STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

-- x

In the Matter of the Petition of:

JOHN X. KAPETANOS, JR. A/K/A JOHN KAPETANOS AND 495 J.J.K. CORP.,

Petitioner,

To Review Under Section 101 of the Labor Law: An Order to Comply with Article 19 of the Labor Law, and an Order Under Articles 5 and 19 of the Labor Law, dated November 23, 2015,

- against -

THE COMMISSIONER OF LABOR,

Respondent.

-- x

DOCKET NO. PR 16-017

RESOLUTION OF DECISION

APPEARANCES

Arthur H. Forman, Esq., Forest Hills, for petitioners.

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

WITNESSES

John Kapetanos, for petitioners.

Jesus Ramirez and Senior Labor Standards Investigator Sha Wei, for respondent.

WHEREAS:

Petitioners filed a petition in this matter on January 19, 2016, pursuant to Labor Law § 101, seeking review of an order issued against them by respondent Commissioner of Labor on November 23, 2015. Respondent filed her answer to the petition on February 23, 2016. Both the petition and the answer were amended on May 12, 2016.

Upon notice to the parties a hearing was held in this matter on October 3, 2017 in New York, New York before J. Christopher Meager, Board Member, and the designated hearing officer in this proceeding. Each party was afforded a full opportunity to present documentary evidence, to examine and cross-examine witnesses, and to make statements relevant to the issues.

The order to comply with Article 19 (overtime wage violation order) under review directs compliance with Article 19 of the Labor Law and payment to respondent for unpaid overtime wages to claimant in the amount of $165,361.00 for the period from March 19, 2011 through March 22, 2014, interest continuing thereon at the rate of 16% calculated to the date of the order in the amount of $44,289.57, liquidated damages in the amount of $41,340.25, and assesses a civil penalty in the amount of $330,722.00, for a total amount due of $581,712.82. The amounts in this order were amended on consent at hearing because a settlement was reached with petitioners in another case, PR 16-016, that had been consolidated with this case because the same orders to comply were at issue in the two cases. The amended amounts are $161,659.55 in wages for the period from March 19, 2011 through November 30, 2013, interest continuing thereon at the rate of 16% calculated to the date of the order in the amount of $43,598.19, liquidated damages in the amount of $40,414.89, and a civil penalty in the amount of $327,020.55, for a total amount of $572,693.18.

The order under Articles 5 and 19 (penalty order) assesses an $800.00 civil penalty for each of four counts for violating the following provisions of law during the period from on or about March 19, 2011 through March 22, 2014: Labor Law § 661 and 12 NYCRR 146-2.1 by failing to keep and/or furnish true and accurate payroll records for each employee, Labor Law § 661 and 12 NYCRR 146-2.3 by failing to provide each employee with a wage statement, Labor Law § 661 and 12 NYCRR 146-2.5 by failing to pay employees an hourly rate, and Labor Law § 162 by failing to provide employees with 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 period. The total amount due is $3,200.00.

Petitioners allege that the orders are invalid and unreasonable because claimant was an exempt employee not eligible for overtime pay; claimant did not work the number of hours asserted in the orders to comply; and petitioners were not claimant's employer. Petitioners also allege that the liquidated damages and penalties are not appropriate because petitioners had a good faith basis that they were complying with the Labor Law as they understood claimant was an exempt employee.

SUMMARY OF EVIDENCE

Wage Claim

Claimant Jesus Ramirez worked as a cook in two restaurants that were owned by related corporations. He began working at Ethos, a restaurant in Manhattan, in February 2003. In 2013, Ramirez was transferred to work at another restaurant in Great Neck, NY, also called Ethos. Ramirez filed a claim on March 24, 2014 stating that from March 17, 2011 to March 17, 2014, he worked more than 40 hours per week but did not receive overtime pay. His rate of pay was $1,300.00 per week during this time period, during which he also did not receive a break for meal times.

Petitioners' Evidence

Petitioner John Kapetanos testified that he was part owner of around 10 to 12 restaurants during the claim period, including the 2 restaurants where claimant worked. Kapetanos said that

he was not involved in running the daily operations of the restaurants where claimant worked and that he was a silent partner in those restaurants. He did visit the restaurants but not every day. He signed checks for the restaurants that were used to buy supplies or to pay workers, but he only did that if the partner who ran the daily operations of the restaurants was not around. Kapetanos would sign blank checks and the manager or another partner would fill in the blank checks to use them for supplies or to pay employees. Kapetanos was managing the daily operations of another restaurant that he owned and, thus, was not available to oversee the daily operations of the subject restaurants. He only inquired about the operations of the restaurant when he was informed that the business was not doing well. Kapetanos did not supervise any employees at the subject restaurants, he did not hire or fire employees, and he did not decide rates of pay. He knew claimant because he would visit the restaurants and greet the workers. He believed that claimant was in a management position at the restaurants and responsible for managing the kitchens, but Kapetanos did not participate in the decision to promote Ramirez to that management position. He also did not know Ramirez's salary.

