STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of: ALEXANDER KAGANOWICZ AND RJAK ENTERPRISES, INC. (T/A PRECISION CAR WASH), Petitioners, To Review Under Section 101 of the Labor Law: An Order to Comply with Article 19 and an Order Under Article 19 of the Labor Law, both dated September 18, 2015, - against - THE COMMISSIONER OF LABOR, Respondent.	DOCKET NO. PR 15-366 RESOLUTION OF DECISION

APPEARANCES

Milman Labuda Law Group PLLC, Lake Success (*Robert F. Milman* of counsel), for petitioners.

Pico P. Ben-Amotz, General Counsel, NYS Department of Labor, Albany (*Kathleen Dix, Benjamin T. Garry*, and *Roya Sadiqi*, of counsel), for respondent.

WITNESSES

Petitioner Alexander Kaganowicz, claimant Emerito Almendares and Labor Standards Investigator Albert Zeng.

WHEREAS:

On November 9, 2015, petitioners Alexander Kaganowicz and RJAK Enterprises, Inc. (T/A Precision Car Wash) filed a petition with the Industrial Board of Appeals seeking review of two orders issued by respondent Commissioner of Labor on September 18, 2015. The Commissioner answered on December 24, 2015.

Upon notice to the parties, a hearing was held on March 22, 2016, and continued on May 17, 2016, in Hicksville, 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, make statements relevant to the issues, and submit post-hearing briefs. Without prior notice to the Board, claimant failed to

appear at the second day of hearing. Upon petitioners' motion to strike claimant's testimony, the hearing officer granted the motion. For reasons discussed below, we affirm her ruling.

The order to comply with Article 19 of the Labor Law (minimum wage order) directs payment of minimum wages due and owing to claimant Emerito Almendares in the amount of $23,599.58 for the period from May 14, 2006, through October 5, 2008. The order assesses interest continuing thereon at the rate of 16% calculated to the date of the order in the amount of $3,206.96, 25% liquidated damages in the amount of $5,899.90, and a 100% civil penalty in the amount of $23,599.58. The total amount due is $56,306.02. At hearing, respondent amended the minimum wage order to direct payment of minimum wages due and owing to claimant in the amount of $13,454.18 for the period from May 14, 2006, through October 7, 2007. The amended order assesses interest continuing thereon at the rate of 16% calculated to the date of the order in the amount of $1,828.30, 25% liquidated damages in the amount of $3,363.55, and a 100% civil penalty in the amount of $13,454.18. The total amount due is $32,100.19.

The order under Article 19 of the Labor Law (penalty order) assesses a civil penalty in the amount of $800.00 for each of the following counts for the period from May 14, 2006, through October 5, 2008: (1) 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; and (2) violation of Labor Law § 661 and 12 NYCRR 142-2.7 by failing to provide each employee complete wage statements with every payment of wages. The total amount due is $1,600.00. At hearing, respondent withdrew the penalty order in its entirety. We approve respondent's withdrawal of the penalty order.

Petitioners contend that the amended order is unreasonable or invalid because petitioners are not employers within the meaning of the New York Labor Law and therefore not liable for wages due and owing. In the alternative, petitioners argue (1) that respondent's wage calculation is erroneous because claimant worked no more than 40 hours per week and petitioners paid him at or above the applicable minimum wage, and (2) the civil penalties assessed against petitioners are excessive. As discussed below, we find petitioners were statutory employers during the period at issue but find the amended minimum wage order is unreasonable and revoke it in its entirety.

SUMMARY OF EVIDENCE

Testimony of Petitioner Alexander Kaganowicz

Alexander Kaganowicz testified that he is the owner of and sole shareholder of Precision Car Wash. During the claim period, Kaganowicz worked at the carwash at all times it was open for business. His duties include hiring and firing personnel, setting work schedules, payroll, and tracking the hours employees work. Kaganowicz hired claimant as an "unskilled laborer with [the] ability to drive." When claimant was not driving cars, he washed cars and performed other tasks at Precision. Kaganowicz hired claimant to work five days weekly. Kaganowicz's practice is to staff the carwash such that each employee worked a five-day work week.

