STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of: RAMON BENITEZ A/K/A RAYMOND BENITEZ AND CARORAY CORP., Petitioners, To Review Under Section 101 of the Labor Law: An Order to Comply with Article 6, and an Order Under Article 19 of the Labor Law, both dated February 5, 2015, - against - THE COMMISSIONER OF LABOR, Respondent.	:	DOCKET NO. PR 15-098 RESOLUTION OF DECISION

APPEARANCES

Ramon Benitez, petitioner pro se, and for Caroray Corp.

Pico P. Ben-Amotz, General Counsel, NYS Department of Labor (Benjamin T. Garry of counsel), for respondent.

WITNESSES

Petitioner Ramon Benitez, for petitioners.

Claimant Cherly Rosario and Labor Standards Investigator Nathan Lazelle, for respondent.

WHEREAS:

On April 6, 2015, petitioners Ramon Benitez A/K/A Raymond Benitez and Caroray Corp. filed a petition with the Industrial Board of Appeals (Board) seeking review of two orders issued by respondent Commissioner of Labor (Commissioner or DOL) on February 5, 2015. The Commissioner answered on May 13, 2015.

Upon notice to the parties, a hearing was held on September 10, 2015, and continued on October 21, 2015, 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.

The order to comply with Article 6 of the Labor Law (wage order) directs payment of wages due and owing to claimant Cherly Rosario in the amount of $8,450.00 for the period from October 15, 2013 through January 30, 2014, interest continuing thereon at the rate of 16% calculated to the date of the order in the amount of $1,374.23, 25% liquidated damages in the amount of $2,112.50, and a 125% civil penalty in the amount of $10,562.50. The total amount due is $22,499.23.

The order under Article 19 of the Labor Law (penalty order) assesses a civil penalty in the amount of $1,000.00 for violation of Labor Law § 661 and 12 NYCRR 142-2.6 for failing to keep and/or furnish true and accurate payroll records for each employee from October 15, 2013 through January 30, 2014.

Petitioners allege that claimant was paid all wages due and owing.

SUMMARY OF EVIDENCE

Testimony of Petitioner Ramon Benitez

Petitioner Ramon Benitez testified that claimant Cherly Rosario started working for him at his restaurant on or around October 15, 2013. Rosario would perform "some light duties," including helping Benitez "put some of the stuff together," for which they agreed he would pay her $500.00 weekly. After approximately one month, with only two employees, it became apparent that the restaurant could not sustain paying Rosario the weekly wage, so Benitez and Rosario verbally agreed to $300.00 weekly for completing the business's "paperwork" including payroll and an additional $100.00 weekly if she performed additional work from home. Rosario did not have regular work hours.

Benitez introduced into evidence a list provided by his bank of checks issued against his business account, which he explained show that he paid Rosario all wages she was due. The list includes a date, check number, and dollar amount for 12 individual checks, but does not indicate the reason for each check and to what each date corresponds. Benitez also introduced into evidence copies of five checks with dates ranging from December 16, 2013 through January 21, 2014[1] for varying amounts from $300.00 to $400.00 issued to the order of Rosario. Two checks include a notation with dates for December 2013, while the others read "payroll." The individual checks are reflected in the check list in evidence. Benitez further testified that, in addition to these checks, he would also deposit funds directly into Rosario's personal bank account. Benitez testified that what he has already paid Rosario "covers" the wages she claims are owed to her for work she performed between October 2013 and January 2014. Benitez did not maintain pay records because Rosario "[took] care of all the paperwork."

Benitez entered into evidence an August 16, 2013, "Placement & Processing Agreement" entered into between Hillside ATM & Communications and Caroray Corp. and a check stub for $500.00 issued to Rosario for an "ATM Placement Bonus." Benitez testified that without authorization Rosario entered into a contract with Hillside ATM to have an ATM machine installed

[1] One check is dated January 21, 2013, but we find this is a typographical error and was instead issued on January 21, 2014. Claimant testified that she started working for petitioners in July 2013, and the parties did not dispute it otherwise.

in the restaurant. Hillside ATM issued a check for $500.00 to Rosario as the signatory of the contract, which Rosario did not deposit in the restaurant's account. On January 14, 2014, Rosario quit her employment with Benitez.

