

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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In the Matter of the Petition of:	:
	:
ANAND D. SINGH, RENU HOODA, AND BJ	:
MAGAZINES INC.,	:
	:
Petitioners,	:
	:
To Review Under Section 101 of the Labor Law:	:
An Order to Comply with Article 19, and Order to	:
Comply with Article 6, and an Order Under Articles 5	:
and 19 of the Labor Law, all dated September 9, 2015,	:
	:
- against -	:
	:
THE COMMISSIONER OF LABOR,	:
	:
Respondent.	:
-----X	

DOCKET NO. PR 15-363

RESOLUTION OF DECISION

APPEARANCES

The Law Offices of Saul D. Zabell, Bohemia (Saul D. Zabell of counsel) and Anand D. Singh (pro se on final day of hearing) for petitioners.

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

WITNESSES

Raj Bhandari, Labor Standards Senior Investigator Emelina Garcia, and Anand D. Singh for petitioners.

Raj Bhandari, Labor Standards Senior Investigators Fang Zou and Emelina Garcia, and Labor Standards Supervising Investigator Suk Chan Leung for respondent.

WHEREAS:

On November 9, 2015, petitioners Anand D. Singh, Renu Hooda, and BJ Magazines Inc., filed a petition with the Industrial Board of Appeals seeking review of three orders issued by respondent Commissioner of Labor on September 9, 2015. Respondent filed an amended answer on May 26, 2016.

Upon notice to the parties, a hearing was held on February 21, February 22, 2017, and July 24, 2017, in New York City before J. Christopher Meagher, Board Member and designated

hearing officer in this proceeding. Petitioners were represented by counsel for the February 21 and February 22, 2017 hearing dates but proceeded *pro se* on the July 24, 2017 hearing date. 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 19 of the Labor Law (minimum wage order) directs payment of wages due and owing to claimant Raj Kumar Bhandari in the sum of \$20,619.50 for the period from September 7, 2010 through March 10, 2012. The order assesses interest continuing thereon at the rate of 16% calculated to the date of the order in the amount of \$14,045.52, 25% liquidated damages in the amount of \$5,154.91, and a 100% civil penalty in the amount of \$20,619.50. The total amount due is \$60,439.43.

The order to comply with Article 6 of the Labor Law (wage order) directs payment of wages due and owing to claimant Raj Kumar Bhandari in the sum of \$29,890.00 for the period from September 7, 2010 through March 10, 2012. The order assesses interest continuing thereon at the rate of 16% calculated to the date of the order in the amount of \$18,510.88, 25% liquidated damages in the amount of \$7,472.50, and a 100% civil penalty in the amount of \$29,890.00. The total amount due is \$85,763.38.

The order under Articles 5 and 19 of the Labor Law (penalty order) assesses a civil penalty in the amount of \$800.00 for violation of Labor Law § 661 and 12 NYCRR 142-2.6 by failing to keep and/or furnish true and accurate payroll records for each employee for the period from September 11, 2010 through March 10, 2012; a civil penalty in the amount of \$800.00 for violation of Labor Law § 661 and 12 NYCRR 142-2.7 by failing to give each employee a complete wage statement with every payment of wages for the period from September 11, 2010 through March 10, 2012; a civil penalty in the amount of \$800.00 for violation of Labor Law § 162 by failing to provide employees at least 30 minutes off for the noon day meal when working a shift of more than six hours extending over the noon day meal for the period from September 11, 2010 through March 10, 2012; and a civil penalty in the amount of \$800.00 for violation of Labor Law § 161 by failing to allow employees at least 24 consecutive hours of rest in any calendar week during the period from September 11, 2010 through March 10, 2012. The total amount due is \$3,200.00

Petitioners contend that the orders are unreasonable or invalid because claimant did not work the number of hours or schedule he claims to have worked and was properly compensated for all hours worked in accordance with New York Labor Law requirements.

As set forth below, we affirm the minimum wage and wage orders, including the imposition of interest, liquidated damages, and civil penalties. We also affirm the penalty order.