Precision's hours of operation during the claim period were from 8:00 a.m. to 5:00 p.m. daily, weather permitting. If there was inclement weather, Kaganowicz would sometimes close Precision before the end of the working day. At other times, he would close Precision for two to three days if the weather forecast included rain or a snowstorm. Kaganowicz estimates that

Precision, which he explained is "never" open a full seven days per week, is open for business between 225 and 240 days yearly, but he does not have records regarding closures dating back to 2005, 2006, or 2007. Kaganowicz explained that claimant reported to work at 8:00 a.m. and would leave by 5:00 p.m. when the carwash closed, but "on occasion," perhaps one day "every few months," claimant would work until 6:00 p.m. Kaganowicz would block the carwash driveway at five minutes until 5:00 p.m. to begin clean up and allow employees to leave at 5:00 p.m. Kaganowicz explained that employees worked eight-hour days and were afforded a daily paid one-half hour lunch and two fifteen-minute breaks, which were also paid. Because Kaganowicz sometimes sent employees home early, he explained that sometimes they worked less than 40 weekly hours.

Kaganowicz paid claimant by check. Kaganowicz required employees to sign in and sign out on a form provided by him. The hours recorded on these forms were input into Intuit QuickBooks to generate Precision's payroll. When DOL requested records related to the claim, Kaganowicz did not have the requested records because, as he understood it, he was not legally obligated to maintain records that remote in time. Kaganowicz also explained that many of petitioners' files were destroyed by flooding in 2012 during Hurricane Sandy. Kaganowicz was able to run a search for payroll records on his computer and printed a payroll details report that includes payroll information for claimant for thirteen weekly pay periods between January 5, 2007, and March 30, 2007, and copies of several corresponding paychecks and stubs. Each weekly statement shows the total number of hours worked, the total wages earned, total tips paid in cash, and notes various deductions from the total dollar amount. The report shows that claimant worked 40 hours weekly, except for two weeks in which he worked 30 and 32 hours. The paystubs show that claimant was paid at an hourly rate of $7.25. The report shows no overtime worked. Kaganowicz explained that it was against company policy for employees to work overtime but was at times permitted if another employee was sick.

Testimony of Claimant Emerito Almendares

Claimant Emerito Almendares began, but did not complete, his testimony at the hearing on March 22, 2016. At the conclusion of the March 22, 2016, hearing, the hearing officer stated she would call the parties the following morning at 9:00 a.m. to schedule a continuation of the hearing. She explained that she wanted to "make sure" claimant would be available and that respondent's counsel would be in touch with claimant to advise him of the date and time of the continuation. The parties agreed to continue the hearing on May 17, 2016. When claimant failed to appear at the May 17, 2016, continuation, petitioners moved to strike claimant's testimony from the record as petitioners had not completed cross-examination. The hearing officer granted the motion.

Testimony of Petitioner Labor Standards Investigator Albert Zeng

Labor Standards Investigator Albert Zeng testified that DOL first notified petitioners of the claim against them by a letter dated November 12, 2014. By the same letter, DOL requested petitioners' payroll records. Zeng acknowledged that petitioners' counsel responded by letter dated November 20, 2014, in which counsel stated the Labor Law requires employers to maintain and retain records of hours worked and wages paid to employees for a period of up to six years. Accordingly, counsel argued, Precision Car Wash was only legally required to maintain and produce to DOL records dating back to November 12, 2008. Zeng acknowledged that petitioners' counsel, by letter dated January 30, 2015, sent certain payroll records for claimant relevant to the

claim period to DOL, including weekly pay periods January 6, 2007 through January 12, 2007; January 13, 2007, through January 19, 2007; February 24, 2007, through March 2, 2007; and March 24, 2007, through March 30, 2007.