Respondent's Evidence

Jesus Ramirez testified that he began working at Ethos restaurant in Manhattan as a cook in 2003. He was transferred to an Ethos in Great Neck, NY in 2013, where he also worked as a cook. The only job that he ever had was as a cook and he never supervised other employees. During the relevant time period, he was always paid $1,300.00 per week no matter how many hours he worked. He almost always worked more than 40 hours a week except for his last week of work in March 2014. He did not receive meal breaks but could eat one meal from the restaurant while he was working.

Ramirez testified that he saw Kapetanos at the Manhattan Ethos every day. He would order food from the kitchen and talk with the manager. Ramirez was supervised by his manager, who was supervised by Kapetanos. Kapetanos would talk to the manager whenever he came to the restaurant, but Ramirez did not know what they would talk about because they would speak in Greek, which Ramirez does not understand. Kapetanos would also order supplies for the restaurant two times per week.

Senior Labor Standards Investigator Sha Wei testified that he became involved in this case when it was scheduled for a compliance conference. Wei testified that he considered the fact that respondent had a prior case against this employer in evaluating how much to impose as a civil penalty. Respondent introduced the New York State Department of State corporate registration information for the Manhattan restaurant where Ramirez worked and it provides that the registered corporation is 495 J.J.K. Corp. and that Kapetanos is the registered officer.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

Petitioners' burden of proof in this matter was 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; *Matter of Angello v. Natl. Fin. Corp.*, 1 AD3d 850, 854 [3d Dept 2003]; *Matter of RAM Hotels, Inc.*, PR 08-078 at p 24 [Oct. 11, 2011]). A petition must state "in what respects [the order on review] is claimed to be invalid or unreasonable," and any objections not raised shall be deemed waived (*Id.* § 101 [2]). The Labor Law provides that an order of the Commissioner shall be presumed valid (*Id.* § 103 [1]). The hearing before the Board is *de novo* (Board Rules [12 NYCRR] § 66.1 [c]). Petitioner Kapetanos argues that respondent's determination that he was claimant's employer was invalid or unreasonable and, thus, he should not be held individually liable for the wages or penalties assessed in the orders. Petitioner 495 J.J.K. Corp. also asserts that it was invalidly determined to be claimant's employer though no evidence was introduced to support this assertion. Petitioners further argue that claimant was an exempt employee who was not eligible for overtime hours and that he did not actually work the hours that he claimed to have worked in his unpaid wages claim form. For the reasons discussed below, we find Kapetanos was not claimant's employer and revoke the orders as issued against him but we affirm the orders as issued, and amended at hearing, against 495 J.J.K. Corp.

Kapetanos Was Not an Employer Individually Liable for the Wages

"Employer" as used in Labor Law Article 19 means "any individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons acting as an employer" (Labor Law § 651 [6]). "Employed" means "permitted or suffered to work" (Labor Law § 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 New York Labor Law is the same test for analyzing employer status under FLSA (*Bonito v. Avalon Partners, Inc.*, 106 AD3d 625 [1st Dept 2013]; *Matter of Maria Lasso and Jaime M. Correa Sr. and Exceed Contracting Corp.*, PR 10-182 [Apr. 29, 2013], *aff'd sub nom. Matter of Exceed Contracting Corp. v. Indus. Bd. of Appeals*, 126 AD3d 575 [1st Dept 2015]).

In *Herman v. RSR Sec. Servs. Ltd.*, (172 F3d 132, 139 [2d Cir 1999] *citing Carter v. Dutchess Comm. College*, 735 F2d 8, 12 [2d Cir. 1984] and *Goldberg v. Whitaker House Coop.*, 366 US 28, 33 [1961]), the Second Circuit 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 included 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 economic reality based on a "totality of circumstances" (*Id.*). A corporate officer who does not have direct control over employees may be individually liable as an employer for unpaid wages if he actually exercises operational control over the daily operation of the business (*Copantila v. Fiskardo Estiatorio, Inc.*, 788 FSupp2d 253, 310-11 [S.D.N.Y. 2011] *cf. Irizarry v. Catsimatidis*, 722 F.3d

99, 111-17 [2d Cir. 2013]). We find that Kapetanos did not exercise sufficient operational control over the business to satisfy this test (*Matter of Dimitrios Gatanas*, PR 13-126 [March 2, 2016]; *Matter of Wah Chan Wong and H.K. Tea and Sushi, Inc.*, PR 12-090 [October 26, 2016].

