STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of:	:	
CAROL A. BENEKE AND KENNETH J. BENEKE AND WILLOW BROOK FARMS, LLC (T/A WILLOWBROOK FARM),	:	
Petitioners,	:	DOCKET NO. PR 15-033
To Review Under Section 101 of the Labor Law: An Order to Comply with Article 19-A of the Labor Law, and An Order Under Article 19-A of the Labor Law, both dated July 15, 2016;	:	RESOLUTION OF DECISION
- against -	:	
THE COMMISSIONER OF LABOR,	:	
Respondent.	:	

APPEARANCES

Davis & Trotta, Millerton (*Robert D. Trotta* of counsel), for petitioners.

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

WITNESSES

Lee McEnroe, Carol A. Beneke, Kenneth J. Beneke, and Labor Standards Investigator David Carey, for petitioners.

Supervising Labor Standards Investigator Jennie Schleimer, for respondent.

WHEREAS:

The petition in this matter was filed with the Industrial Board of Appeals (Board) on February 5, 2015, seeking review of an order to comply with Article 19 of the Labor Law and an order under Article 19-A of the Labor Law issued by respondent Commissioner of Labor against petitioners Carol A. Beneke and Kenneth J. Beneke and Willow Brook Farms, LLC (T/A Willowbrook Farm) on November 18, 2014.

Respondent moved on March 31, 2015 to dismiss the petition as untimely because it was filed more than 60 days after the orders were issued (*see* Labor Law § 101 [1]). Because petitioners

demonstrated to the Board that they were out of the state during the 60-day statute of limitations period without access to their mail, we denied respondent's motion to dismiss and deemed the petition as timely filed, and respondent filed an answer to the petition on October 16, 2015.

Respondent moved on March 30, 2016, to amend the order to comply to reflect it was an order to comply with Article 19-A, not Article 19. We granted the motion to amend by resolution of decision, dated May 25, 2016. The amended orders were reissued by respondent on July 15, 2016, and served on petitioners the same day. Petitioners filed an amended petition on October 31, 2016, and a second amended petition on December 6, 2016. Respondent filed her answer on January 3, 2017.

Upon notice to the parties, a hearing was held in this matter on May 17 and August 1, 2017, in Albany, New York, before Devin A. Rice, Counsel to the Board, and designated hearing officer in this proceeding. Each party was afforded a full opportunity to present documentary evidence, to examine and cross-examine witnesses, to make statements relevant to the issues raised in the proceeding, and to file legal briefs.

The order to comply with Article 19-A (minimum wage order) under review directs compliance with Article 19-A of the Labor Law and payment to the Commissioner for unpaid minimum wages due and owing to Alberto De La Cruz Martinez for the time period from June 10, 2010 to January 13, 2014, in the amount of $12,412.95, with interest continuing thereon at the rate of 16% calculated to the date of the order in the amount of $1,681.36, 25% liquidated damages in the amount of $3,103.24, and assesses a 50% civil penalty in the amount of $6,206.47, for a total amount due of $23,404.02.

The order under Article 19-A of the Labor Law (penalty order) assesses a $1,000.00 civil penalty for violating Labor Law § 673 (2) and 12 NYCRR 190-8.2 by failing to keep and/or furnish true and accurate payroll records for each employee from on or about June 10, 2010 through January 13, 2014.

Petitioners allege the orders are invalid or unreasonable because Martinez worked fewer hours (62 ½) per week than determined by respondent (66); the housing allowance was incorrectly calculated by respondent; credit was not given for one-week paid vacation per year, bonuses, and market value of beef and milk provided to Martinez; and that the housing allowance for the farm industry is unreasonable and invalid because it has not been updated since 1990.

SUMMARY OF EVIDENCE

Petitioners Carol A. and Kenneth J. Beneke own and operate Willowbrook Farm, a dairy farm in Dutchess County, incorporated as Willowbrook Farms, LLC. Carol Beneke is the bookkeeper for the farm, and her son, Kenneth Beneke, manages and works on the farm. Petitioners testified that the farm employed approximately four to five workers during the period relevant to this proceeding, including claimant Alberto De La Cruz Martinez, who worked as a milker. Martinez lived on the farm in housing provided by petitioners that he shared with at least one other employee. Petitioners paid Martinez $400.00 a week except for rare occasions when he worked extra hours and received $10.00 per hour for each extra hour worked. Petitioners paid for the utilities and heat at the house provided to Martinez and he had access to food grown on the

farm, including beef and milk. Real estate appraiser Lee McEnroe testified that the estimated rental value of the house was $700.00 a month on November 4, 2016, which was "not much different" from the rental value during the period Martinez lived there.