Because petitioners provided no employment records, Zeng based his determination that petitioners were in violation of the Labor Law and calculated wages due and owing based on claimant's statement. The claim form states that Precision's hours of operation are from 7:00 a.m. to 6:00 p.m. and that claimant worked 10-1/2 hours daily, including a 1/2 hour lunch daily, seven days weekly. Using the daily hours worked included in the claim form, Zeng computed unpaid wages using a "weather formula," which adjusts the number of days worked to account for the carwash closing due to inclement weather. The formula assumes that, "because of the nature of this business," in 52 weeks during any calendar year, a carwash employee would work 22 weeks at 6 days weekly, 20 weeks at 5 days weekly, and 10 weeks at 4 days weekly. For the original claim period from May 6, 2006, through October 5, 2008, claimant worked 34 weeks. Under DOL's weather formula, claimant worked 14 weeks at six days weekly, 13 weeks at five days weekly, and 7 weeks at four days weekly. Zeng credited petitioners with a daily, 1/2 hour lunch break. Zeng explained that DOL uses this formula when the employer fails to provide DOL with payroll records. Zeng called the claimant about the claim but was unsure of whether he spoke with claimant or claimant's wife.

SCOPE OF REVIEW AND BURDEN OF PROOF

A hearing before the Board is original (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 Rules [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 Rules (12 NYCRR) § 65.39. Petitioners failed to meet their burden of establishing that they were not the statutory employer. Petitioners, however, met their burden of establishing that the amended minimum wage order is invalid or unreasonable. As discussed below, we revoke the amended order in its entirety.

Employer Status

Petitioner Kaganowicz is a Statutory Employer Responsible for Paying Minimum Wages

The petition contends petitioner Kaganowicz did not exercise the requisite operational control at Precision to be liable for wages due and owing under the Labor Law. We disagree. As a

matter of economic reality, we find that petitioner Kaganowicz was a statutory employer and therefore liable for wages due and owing during the claim period.

Article 19 of the Labor Law defines "employer" as including "any individual, partnership, association, corporation, limited liability company . . . acting as employer" (Labor Law § 651 [6]). "Employed" means that a person is "permitted or suffered to work" (*id.* § 2 [7]). Like the New York Labor Law, the federal Fair Labor Standards Act (FLSA) 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 Labor Law is the same test for analyzing employer status under the FLSA (*Matter of Yick Wing Chan v. N.Y. State Indus. Bd. of Appeals*, 120 AD3d 1120 [1st Dept 2014]; *Chung v. New Silver Palace Rest., Inc.*, 272 F Supp 2d 314, 318 n6 [SDNY 2003]).

In *Herman v. RSR Security Services Ltd.*, (172 F3d 132, 139 [2d Cir 1999]), the Second Circuit Court of Appeals explained the "economic reality test" used for determining employer status:

> [T]he 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 the 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).

No one of these factors is dispositive; the purpose of examining them is to determine the economic reality based on a "totality of circumstances" (*id.*).

Appling the *Herman* factors to the instant case, we find that petitioner Kaganowicz was an employer under the Labor Law. By his own testimony, petitioner Kaganowicz hired and fired personnel, set employees' schedules, performed payroll, and tracked employee hours. Moreover, he hired claimant as an "unskilled laborer with [the] ability to drive" and set claimant's schedule and rate of pay. As a matter of economic reality, we find that petitioner Kaganowicz "possessed the power to control the worker[] in question," and was therefore a statutory employer during the claim period (*id.* at 139).

Petitioner RJAK Enterprises, Inc. is a Statutory Employer Responsible for Paying Minimum Wages

The petition similarly contends that petitioner RJAK Enterprises, Inc., did not exercise the requisite operational control at Precision to be liable for wages due and owing under the Labor Law. It is well settled that more than one entity or person can be found to be a worker's employer (*id.*; *Matter of Minkel*, PR 08-158 at 8 [January 27, 2010]). Because petitioners, who had the burden of proof, offered no evidence to support their contention, we affirm respondent's determination that petitioner RJAK Enterprises, Inc., was a statutory employer during the claim period.

Minimum Wage Order

The amended minimum wage order directs payment of wages due and owing to claimant in the amount of $13,454.18 for the period from May 14, 2006, through October 7, 2007. Because petitioners were under no legal obligation to maintain payroll records and offered unrebutted evidence that they paid claimant wages due to him, we find respondent's wage calculations to be unreasonable.

Petitioners Were Under No Legal Duty to Maintain Employment Records

Article 19 of the Labor Law, known as the Minimum Wage Act, requires employers to maintain for six years records of the hours their employees worked and the wages paid (Labor Law § 661; 12 NYCRR 142-2.6). 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, and allowances claimed, if any (Labor Law § 661; 12 NYCRR 142-2.6). 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 2010]). In the absence of legally required records, 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]).