SUMMARY OF EVIDENCE

Testimony of Claimant Raj Bhandari

When Bhandari met Singh, the store owner, in September 2010, Singh offered him 50-55 hours of work per week at a rate of \$7.00 per hour to be paid in cash. Bhandari worked at BJ Magazines (the “store”) from September 7, 2010 through March 10, 2012, initially only at the

200 Varick Street location, then eventually also at the 80 Varick Street location. Gopal Gurung was Bhandari's supervisor who, along with Singh, set Bhandari's schedule.

While Bhandari's schedule varied during the claim period, he testified that he often worked seven days a week. In 2010, he worked Monday through Friday from 2:00 p.m. until 11:00 p.m. Starting January 1, 2011, he worked seven days a week; Monday through Friday from when he opened the store at 7:00 a.m. until 9:00 p.m. or 11:00 p.m., and Saturdays and Sundays from when he opened the store at 8:00 a.m. until 10:00 p.m. and 8:00 p.m., respectively. Some weeks, Bhandari worked as many as 110 hours. On a few occasions in 2011, Bhandari either left work early or took a day off from work.

In addition to opening the store, Bhandari prepared coffee, sold lotto tickets, arranged magazines and newspapers for display, cleaned the store, rearranged the sodas and waters on the shelves, helped prepare the store for the following day, reconciled lotto sales and shut down the machine, and turned on the overnight security alarm when closing the store.

Singh usually paid Bhandari between \$100.00 and \$200.00 in cash on a weekly basis, and some weeks failed to pay him. On four occasions, Singh paid Bhandari via check; the first two bounced, and the last two Bhandari did not attempt to cash or deposit to avoid having to pay another bank fee/penalty should they also bounce.

Bhandari testified that his hourly rate was \$7.00 from September 2010 until March 2011, \$7.50 from March 2011 until January 1, 2012, and \$8.00 from January 1, 2012 until March 10, 2012.

Testimony of Labor Standards Supervising Investigator Suk Chan-Leung

Chan-Leung testified that investigators considered several factors to assess appropriate civil penalties. Investigators considered how long the company was in business, whether there was a prior history of failure to comply with the Labor Law, whether petitioners were cooperative during the investigation and acted in good faith, the size of the employer in terms of number of employees at any given time, the gravity of the monetary violations, and the recordkeeping violations. After weighing these factors, a civil penalty in the amount of 100% of the wages owed was assessed in each of the wage orders.

Chan-Leung credibly testified that petitioners provided some records during a compliance conference, but indicated since said records were lacking information, such as number of hours worked, respondent did not credit or use them in calculating wages owed.

Testimony of Petitioner Anand D. Singh

Singh hired Bhandari in September 2010 to work part-time, from 7:00 p.m. until 11:00 p.m., three to four days each week. Bhandari worked part-time in the evenings because he worked elsewhere during the day. During this time, Bhandari was primarily responsible for cleaning the store and re-stocking the soda machine. Starting in March 2011, Bhandari's work schedule changed to 7:00 a.m. to 11:00 a.m. Monday through Friday, and sometimes Saturdays from 12:00 p.m. to 10:00 p.m. and Sundays from 8:00 a.m. to 8:00 p.m. With the new schedule, Bhandari opened the store, organized newspapers, prepared the morning coffee, and helped

customers purchase lotto tickets, drinks, or food. According to Singh, Bhandari never worked more than 40 hours per week.

Singh also had an employee named Gopal Guring during the claim period, who worked 11:00 a.m. to 11:00 p.m. five to six days a week. Singh worked six days a week, from approximately 12:00 p.m. to 10:00 p.m. during the week and a full weekend day, while Guring worked the other weekend day. If there was need for additional help, Singh's wife worked at the store, approximately three or four times a month. Singh testified that when Bhandari's schedule changed in March 2011, his and Guring's schedules remained the same.

In September 2010, when Bhandari began working at the store, the hours of operation were 8:00 a.m. to 10:00 p.m. during the week, and 8:00 am to 8:00 pm on weekends. Singh testified that although two people are needed to stock the store, there was usually only one person working from 10:00 a.m. until 11:00 a.m.