Kapetanos credibly testified that he did not hire or fire employees at the subject restaurants, that he did not supervise or control the employees' work schedules or conditions of their work, and that he did not make any determinations regarding the pay for employees. He testified that he signed checks for the subject restaurants at times and some of those checks were used to pay employees, purchase supplies, or pay rent but that he would generally just sign blank checks and did not get involved with what those checks were used for. Kapetanos did visit the restaurants but was not there enough to supervise the daily operations.

Once Kapetanos met his burden, it shifted back to respondent to refute it and we find that respondent did not produce sufficient and credible evidence that Kapetanos was an employer. Ramirez's testimony was insufficient to rebut Kapetanos's testimony and the investigator witness gave no testimony relevant to Kapetanos's role in the restaurants. Ramirez's testimony about Kapetanos's role was vague and conclusory in nature. He said that Kapetanos oversaw the managers and would give them orders but without more specifics it is too vague to rebut Kapetanos's credible testimony that he did not have operational control over the subject restaurants. Ramirez testified that Kapetanos was at the restaurant daily but only for about an hour a day. He testified that he would order food from the kitchen to eat and that he would order supplies two times per week. Without more specific details to support the assertion about his activities at the restaurant, the assertion that he would order supplies alone is insufficient evidence that Kapetanos had operational control over the restaurant (*Salinas v. Starjem Restaurant Corp.*, 123 FSupp3d 442, 464-65 [SDNY 2015]). Ramirez also said that Kapetanos spoke with the managers in Greek so he did not understand what they were saying, so we do not give much weight to his testimony that Kapetanos was in charge of the managers. Respondent's investigator witness did not testify at all about Kapetanos's role in the restaurant, nor did any of respondent's documentary evidence refute Kapetanos's testimony.

Respondent's evidence that Kapetanos may have been at the restaurant daily and that Ramirez believed that he oversaw the managers does not rise to the level of operational control necessary to hold Kapetanos individually liable as an employer (*Salinas*, 123 FSupp3d at 464-65 [SDNY 2015]). The record lacks evidence that Kapetanos hired or fired employees, or had the authority to do so, supervised and controlled employees' work schedules, determined rates and methods of employees' wages, or paid employees except when a blank check that he signed was used to pay an employee by the manager who controlled the blank checks. Kapetanos's status as part owner of the subject restaurants absent specific evidence of control over employment matters is not sufficient to render him liable as an employer (*Salinas*, 123 FSupp3d at 464-65; *Copantitla*, 788 FSupp2d at 311). Ramirez gave no testimony about Kapetanos being involved in his hiring or firing, supervision, or determinations about his rate of pay. Applying the economic reality test to determine employer status to the record in the present case, we find that it was unreasonable and invalid to deem Kapetanos to be a statutory employer who in economic reality was responsible for claimant's wages. Because we find that Kapetanos was not an employer under the Labor Law, the orders as to Kapetanos are unreasonable and must be revoked with respect to Kapetanos only.

The Overtime Wage Order is Upheld as to 495 J.J.K. Corp.

Petitioner 495 J.J.K. Corp. asserted that it was also not claimant's employer yet offered no evidence at the hearing to support that assertion. As such, the Board affirms the respondent's finding that 495 J.J.K. Corp. was claimant's employer.

Pursuant to Article 19 of the Labor Law, employers must pay an overtime premium of time and one-half the regular hourly rate for hours worked over 40 in one week (12 NYCRR 146-1.4). The overtime wage order finds that claimant was paid a fixed weekly wage during the claim period and did not pay him overtime when he worked in excess of 40 hours. Petitioners assert that claimant was not eligible for overtime pay because he was an exempt employee but the only evidence they offered in support of this assertion was vague testimony from Kapetanos about Ramirez being a manager. We do not find this testimony credible because Kapetanos also testified about having no personal knowledge about the hiring decisions at the subject restaurants or otherwise managing the daily operations. Additionally, Ramirez credibly testified about his role at the restaurants and that he did not supervise any other employees.

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 146-2.1). 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 146-2.1 [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). 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. (*Ramirez v. Commissioner of Labor*, 110 AD3d 901 [2d Dept 2013]; *Matter of Mid-Hudson Pam Corp. v. Hartnett*, 156 AD2d 818m 820-21 [3d Dept 1989]).

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). Petitioner 495 J.J.K. Corp. neglected to offer the legally required records of the days claimant worked and the wages they paid him either at the investigative phase of this matter or at the hearing before the Board. As such, respondent's calculation of wages must be credited since petitioner did not meet his burden to negate the reasonableness of the Commissioner's determination (*Anderson v. Mt. Clements Pottery Co.*, 328 US 680, 687 [1949]). The burden is not an impossible one, however, in this case, petitioner 495 J.J.K. Corp. failed to present any evidence to satisfy their burden. There were no records offered by petitioners regarding the wages for claimants. The only witness that testified for petitioners had no personal knowledge about the claimant's wages.

