-Castillo's testimony that Peralta had "no experience" and that she was at the restaurant to "get trained." As such, petitioners have presented no evidence that Peralta exhibited the indicia of a person in business for herself, such as possessing business cards or working remotely. To the contrary, petitioners' evidence, including that petitioner Altigieri accompanied Peralta to open a personal checking account in her name, underscores Peralta's economic dependence upon petitioner.

The nature and extent of the relative investments of petitioners and claimant Peralta in the business and their respective opportunity for profit or loss does not support petitioners' contention that Peralta was an independent contractor. Petitioners offered no evidence to suggest that Peralta made material investments pursuant to her performing her duties that would show she was in business for herself. Instead, petitioners' evidence shows that Peralta performed work at the restaurant either at the request of petitioner Altigieri or in response to working conditions at the

restaurant as they played out in real time. Claimant's dearth of investment in the business and, as we discussed above, the fact that Peralta's work was in part devoted to her "learning and knowing a menu" limits her ability to make decisions or use independent skills and initiative, if any, to affect her opportunity for profit or loss.

While no single *Brock* factor is dispositive, the record before us fails to show that claimant Peralta, as a matter of economic reality, controlled meaningful aspects of her work such that it is possible to view her as conducting her own business from the start of the claim period until June 29, 2009, and thus shifting the burden to respondent. While petitioner Altigieri set no work schedule for Peralta, allowing her to come and go as she pleased, the fact that Peralta could control the hours during which she worked is largely insignificant in determining her status (*see Matter of Kennelly*, PR 14-271 at 7 [July 13, 2016]; *Brock*, 840 F2d at 1060). Considering the discussion set out above, we find that petitioners have not met their burden of showing that claimant Peralta controlled meaningful aspects of her work sufficient to support her economic independence from petitioners.

We find, by petitioners' own evidence, that claimant Peralta was "permitted or suffered to work" by petitioners, and she was thereby "employed" (*see* Labor Law § 2 [7]). Based on the totality of circumstances, we find that as a matter of economic reality claimant Peralta was dependent upon petitioners as her employers from the start of the claim period until June 29, 2009, and thereby petitioners are responsible for any wages owed during the period at issue.

Petitioners Failed to Sufficiently Challenge Respondent's Wage Calculations

The minimum wage order finds petitioners owes claimant Peralta $30,037.70 in unpaid wages. Article 19 of the Labor Law requires employers to pay not less than the applicable minimum wage to each covered employee (Labor Law § 652 [1]; 12 NYCRR 137-1.2). Article 19 also requires employers to maintain for six years certain records of the hours their employees worked and the wages they paid them (Labor Law § 661; 12 NYCRR 137–2.1). The records must show for each employee, among other things, the number of hours worked daily and weekly, the amount of gross wages, deductions from gross wages, allowances claimed, if any, and money paid in cash (Labor Law § 661; 12 NYCRR 137–2.1 [a]).

In the absence of accurate records required by the Labor Law, an employer bears the burden of proving that the disputed wages were paid (Labor Law § 196-a). In a proceeding challenging respondent's wage calculation absent records required by the Labor Law, 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 employee's evidence (*Anderson v Mt. Clemens Pottery* [*Mt. Clemens Pottery*], 328 US 680, 687–88 [1949]; *Matter of Mid-Hudson Pam Corp. v Hartnett*, 156 AD2d 818, 821 [3d Dept 1989]). Given the interrelatedness of wages and hours, the same burden shifting applies to wages and requires the employer to prove the "precise wages" paid for that work or to negate the inferences drawn from the employee's credible evidence (*Doo Nam Yang v ACBL Corp.*, 427 F Supp 2d 327, 332 [SDNY 2005]; *Matter of Kong Ming Lee*, PR 10-293 at 16 [April 20, 2014]).

Having failed to produce legally sufficient payroll records as required by the Labor Law, respondent's calculation of wages must be credited unless petitioners meet their threshold burden to negate the reasonableness of the Commissioner's determination or prove the "precise" extent of uncompensated work, if any (*Mt. Clements Pottery Co.*, 328 US at 687). On the facts before us, petitioners failed to present sufficient reliable and credible evidence to satisfy their burden.