From September 2010 through March 2011, Bhandari's hourly wage was \$7.00. In March 2011, it increased to \$7.50, and at some point, in 2011 or early 2012, it increased to \$8.00.

BJ Magazine Inc. was in operation from 2005 until it closed in December 2014. Singh testified he never owned or operated or sent Bhandari to work at a store located at 80 Varick Street. Singh added that, as they are in the same business, he and the owners of the 80 Varick Street store often helped each other; for example, if the 80 Varick Street store owners ran out of magazines, they would get some from BJ Magazines to sell to their customers. Singh testified that he and BJ Magazines had no relation to the store on 80 Varick Street.

Singh's accountant advised him on how much to pay Bhandari each week. Singh later testified that Bhandari kept track of his hours in a diary, and told him the number of hours worked whenever he requested that information. Payment was usually in the form of cash, although on some occasions he used checks. Singh learned that two of the checks he had given to Bhandari bounced and he tried, unsuccessfully, to reach Bhandari to pay him. Singh eventually gave Bhandari a check for \$1,717.00 for unpaid wages. In total, Singh gave Bhandari four checks to cover all the money owed to him dating back from August 2011, as that is when the store began to struggle financially. Singh had advised Bhandari of the financial hardship, and Bhandari understood and accepted that he would eventually get his unpaid wages.

Singh testified that his accountant mailed Bhandari a W-2 form, but did not indicate for what taxable year. Singh fired Bhandari at the end of 2012 for drinking at the store.

ANALYSIS

The Board makes the following findings of fact and conclusions of law pursuant to the provision of Board Rules of Procedure and Practice (Board 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 [“The burden of proof of every allegation in a proceeding shall be upon the person asserting it”]; see also *Matter of Ram Hotels, Inc.*, PR 08-078, at 24 [Oct. 11, 2011]). For the reasons stated below, we find that petitioners failed to meet their burden of proof to show that the orders to comply with Articles 6 and 19 are unreasonable. Petitioners also failed to prove that the penalty order was unreasonable.

The Wage Orders are Affirmed

The Labor Law requires employers to maintain payroll records that include, among other things, its employees’ daily and weekly hours worked, wage rate, and gross and net wages paid (Labor Law §§ 195 and 661, 12 NYCRR 142-2.6). Employers are required to keep such records open to inspection by the Commissioner or a designated representative.

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). 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. 2013]).

In a proceeding challenging such determination, the employer must then 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 employees’ evidence (*id.*; *Tyson Foods, Inc. v Bouaphakeo*, 136 SCt 1036, 1047 [2016]; *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 employees’ statements (*Doo Nam Yang v ACBL Corp.*, 427 FSupp2d 327, 332 [SDNY 2005]; *Matter of Kong Ming Lee*, PR 10-293 at 16 [April 10, 2014]).

Petitioners did not submit any time or payroll records at the hearing showing the hours worked or wages paid to Bhandari during the time he was employed, nor did they provide records showing the dates he worked for petitioners. In fact, Singh testified that it was Bhandari who kept track of his hours, which strengthens Bhandari’s credibility as to the hours he claims to have worked. Investigator Suk Chan-Leung credibly testified that petitioners provided some records during a compliance conference, but that said records were lacking information, such as number of hours worked, thereby making them legally insufficient. Upon review of said records, consisting of three pages within respondent’s exhibit J, we find that they do not comply with the records requirement pursuant to (Labor Law §§ 195 and 661).

Petitioner Singh’s testimony concerning the number of hours worked by Bhandari and wages paid to him was unreliable. Singh testified that in September 2010, when Bhandari worked three or four days each week from 7:00 p.m. until 11:00 p.m., Guring reported to work at 11:00 a.m., and Singh himself arrived around noon. Having also testified that the hours of operation at the time were 8:00 a.m. to 10:00 p.m., it is then unclear who was working at the store from the 8:00 a.m. opening to when Guring arrived at 11:00 a.m. Singh also testified that

while two workers were required to stock the store, only one person worked at the store from 10:00 a.m. until 11:00 a.m., but never clarified who that was or who then staffed the store from opening to 10:00 a.m.