Carol Beneke testified that she did not supervise Martinez, did not know the actual hours he worked and did not check his hours, although her son did, and that his normal work week was 65 hours. She further testified that she wrote a letter to respondent stating that Martinez worked 65 hours a week. She also testified that Martinez had one week's paid vacation per year.

Kenneth Beneke testified that he was present every day at the barn, and supervised Martinez's work. Kenneth Beneke testified that there were two milkers responsible for milking 120 cows. Kenneth Beneke testified that the schedule for the milkers was to milk the cows from 4:00 a.m. to 7:00 a.m., eat breakfast from 7:00 a.m. to 8:00 a.m., feed the cows and clean from 8:00 a.m. to 12:00 p.m., eat lunch from 12:00 p.m. to 2:00 p.m., and milk the cows from 2:00 p.m. until "whatever time they were done milking," which was generally 6:00 p.m. Martinez had one day off per week and only worked seven hours on Sunday. According to Kenneth Beneke, Martinez worked no more than 62 ½ hours per week, which was less than the other milkers, because he often arrived 30 to 45 minutes late in the morning, but was otherwise a good and efficient employee.

Kenneth Beneke testified that the letter his mother sent to respondent stating Martinez worked 65 hours a week was not accurate, because the milkers were not scheduled to work until 6:30 p.m. as she had written. Kenneth Beneke further testified that he believed his mother's letter to respondent was based on what he had told her to be the maximum number of hours the milkers were supposed to work. Kenneth Beneke testified that the weekly wages were not adjusted if a worker came late or left early, "[e]verybody was paid a salary . . . we didn't really figure on hours . . . . We always figured in the housing as what we paid for the house on top of their wage," and further explained that "[i]f he worked an eight-hour day or an eleven-hour day or twelve-hour day, they all got paid the same."

Martinez and petitioners entered into a "farm worker agreement" on February 5, 2013, that among other things, stated Martinez's rate of pay was $7.25 an hour, with an $8.00 per day or $56.00 a week housing allowance, and a 65 hour per week work schedule. Carol Beneke testified that the hours listed in the agreement were the general hours the employees worked and that she got the $8.00 per day lodging amount from "farm credit," which she described as an agency that does bookkeeping for farms, including petitioners. Kenneth Beneke testified that petitioners had no written agreement with Martinez prior to respondent's investigation and that the $8.00 per day housing allowance was provided by either one of respondent's investigators or an agent from "farm credit."

Respondent's Division of Labor Standards investigated petitioners based on a complaint to respondent's Division of Immigrant Policies and Affairs of possible Labor Law violations at Willowbrook Farms. Investigators from respondent visited the farm on at least two occasions between October 2, 2012 and June 10, 2013. On June 10, 2013, David Carey, a Spanish speaking Labor Standards Investigator, interviewed Martinez at the farm. The handwritten English translation of the "narrative report" of the interview states:

"Alberto de la Cruz Martinez
"DOH: 4/2007
"ROP: $400 per week, in cash[,] lives on the farm
"Time: no time clock or time sheet used
Hours: Friday off
Mon, Tues, Wed, Thurs, Sat/Sun and half day on Sunday
4 am – 7:30 am
8am-12pm
2:00 pm – 6:30 p.m.

"There is no rent charged.
Has to buy his own food.
No illegal deductions.
Paid weekly in cash.

"Employee signed on 6/10/13."

Carey testified that his only role in the investigation was to interview workers. Carey was not involved in determining the amounts owed to Martinez.

Supervising Labor Standards Investigator Jennie Schleimer testified she did the computations based on the information from Carey's interview of Martinez. Schleimer explained that "everybody agreed" that Martinez worked 66 hours a week, and that his rate of pay was $400.00 per week. She testified that she used the minimum wage order for the farm industry, including a housing allowance of $12.65 per week, because Martinez lived with other workers, to determine the amount petitioners had underpaid Martinez during the relevant period. Schleimer computed the underpayment based on Martinez's statement to Carey because petitioners did not have any time records to show Martinez worked fewer hours, and, in fact, a letter from petitioners, written by Carol Beneke, indicated Martinez worked "close to" the total number of hours per week that Martinez claimed.