Through the testimony of three witnesses, petitioners sought to challenge respondent's wage calculations as unreasonable. Petitioner Altigieri testified that Peralta would work when "it was convenient for her." He further testified that until she began working for petitioners as a waitress in 2009, she would "help" at the restaurant between two and six hours "very often." As a waitress, Peralta worked two to three shifts weekly, with a shift running from "midday" to 4:00 p.m. or 4:00 p.m. to 11:00 p.m. Altigieri further explained that there was one period in 2009 in which Peralta did not work for two to three months. On a separate occasion, in 2009, Peralta did not work for petitioners for four or five months. In 2010, Peralta would "take a few shifts some days." Although Cruz-Mendez acknowledged that he primarily worked the day shift and had no actual knowledge of Peralta's work schedule or whether petitioner Altigieri maintained a record of her hours, Cruz-Mendez testified that Peralta was sometimes at the restaurant "every day," while at other times she was at the restaurant two or three days weekly. Galindo-Castillo testified that he saw Peralta at the restaurant once or twice weekly for "a few hours," yet he failed to explain whether this was true for the claim period or a lesser timeframe. Furthermore, he testified that he was unaware of other employees' work schedules. We have repeatedly held that such general testimony and conjecture is insufficient to meet an employer's burden of proof in the absence of legally sufficient employee records (*see e.g. Matter of Ahmed*, PR 12-081 at 9 [April 13, 2016]; *Matter of Young Hee Oh*, PR 11-017 at 12 [May 22, 2014]). We find that petitioners' evidence is too general, incomplete, and contradictory to shift the burden to respondent (*see Mt. Clemens Pottery,* 328 US at 687).

The minimum wage order also finds that petitioners violated Article 19 of the Labor Law by failing to pay claimant Torres the statutory minimum wage for work performed from October 25, 2010, through December 25, 2010 (*see* Labor Law § 652 [1]; 12 NYCRR 137-1.2). Because petitioners failed to challenge the minimum wage order as it applies to claimant Torres or offer proof of payment relating to his claim, we affirm claimants' claims for unpaid wages. Petitioners did not challenge the interest, liquidated damages, or civil penalty assessed in the minimum wage order. We affirm the minimum wage order in total.

Wage Order

The wage order finds that petitioners owe claimant Peralta $2,439.84 in unlawful tip appropriations. Labor Law § 196-d prohibits an employer from demanding or accepting, directly or indirectly, any part of the gratuities received by an employee, or to retain any part of a gratuity or any charge purported to be a gratuity for an employee. Galindo-Castillo testified that, in addition to his regular wages, he would receive "some percentage" from tips, which were included in his paycheck. He explained that his paychecks would specify what portion of the check was his regular salary and what portion was tips. Petitioners, however, put forward no evidence of how tips were divided and among whom they were divided. Furthermore, whether Galindo-Castillo was paid tips owed him is not dispositive as to whether petitioners unlawfully appropriated tips with respect to

claimant Peralta. On the evidence before us, petitioners failed to shift the burden to respondent. Petitioners did not challenge the interest, liquidated damages, and civil penalty assessed in the wage order. Accordingly, we affirm the wage order in its entirety.

Penalty Order

The penalty order finds that petitioners violated Article 19 of the Labor Law by failing to keep and / or furnish true and accurate payroll records for each employee (Labor Law § 661; 12 NYCRR 137-2.1) and by failing to provide each employee a complete wage statement with every payment of wages (Labor Law § 661; 12 NYCRR 137-2.2). Petitioners did not challenge the penalty order. We, therefore, affirm the penalty order.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The minimum wage order is affirmed; and

2. The wage order is affirmed; and

3. The penalty order is affirmed; and

4. The petition for review is denied.

Vilda Vera Mayuga, Chairperson

J. Christopher Meagher, Member

Michael A. Arcuri, Member

Molly Doherty, Member

Gloribelle J. Perez, Member

Dated and signed by the Members
of the Industrial Board of Appeals
in New York, New York, on
May 3, 2017.

claimant Peralta. On the evidence before us, petitioners failed to shift the burden to respondent. Petitioners did not challenge the interest, liquidated damages, and civil penalty assessed in the wage order. Accordingly, we affirm the wage order in its entirety.

Penalty Order

The penalty order finds that petitioners violated Article 19 of the Labor Law by failing to keep and / or furnish true and accurate payroll records for each employee (Labor Law § 661; 12 NYCRR 137-2.1) and by failing to provide each employee a complete wage statement with every payment of wages (Labor Law § 661; 12 NYCRR 137-2.2). Petitioners did not challenge the penalty order. We, therefore, affirm the penalty order.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The minimum wage order is affirmed; and

2. The wage order is affirmed; and

3. The penalty order is affirmed; and

4. The petition for review is denied.

Vilda Vera Mayuga, Chairperson

J. Christopher Meagher, Member

Michael A. Arcuri, Member

Molly Doherty, Member

Gloribelle J. Perez, Member

Dated and signed by a Member
of the Industrial Board of Appeals
in Utica, New York, on
May 3, 2017.