Singh often gave conflicting or incomplete information regarding the hours worked by himself and his workers. For example, Singh testified that Guring sometimes worked weekends, but then testified that he always worked one full weekend day. Singh also testified that he worked six days a week, but later contradicted his testimony by indicating that he worked five days a week. Singh also testified that Bhandari never worked more than 40 hours a week, which was contradicted by Bhandari's credible testimony that he worked more than double that amount, except on the few occasions when he either left work early or did not report to work because he had to stay home with a sick child.

As to wages, while Bhandari's hourly rate was not rebutted, and instead confirmed by Singh's testimony that his hourly rate increased twice during the claim period, there was no indication that the weekly payments increased accordingly. Singh also admitted to owing at least some wages when he testified that he paid Bhandari with checks that bounced. However, Singh failed to credibly testify as to the specific and precise amounts paid or owed to Bhandari and the hours worked.

We credit Bhandari's credible and detailed testimony regarding the hours worked and money paid, and find the Commissioner's approximation of wages owed drawn from information on his written claim form and conversations with labor standards investigators to be reasonable. Petitioners failed to overcome that approximation with sufficient and reliable evidence establishing the precise hours he worked, and that he was paid for those hours, or with other credible and reliable evidence showing the Commissioner's determination to be unreasonable. As such, the wage orders are affirmed.

The Civil Penalty, Interest, and Liquidated Damages are Affirmed

Labor Law § 218 (1) provides that when the Commissioner determines that an employer has violated a provision of Articles 6 or 19, she must issue an order directing payment of wages found to be due, plus "the appropriate civil penalty." Here, the investigators considered how long the company was in business, whether there was a prior history of failure to comply with the Labor Law, whether petitioners were cooperative during the investigation and acted in good faith, the size of the employer in terms of number of employees at any given time, the gravity of the monetary violations, and the recordkeeping violations, to impose a civil penalty in the amount of 100% of the wages owed. While petitioners challenged the civil penalties in the petition, they did not submit evidence at hearing challenging the civil penalty assessed in the wage orders and the issue is thereby waived pursuant to Labor Law § 101 (2).

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 did not challenge the interest assessed in the wage orders and the issue is thereby waived pursuant to Labor Law § 101 (2).

Labor Law § 663 (2) 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. *See also* Labor Law 218 (1). The wage orders impose liquidated damages in the amount of 25% of the wages owed. Here, petitioners did not submit evidence challenging the Commissioner's determination to assess liquidated damages in the wage orders and the issue is thereby waived pursuant to Labor Law § 101 (2).

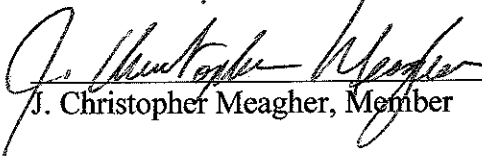
Penalty Order

Petitioners did not submit evidence challenging the civil penalties assessed in the penalty order and the issue is thereby waived pursuant to Labor Law § 101 (2). We find that the considerations and computations respondent made in issuing the penalty order are valid and reasonable. The order is, therefore, affirmed.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The minimum wage and unpaid wages orders are affirmed; and
2. The penalty order is affirmed; and
3. The petition be, and the same hereby is, denied.


Molly Doherty, Chairperson


J. Christopher Meagher, Member

Michael A. Arcuri, Member


Gloribelle J. Perez, Member

Dated and signed by the Members
of the Industrial Board of Appeals
in New York, New York,
on August 8, 2018.

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Molly Doherty, Chairperson

J. Christopher Meagher, Member



Michael A. Arcuri, Member

Gloribelle J. Perez, Member

Dated and signed by a Member
of the Industrial Board of Appeals
in Utica, New York,
on August 8, 2018.