When, however, the employer is under no legal obligation to maintain employment records, Labor Law § 196-a's presumption against petitioners does not apply (*Matter of Berkowitz*, PR 14-170 at 9 [Sept. 14, 2016]). In such an instance, a petitioner must still carry the threshold burden of showing that the challenged order is invalid or unreasonable before the burden shifts to respondent (*see* State Administrative Procedure Act § 306 [1]; Board Rules [12 NYCRR] § 65.30).

On the facts before us, we find that petitioners were under no legal duty to maintain employment records relating to the claim period. It is uncontested that respondent first notified petitioners of the claim against them and sought petitioners' payroll records by a letter dated November 12, 2014. Under Article 19, petitioners were only under a legal duty to maintain records from November 12, 2008, to November 12, 2014 (*see* Labor Law § 661; 12 NYCRR 142-2.6). Because the amended minimum wage order covers wages earned from May 14, 2006, through October 7, 2007, we find Labor Law § 196-a's presumption inapplicable.

Respondent's Wage Calculations Are Unreasonable

Article 19 also requires employers to pay no less than the applicable minimum wage to each covered employee (Labor Law § 652; 12 NYCRR 142-2.1). During the claim period, the

minimum wage was $6.75 an hour in 2006, and $7.15 an hour from 2007 through the end of the claim period (Labor Law § 652 [1]; 12 NYCRR 142-2.1). Article 19 also requires payment of an overtime premium of time and one-half the regular hourly rate for hours worked over 40 in one week (12 NYCRR 142-2.2).

Absent Labor Law § 196-a's presumption against petitioners, on the record before us, we find they have met their burden of showing the amended order is unreasonable. Petitioner Kaganowicz testified that he paid claimant an hourly rate of $7.25 by check. Petitioner Kaganowicz further testified that Precision's regular hours of operation are from 8:00 a.m. to 5:00 p.m., seven days weekly. Due to inclement weather, however, he would at times close the business early or for part of the day or an entire day or days depending upon the weather forecast. Petitioner Kaganowicz estimated that Precision was open between 225 and 240 days yearly and explained that it was "never" open seven continuous days. Petitioner Kaganowicz also disputed that claimant reported to work at 7:00 a.m., but acknowledged that "on occasion," perhaps one day "every few months," claimant would work until 6:00 p.m. Typically, Petitioner Kaganowicz explained, petitioner Kaganowicz would close the carwash driveway at five minutes until 5:00 p.m. to allow for employees to leave work at 5:00 p.m. During a full day of business, employees worked eight hours plus one-half hour lunch and two fifteen-minute breaks, all of which were paid.

While petitioner Kaganowicz was under no duty to maintain payroll records relating to the claim period, and notwithstanding flooding from Hurricane Sandy destroying many of petitioners' files, he introduced into evidence payroll information for claimant for thirteen weekly pay periods between January 5, 2007, and March 30, 2007. Petitioner Kaganowicz explained that he required employees to sign in when they arrived at the carwash and sign out when they left. These recorded hours were input into Intuit QuickBooks, which is the program he used to generate Precision's payroll. Each weekly statement shows the total number of hours worked, the total wages earned, total tips paid in cash, if any, and notes various deductions from the total dollar amount. Specifically, the report shows that claimant worked 40 hours weekly, except for two weeks in which he worked 30 and 32 hours, which is consistent with petitioner Kaganowicz's testimony that he sometimes sent employees home early, and it is therefore plausible that an employee would work less than a 40-hour work week. Furthermore, the report shows that during the sampled period claimant worked no overtime. While petitioner Kaganowicz testified that working overtime was against company policy, he acknowledged that overtime was sometimes necessary. Petitioner Kaganowicz testified that he paid overtime at time and one half of the $7.25 hourly rate. The employment records in evidence support Petitioner Kaganowicz's testimony that petitioners paid claimant for hours worked at an hourly rate of $7.25.