Schleimer testified that the penalty order was issued against petitioners because they did not keep daily records of the hours Martinez worked. She testified that the 50% civil penalty in the minimum wage order was "on the lower side" because she did not believe petitioners intended to violate the law and were cooperative during respondent's investigation.

ANALYSIS

The Board makes the following findings of fact and conclusions of law pursuant to Board Rules of Procedure and Practice (Rules) (12 NYCRR) § 65.39.

Burden of proof

Petitioners' burden of proof in this matter is 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; Board Rules [12 NYCRR] § 65.30; *see also Matter of Ram Hotels, Inc.*, PR 08-078, at 24 [2011]). We find petitioners met their burden of proof

to show the minimum wage order must be modified, but failed to show the penalty order is unreasonable.

The penalty order is affirmed as petitioners failed to maintain required records

The penalty order assesses a $1,000.00 civil penalty for violating Labor Law § 673 (2) and 12 NYCRR 190-8.2 by failing to keep and/or furnish true and accurate payroll records for each employee from on or about June 10, 2010 through January 13, 2014. Article 19-A of the Labor Law, entitled "Minimum Wage Standards and Protective Labor Practices for Farm Workers," requires employers to maintain for no less than three years, payroll records that show for each employee, among other things, the total number of hours worked daily and weekly, gross wages, deductions from gross wages, allowances claimed as part of the minimum wage, and the wage rate (12 NYCRR 190-8.2 [a]). There is no dispute that during the relevant period petitioners failed to maintain the records required by the Labor Law. The penalty order is affirmed.

The minimum wage order is modified

Article 19-A of the Labor Law provides that farm workers must be paid for each hour worked a wage of no less than the state minimum wage (Labor Law § 673 [1]). The state minimum wage rates applicable to this proceeding were $7.25 an hour from June 10, 2010 to December 30, 2013, and $8.00 an hour from December 31, 2013 to January 13, 2014 (12 NYCRR 190-1.3 [2], [3] [effective until Dec. 30, 2016]). An allowance for housing may be considered as part of the minimum wage for year- round employees (12 NYCRR 190-3.1 [b] [2]). 12 NYCRR 190-3.1 (b) (2) provides in relevant part that the lodging allowance for farm workers is:

> "$18.95 per week on and after January 1, 1992 for single occupancy or . . . $12.65 per week on and after January 1, 1992 per employee for multiple occupancy. When a house or apartment and utilities are furnished by an employer to an employee, a fair and reasonable amount may be allowed for such facilities, which amount shall not exceed the lesser of either the reasonable value of comparable facilities in the locality, or . . . . $5.00 a day on and after January 1, 1992 for an individual employee and . . . $8.00 a day on and after January 1, 1992 when the employee's family resides with the employee."

The minimum wage order finds petitioners owe Alberto De La Cruz Martinez $12,412.95 in minimum wage underpayments for the period from June 10, 2010 to January 13, 2014. In the absence of required 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* 21 NY3d 858 [2013]). 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 (*Ram Hotels, supra*). Where no wage and hour records are available, respondent 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).

Petitioners denied that Martinez worked the number of hours claimed per week. We find that although petitioners did not maintain legally required records, they met their burden of proof to show that Martinez did not regularly work 66 hours per week as determined by respondent. Respondent determined, based on Carey's notes of his June 13, 2013 interview of Martinez, that Martinez worked 66 hours per week. Kenneth Beneke, however, provided credible testimony that he was present at the barn each day, described in detail the daily hours worked by the milkers, and that Martinez, who regularly arrived 30 to 45 minutes after the scheduled start time, did not work more than 62 ½ hours per week. Kenneth Beneke also testified credibly that the general work schedule for the milkers Carol Beneke provided to respondent indicating Martinez worked 65 hours per week was not accurate because the milkers were not scheduled to work until 6:30 p.m., as she had written. We credit Kenneth Beneke's testimony, which was not rebutted by respondent, and find Martinez worked 62 ½ hours per week. We also credit Carol Beneke's unrebutted testimony that Martinez had one week of paid vacation per year.

Petitioners, however, failed to prove that the housing allowance used by respondent in determining the underpayment was unreasonable. Because the housing provided by petitioners to Martinez was shared with other employees, it was "multiple occupancy" and the maximum allowance permitted was $12.65 per week (12 NYCRR 190-3.1 (b) (2)]). Petitioners' allegation that the housing allowance itself is unreasonable because it has not been updated since 1990 to account for inflation is time-barred by Labor Law § 676 (2), which sets the statute of limitations for appealing regulations issued pursuant to Article 19-A as 45 days after the publication of the notice of the regulation.