Investigator Wei testified that he used the claim form to calculate the underpayment for Ramirez. That amount was amended to a lower amount on consent at hearing based on a settlement that respondent reached with the owner of the Great Neck location of Ethos. We find that the Commissioner used the best available evidence in determining the underpayment due and we affirm the overtime wage order as to petitioner 495 J.J.K. Corp.

Interest

Labor Law § 219 (1) provides that when the Commissioner determines that wages are due, then the order directing payment of those wages 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." Here, respondent correctly determined that claimant was not paid all wages owed and petitioner 495 J.J.K. Corp. did not offer any evidence to challenge the imposition of interest. We affirm the interest imposed in the overtime wages order.

Liquidated Damages

Labor Law § 218 provides that when wages are found to be due, respondent shall assess against the employer the full amount of the underpayment or unpaid wages and an additional amount as liquidated damages, unless the employer proves a good faith basis for believing that its underpayment or nonpayment of wages was in compliance with the law. Here, respondent correctly determined that claimant was not paid all wages and petitioner 495 J.J.K. Corp. failed to offer any evidence challenging the imposition of liquidated damages. We affirm the liquidated damages imposed in the unpaid wages order.

The Civil Penalty is Affirmed

The unpaid wages order includes a 200% civil penalty. Labor Law § 218 (1) provides if orders are issued to "an employer who previously has been found in violation of [the Labor Law] or to an employer whose violation is willful or egregious," the order must direct payment to the Commissioner of a civil penalty in an amount not to exceed 200% of the total amount of wages found to be due and owing.

In explaining the basis for the civil penalties, investigator Wei testified that the employer had a prior history. Petitioner 495 J.J.K. Corp. did not introduce any evidence to challenge the civil penalty. We affirm the civil penalties in the overtime wage order.

The Penalty Order is Affirmed

Labor Law § 218 (1) provides that where a violation is for a reason other than an employer's failure to pay wages, the order shall direct payment to respondent of a civil penalty in an amount not to exceed $1,000.00 for a first violation. In this case, respondent assessed an $800.00 penalty against petitioners for failure to keep and/or furnish true and accurate payroll records for each employee from on or about March 19, 2011; an $800.00 civil penalty for violating Labor Law § 661 and 12 NYCRR 146-2.3 by failing to provide each employee with a wage statement from on or about March 19, 2011 through March 22, 2014; an $800.00 civil penalty for violating Labor Law § 661 and 12 NYCRR 146-2.5 by failing to pay employees an hourly rate from on or about March 19, 2011 through March 22, 2014; and an $800.00 civil penalty for violating Labor Law § 162 by failing to provide employees with 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 period from on or about March 19, 2011 through March 22, 2014. The total amount due in the penalty order is $3,200.00. Petitioner 495 J.J.K. Corp. failed to introduce any evidence at hearing

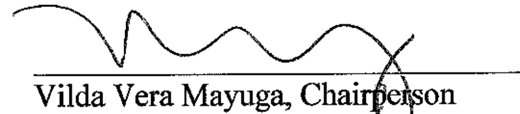
that it kept required records, issued employees wage statements, paid employees an hourly rate, or provided noon day meal times. We affirm the penalty order.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

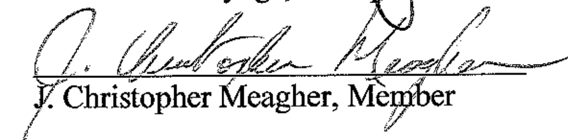
1. The overtime wage violation and penalty orders are revoked as to petitioner Kapetanos; and

2. The overtime wage violation and penalty orders are affirmed, as amended at hearing, as to petitioner 495 J.J.K. Corp.; and

3. The petition for review is granted in part and denied in part.

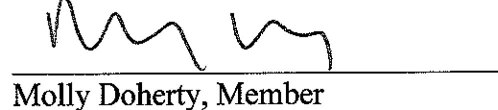


Vilda Vera Mayuga, Chairperson



J. Christopher Meagher, Member

Michael A. Arcuri, Member



Molly Doherty, Member

Absent

Gloribelle J. Perez, Member

Dated and signed by the Members
of the Industrial Board of Appeals
in New York, New York, on
June 6, 2018.

that it kept required records, issued employees wage statements, paid employees an hourly rate, or provided noon day meal times. We affirm the penalty order.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The overtime wage violation and penalty orders are revoked as to petitioner Kapetanos; and

2. The overtime wage violation and penalty orders are affirmed, as amended at hearing, as to petitioner 495 J.J.K. Corp.; and

3. The petition for review is granted in part and denied in part.

Vilda Vera Mayuga, Chairperson

J. Christopher Meagher, Member

Michael A. Arcuri, Member

Molly Doherty, Member

Absent

Gloribelle J. Perez, Member

Dated and signed by a Member
of the Industrial Board of Appeals
in Utica, New York, on
June 6, 2018.