Testimony of Claimant Cherly Rosario

Cherly Rosario testified that she began working for Benitez's restaurant on July 25, 2013. Benitez agreed that he would pay her a flat $650.00 weekly wage. In addition to handling payroll for the restaurant, Rosario also did business with vendors on Benitez's behalf, performed inventory, put together employee schedules, and, in consultation with Benitez, made personnel decisions. She would also cook, work the cash register, and do accounting for the restaurant. On Wednesdays, Rosario paid Benitez's employees, and when she would remind him that he needed to pay her too, he would reply: "oh, I cannot pay you because we have to pay the light bill or we have to pay this, we have to pay that, so wait two more days." Two days would pass, and Benitez would not pay Rosario. On January 30, 2014, Rosario spoke to Benitez seeking payment for hours worked. Benitez told her the business did not have money to pay her. She informed him she could no longer work for him without being paid.

Rosario testified that she received and cashed checks from petitioners as partial payment of wages due to her for time worked until October 15, 2013, and which were not included in the wage claim. Rosario did not recall receiving any payments related to the business directly into her bank account. Rosario also denied signing the Hillside ATM & Communications agreement but acknowledged that she received a check from Hillside and explained that Hillside sent a bonus check "to every person who opened an account and manager of the business who opened an account for them."

Testimony of Labor Standards Investigator Nathan Lazelle

Labor Standards Investigator Nathan Lazelle testified that he did not investigate Rosario's claim, but reviewed respondent's file. He testified that petitioners' only evidence to rebut Rosario's claim was the checks presented at hearing during petitioner Benitez's testimony. Having produced no legally required payroll records, respondent computed the wages owed Rosario based on her claim form.

SCOPE OF REVIEW AND BURDEN OF PROOF

An aggrieved party may petition the Board to review the validity and reasonableness of an order issued by the Commissioner (Labor Law § 101 [1]). A petition must state in what respects the order on review is claimed to be invalid or unreasonable and any objections not raised in the petition shall be deemed waived (*id.* § 101 [2]).

The hearing before the Board is *de novo* (original) in nature (Board Rule 66.1 [c], 12 NYCRR 66.1 [c]). The Labor Law provides that an order of the Commissioner is presumed valid (*id.* § 103 [1]). The party alleging error bears the burden of proving every allegation in a proceeding (State Administrative Procedure Act § 306 [1]; 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 [October 11, 2011]). Should the Board find the order or any part thereof is invalid or unreasonable, the Board shall revoke, amend, or modify the order (*id.* § 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 65.39 (12 NYCRR 65.39). The wage order finds that petitioners owe claimant $8,450.00 in unpaid wages. Petitioners allege they paid claimant "her wages in full." We find that petitioners failed to meet their burden of proving the "precise wages" paid for claimant's work or to negate the reasonable inferences the Commissioner drew from claimant's credible evidence. We, therefore, affirm the wage order.

We Affirm the Wage Order

Petitioners Failed to Maintain Required Records

Article 6 of the Labor Law requires that an employer pay wages to its employees (Labor Law § 191). Labor Law § 190 (1) defines "wages" as "the earnings of an employee for labor or services rendered, regardless of whether the amount of earnings is determined on a time, piece, commission or other basis." Article 6 also requires employers to maintain for six years certain records of the hours their employees worked and the wages they paid them (Labor Law § 195 [4]). 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, if any, and money paid in cash (*id.*). Petitioners admitted that they did not maintain employment records. We therefore find that petitioners failed to maintain true and accurate payroll records required by the Labor Law (*see id.*).

Petitioner Failed to Offer Sufficient Evidence to Challenge Respondent's Wage Calculations

As discussed above, petitioners failed to maintain legally required payroll records for the period from October 15, 2013 through January 30, 2014. In the absence of such records, an employer bears the burden of proving that the disputed wages were paid (Labor Law § 196-a [a]). Where the employer has failed to keep such records, the Commissioner may draw reasonable inferences and calculate unpaid wages based on the "best available evidence" drawn from employee statements or other evidence, even though the results may be approximate (*Matter of Mid-Hudson Pam Corp. v Hartnett*, 156 AD2d 818, 820–21 [3d Dept 1989]; *Ramirez v Commissioner of Labor*, 110 AD3d 901 [2d Dept 2010]).