Petitioners also failed to meet their burden that they are entitled to an allowance for meals under 12 NYCRR 190-3.1 (a) or for payments in kind pursuant to 12 NYCRR 190-3.1 (c). Petitioners credibly testified that Martinez had access to milk and beef and was free to take as much as he wanted, but provided no sufficient evidence of the amount Martinez took or its value. Further, to qualify for a meal allowance, petitioners needed to prove that any meals provided contained at least one type of food from each of all four of the food groups -- fruits or vegetables; cereals, bread, pasta or potatoes; eggs, meat, fish or poultry; and milk, tea or coffee (12 NYCRR 190-1.3 [j]). Further, as discussed above, petitioners did not maintain records of the allowances claimed as part of the minimum wage as required by law (12 NYCRR 190-8.2 [a] [7]; *Matter of Nick Malegiannakis et al.*, PR 09-254 at p9 [May 30, 2012] [reasonable for DOL to not include allowances where legally required records not kept by the employer]). We find respondent's decision not to credit petitioners for meal allowances and payments in kind was reasonable.

The order, therefore, must be modified to reduce the wages due and owing to $6,062.58 based on 62 ½ hours per week at the applicable state minimum wage less $12.65 per week for

housing and a $400.00 per week credit for wages paid, with an additional credit of $400.00 for paid vacation for the years 2010, 2011, 2012, and 2013.[1]

Civil penalty

Labor Law § 218 (1) requires respondent to assess a civil penalty "not to exceed 200% if an employer has previously violated the Labor Law or the violation is egregious or willful, or an appropriate civil penalty where the employer has not previously violated the Labor Law and the violation is not willful or egregious. In assessing the amount of the civil penalty for employers who have not previously violated the Labor Law and whose violation was not willful or egregious, respondent shall give "due consideration to the size 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." Respondent, in this case, determined that the appropriate civil penalty is 50% of the wages found due. Supervising Investigator Schleimer adequately and credibly explained the bases for the civil penalty and her consideration of the statutory factors to support a 50% civil penalty, including that the violation was not willful. We affirm the civil penalty, which, in any event, was not challenged in the petition and was thereby waived pursuant to Labor Law § 101 (2). The civil penalty, however, is reduced to $3,031.29, which is 50% of the modified amount of minimum wages due.

Liquidated damages

Labor Law § 218 (1) requires respondent to include liquidated damages in the amount of 100% of the wage underpayments found due when issuing an order to comply with Article 19-A of the Labor Law. Labor Law § 681 (2), however, provides that when respondent brings "any legal action" necessary to collect an employee's wage claim, the employer shall be required to pay liquidated damages in the amount of 25% if the violation was willful (*compare* Labor Law § 198 [1-a] [up to 100 % liquidated damages for violations of Article 6 of the Labor Law unless the employer proves a good faith belief that the underpayment was in compliance with law]). We do not need to decide in this case, however, which statute or statutes related to liquidated damages apply to farm workers under Article 19-A, because petitioners did not challenge the liquidated damages in their petition and the issue was therefore waived under Labor Law § 101 (2). Liquidated damages in the amount of 25% of the unpaid wages are affirmed, but reduced to $1,515.64 based on the modified amount of minimum wages due and owing.

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." The Commissioner's determination of interest due was required by statute and did not exceed the statutory limit, and is, therefore, not unreasonable or invalid, but must be recalculated based on the modified principal

[1] $7.25 x 62 ½ =$453.13 less $12.65 =$440.48 earned less $400.00 = $40.48 owed x 185 weeks = $7,487.88; plus $8.00 x 62 ½ = $500.00 less $12.65 = $487.35 earned less $400.00 = $87.35 owed x 2 weeks = $174.70; less $1,600.00 vacation.

amount of $6,062.58, and suspended from March 30, 2016, the date respondent moved to amend the orders, to July 15, 2016, the date the orders were reissued.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The minimum wage order is modified to reduce the wages due and owing to $6,062.58, to reduce the civil penalty to $3,031.29, to reduce liquidated damages to $1,515.64, and to recalculate interest on the modified principal amount consistent with this decision and suspended from the period from March 30, 2016 until July 15, 2016; and

2. The penalty order is affirmed; and

3. 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

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
March 7, 2018.

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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
March 7, 2018.