STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of: SUECHAND TOOLSEE A/K/A JACK TOOLSEE AND TOOLSEE WASH CORP., Petitioners, To Review Under Section 101 of the Labor Law: An Order to Comply with Article 19, and an Order under Articles 5 and 19 of the Labor Law, both dated June 2, 2011, - against - THE COMMISSIONER OF LABOR, Respondent.	:	DOCKET NO. PR 16-034 RESOLUTION OF DECISION

APPEARANCES

Joseph A. Altman, P.C., Bronx (*Joseph A. Altman* of counsel), for petitioners.

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

WITNESSES

Suechand Toolsee for petitioners.

Claimant Alexandra Martinez, Senior Labor Standards Investigator Gerard Capdeville, and Senior Labor Standards Investigator Johanna Cabrera for respondent.

WHEREAS:

On April 11, 2016, petitioners Suechand Toolsee a/k/a Jack Toolsee and Toolsee Wash Corp. filed a petition with the Industrial Board of Appeals pursuant to Labor Law § 101 seeking review of two orders issued against them by respondent Commissioner of Labor on June 2, 2011. Respondent filed her answer on August 3, 2016.

Upon notice to the parties, a hearing was held on January 27, 2017 in New York, New York before Vilda Vera Mayuga, Chairperson of the Board and designated Hearing Officer in the proceeding. Each party was afforded a full opportunity to present documentary evidence, examine and cross-examine witnesses, and make statements relevant to the issues.

The first order (minimum wage order) demands that petitioners comply with Article 19 of the Labor Law and pay the Commissioner $21,631.88 in unpaid wages due and owing to claimant Alexandra Martinez for the period from June 17, 2007 through April 27, 2008, interest at the rate of 16% calculated to the date of the order in the amount of $13,405.84, liquidated damages in the amount of $5,407.97, and a civil penalty in the amount of $21,631.88. The total amount due is $62,077.57.

The second order (penalty order) under Articles 5 and 19 of the Labor Law assesses petitioners a civil penalty of $1,000.00 for violation of Labor Law § 661 and 12 NYCRR 142-2.6 for failure to keep and/or furnish true and accurate payroll records for the period from June 17, 2007 through April 27, 2008; a civil penalty of $1,000.00 for violation of Labor Law § 661 and 12 NYCRR 142-2.7 for failure to give each employee a complete wage statement with every payment of wages for the period from June 17, 2007 through April 27, 2008; and a $750.00 civil penalty for violation of Labor Law § 162 for failure to provide employees at least 30 minutes off for the noon day meal for the period from January 14, 2008 through April 27, 2008. The total amount due is $2,750.00.

Petitioners allege that claimant was properly paid for the hours worked.

For the following reasons, we find petitioners failed to meet their burden of proof to establish that the orders are invalid or unreasonable. The orders are affirmed.

SUMMARY OF EVIDENCE

Petitioners' Evidence

Testimony of petitioner Suechand Toolsee

Petitioner Toolsee has owned co-petitioner Toolsee Wash Corp., a laundromat in the Bronx, for 20 years. The laundromat has always had two employees at a time, including petitioner Toolsee. The laundromat is open seven days a week from 7:00 a.m. until 7:00 p.m. An employee has always worked the 7:00 a.m. until 4:00 p.m. shift Monday through Friday. Toolsee, who would sometimes visit the laundromat during the day to supervise the employee, worked alone from 4:00 p.m. until 7:00 p.m. during the week, and 7:00 a.m. through 7:00 p.m. on Saturdays and Sundays.

Claimant Martinez worked at the laundromat from June 2007 through January 2008. She worked Monday through Friday from 7:00 a.m. until 4:00 p.m. at a rate of $70.00 per day, which she received weekly in cash, a total $350.00. Sometimes Toolsee asked Martinez to work until 5:00 p.m. or 6:00 p.m., and paid her an additional $20.00 for staying that extra hour or two. Martinez did not work on weekends and was fired by Toolsee in January 2008.

On cross-examination, Toolsee clarified that he withheld $100.00 from Martinez's weekly salary to pay Martinez's rent to her landlord as Toolsee, who did not own the apartment, helped Martinez find the rental.

Toolsee testified that he did not maintain records indicating the days and hours worked by Martinez, nor the amounts withheld from her pay.

Respondent's Evidence

The Claim Form

Dated January 8, 2008, Martinez's claim form states that she worked at a laundromat for Mr. Toolsee as of June 17, 2007. While in response to the question regarding her last date worked, she entered January 7, 2008, she answered that she was still employed by Mr. Toolsee in response to four other questions on the form, either by writing "still employed" or, when indicating a date range covering the period of the complaint, writing "present."