In a proceeding challenging such determination, the employer must come forward with evidence of the "precise" amount of work performed or with evidence to negate the reasonableness of the inferences to be drawn from the employee's evidence (*Anderson v Mt. Clemens Pottery*, 328 US 680, 687–88 [1949]; *Mid-Hudson Pam Corp.*, 156 AD2d at 821). Given the interrelatedness of wages and hours, the same burden shifting applies to wages and requires the employer to prove the "precise wages" paid 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]).

Because petitioners failed to offer accurate and reliable payroll records, the Commissioner was entitled to draw reasonable inferences and calculate the underpayment based on the best available evidence of employee statements and other circumstantial evidence. Petitioner Benitez testified that he agreed to pay claimant a flat weekly wage without regard for the hours she worked. Claimant explained that she was responsible for paying petitioners' employees, but petitioner Benitez deferred paying her on the basis that the business had insufficient funds. On January 30, 2014, when claimant demanded payment and petitioner Benitez said he could not pay her, she quit her employment at his restaurant.

Claimant also credibly testified that petitioners made partial payments toward the wages petitioners owed her, but that these payments were for time worked before October 15, 2013. Claimant also denied that petitioners ever deposited payment of her wages directly into her bank account or that she signed the Hillside agreement, and testified that Hillside sent a "bonus" check to claimant in her name for her role as the "manager of the business who opened an account." Petitioners did not rebut such testimony. We, therefore, find that the Commissioner relied on the best available evidence in calculating the wage underpayment due and owing to claimant (*see Matter of Mid-Hudson Pam Corp. v Hartnett*, 156 AD2d 818, 820–21 [3d Dept 1989]; *Ramirez v Commissioner of Labor*, 110 AD3d 901 [2d Dept 2010]).

We reject petitioners' argument that he is entitled to withhold payment to claimant on the basis that she misappropriated funds from him. Subject to certain exceptions, none of which are relevant here, Article 6 prohibits employers from making "any deduction from the wages of an employee" unless the deduction is "for the benefit of the employee" (Labor Law § 193). As such, any deduction petitioners made to recuperate money they believe claimant owes is impermissible under the Labor Law (*see id.*; *cf. Guepet v International TAO Systems, Inc.*, 110 Misc 2d 940, 941 [Sup Ct, Nassau County 1981] ["Nowhere does [Section 193] permit an employer to make . . . deductions from wages because an employee failed to perform properly"]).

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 (1) sets the "maximum rate of interest" at "sixteen per centum per annum." Petitioners failed to submit evidence at hearing challenging the interest assessed in the wage order and the issue is thereby waived pursuant to Labor Law § 101 (2).

Liquidated Damages

Labor Law § 198 (1-a) provides that when wages are found to be due, the Commissioner shall assess against the employer the full amount of the underpayment "and an additional amount as liquidated damages, unless the employer proves a good faith basis for believing that its underpayment of wages was in compliance with the law." Such damages shall not exceed 100% of the total amount of wages found to be due. Petitioners failed to submit evidence at hearing challenging the liquidated damages assessed in the minimum wage order and the issue is thereby waived pursuant to Labor Law § 101 (2).

Civil Penalty

Labor Law § 218 (1) authorizes the Commissioner to assess civil penalties based upon the wages found owing upon giving "due consideration" to the factors listed in the statute. Petitioner did not challenge the civil penalty assessed in the wage order and the issue is thereby waived pursuant to Labor Law § 101 (2).

Penalty Order

Labor Law § 661 and 12 NYCRR 142-2.6 require that every employer establish, maintain and preserve for not less than six years, contemporaneous, true, and accurate weekly payroll records and make such records available upon request of the Commissioner at the place of employment. Petitioner did not challenge the penalty order and the issue is thereby waived pursuant to Labor Law § 101 (2).

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The wage order is affirmed; and

2. The penalty order is affirmed; and

3. The petition for review is denied.

Vilda Vera Mayuga, Chairperson

J. Christopher Meagher, Member

Michael A. Arcuri, Member

Absent
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
January 25, 2017.