The burden thereby shifted to respondent to establish that petitioners failed to pay claimant a minimum wage for hours worked during the claim period. The Commissioner failed to meet her burden. Petitioner Zeng testified that he calculated wages due and owing based on the claim form. The claim form states that Precision's hours of operation are from 7:00 a.m. to 6:00 p.m. and that claimant worked ten and a half hours daily, including a one-half-hour lunch daily, seven days a week. Investigator Zeng explained that he called claimant to verify the information in the claim form, but Zeng could not recall whether he spoke with claimant or claimant's wife. Respondent failed to offer the testimony of claimant to substantiate the claim form or otherwise rebut petitioners' evidence, and we therefore cannot credit it as accurate or reliable. Our finding is supported by the fact that investigator Zeng, despite testifying that he credited the claim form, calculated claimant's unpaid wages using a "weather formula," which adjusted the number of days

claimant worked to account for the carwash closing due to inclement weather and, thus, substantially departs from the hours stated on the claim form. Standing alone, Investigator Zeng's testimony is insufficient to rebut petitioners' credible testimonial and documentary evidence.

We find that respondent has failed to rebut petitioners' evidence that they paid claimant a minimum wage for hours worked during the claim period. Based on the facts as we find them, we revoke the amended minimum wage order in its entirety.

Claimant's Testimony

Striking Claimant's Testimony from the Record was Proper

Respondent contends that the hearing officer's decision to strike claimant's testimony after he failed to appear at the May 17, 2016, continuation of the hearing was improper. We disagree. Board Rules (12 NYCRR) § 65.27 (8) grant hearing officers the power to "regulate, in any manner, the course of the hearing, subject to confirmation by the Board." The Board Rules also accord to all parties the "right to cross-examine any witness whose testimony is introduced by an adverse party," (Board Rules [12 NYCRR] § 65.31).

We confirm the hearing officer's decision to strike claimant's testimony. Pursuant to her authority under rule 65.27 (10) of the Board Rules ([12 NYCRR] § 65.27 [10]), the hearing officer adjourned the March 22, 2016 hearing to May 17, 2016. Because respondent did not produce the witness at the continuation and failed to seek relief from the Board in advance of the hearing, thus depriving petitioners of the ability to confront the witness, we find the hearing officer acted within the discretion afforded to her under our rules and, thus, confirm as proper striking claimant's testimony.

We reject respondent's argument that the State Administrative Procedure Act compels a different outcome. SAPA § 306 provides that "[n]o decision, determination or order shall be made except upon consideration of the record as a whole or such portion thereof as may be cited by any party to the proceeding and as supported by and in accordance with substantial evidence." As noted above, upon proper notice and two days of hearing, the parties were afforded a full opportunity to present documentary evidence, examine and cross-examine witnesses, make statements relevant to the issues, and submit post-hearing briefs. Nonetheless, respondent contends that, absent testimony that was duly stricken from the record, the record before us is not a "record" within the meaning of SAPA or constitutes less than "substantial evidence" upon which to resolve the matter. But because the Board is, in the first instance, the factfinder, and, as noted above, we struck claimant's testimony because his failure to appear deprived petitioners of the ability to cross examine the witness, respondent's logic is circular and cannot stand (*see* Board Rules [12 NYCRR] §§ 65.39, 66.1 [c]).

Finally, respondent argues that the Division of Unemployment Insurance Regulations (12 NYCRR) § 461.8 provide authority for Board to reopen a case where a decision was rendered, or following the default of an affected party. By its terms, the regulation applies to administrative hearings governed by the Unemployment Insurance Law (Division of Unemployment Insurance Regulations [12 NYCRR] § 460.1), and thus does not apply to the Board.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The minimum wage order, as amended at hearing, is revoked; and

2. Respondent's withdrawal of the penalty order at hearing is approved; and

3. The petition for review is granted.

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
June 14, 2017.

PR 17-346

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The minimum wage order, as amended at hearing, is revoked; and

2. Respondent's withdrawal of the penalty order at hearing is approved, and

3. The petition for review is granted.

Vilda Vera Mayuga, Chairperson

J. Christopher Meagher, Member

Michael A. Arcuri, Member

Molly Doherty, Member

Dated and signed by a Member
of the Industrial Board of Appeals
in Utica, New York, on
June 14, 2017.

Gloribelle J. Perez, Member