The second page of the claim form indicates that from June 17, 2007 to September 10, 2007, Martinez worked from 7:00 a.m. to 4:00 p.m., 7 days per week, for $40.00 per day. From September 17, 2007 through the "present" date, or January 8, 2008, she worked from 7:00 a.m. to 10:00 p.m., 7 days per week, for $70.00 per day, without a meal period.

Approximately ten years spanned from when Martinez filed her claim with respondent and when she testified in this proceeding.

Claimant Alexandra Martinez

Martinez testified that Toolsee interviewed her in 2007 at a Westchester Avenue laundromat. At the job interview, Toolsee offered Martinez the job, set her hours to 7:00 a.m. to 4:00 p.m., seven days per week, and rate of pay of $40.00 per day. Martinez started working at the Westchester Avenue laundromat soon thereafter.[1] Her duties included washing, folding and labeling the laundry of customers who wanted drop-off service. She also cleaned the laundromat, tended to customers, sold soap and other supplies, and provided change when customers did not have any for use of the machines.

Six to eight weeks after Martinez started working at the Westchester Avenue laundromat, she learned that an apartment belonging to Toolsee's sister-in-law became available. She had been living with her father, but upon selling the family home and moving to another state, Martinez was left in need of quickly finding a home. She moved into the apartment offered by Toolsee and his sister-in-law, and as a result, was immediately transferred to work at the Morrison Avenue laundromat that Toolsee also owned. The Morrison Avenue laundromat was much closer to Martinez's new apartment, and Toolsee had a greater need for her help in that location. The hours of operation at both the Westchester and Morrison Avenue laundromats are 7:00 a.m. to 10:00 p.m.

Toolsee's sister-in-law required two months of rent as a deposit, a total of $1,000.00, and that Toolsee pay her Martinez's rent from her salary to assure that rent is always paid. Martinez agreed to work additional hours as she needed to earn more money to cover the rent. Now at the Morrison Avenue laundromat, where she remained throughout her employment with Toolsee, she worked seven days a week, from 7:00 a.m. to 10:00 p.m. at a rate of $70.00 per day.

[1] According to Martinez's claim form, she started working on June 17, 2007.

Martinez earned $490.00 per week, of which Toolsee deducted $100.00 to pay towards her monthly rent.

At first, when Martinez started working at the Morrison Avenue laundromat, Toolsee would stop by to see how business is going, and to bring supplies, such as various soaps and detergents. As weeks and months passed, Toolsee's appearances decreased. In January 2008, Martinez began asking Toolsee to hire an additional worker to help her because she was feeling tired and fatigued working more than 100 hours per week for months without a day off and desperately needed help. After Toolsee told Martinez that he could not find anybody to help her, she had her sister help her at the laundromat for a couple of hours so that she could rest. Martinez would have to pay her sister because Toolsee did not pay Martinez's sister despite knowing that she sometimes worked there helping Martinez.

Martinez filed a complaint with respondent in January 2008, which she identified at hearing and stated was correct and her best recollection since events happened approximately ten years ago. In or around March and April 2008, Toolsee started appearing at the laundromat more and more, and eventually fired her at the end of April.

Department of Labor Investigation

Senior Labor Standards Investigators Gerard Capdeville and Johanna Cabrera testified on behalf of the Department of Labor. Capdeville testified that an investigator for respondent visited the Morrison Avenue laundromat on June 8, 2008. At the end of this visit, respondent provided Toolsee with a notice of revisit form requesting records, including those related to payroll, going back to January 8, 2002 through the day of the visit.

Capdeville and Cabrera testified that the final calculations of wages owed reflect the claim form filed by Martinez and information gathered during the investigation: that she worked nine hours per day, seven days a week, from June 2007 through to the week ending September 9, 2007, for a total of 63 hours per week, earning $40.00 per day, and worked 15 hours per day, seven days per week, from the week ending September 17, 2017 to April 27, 2008, for a total of 105 hours per week, earning $70.00 per day. Martinez was never provided a meal period during her employement with petitioners. The calculations used the minimum wage rate at the time, or $7.15, to calculate wages for the first 40 hours of work, and applied the overtime rate of $10.72 to the remaining hours. In addition, spread of hours was added for the days claimant worked more than ten hours in a day.

Cabrera testified that she prepared the June 25, 2010 narrative report which reflects the amounts owed by petitioners were lowered to remove the spread of hours that was mistakenly applied to the time period June 17, 2017 to September 9, 2007 since Martinez did not work more than ten hours per day. The final amount, which is reflected on the orders issued by respondent, is $21,631.88, exclusive of interest and penalties.

Cabrera also testified that she relied on Martinez's claim form for number of hours worked and monies paid since petitioners did not submit any payroll records for her to review and consider. Cabrera further testified that the civil penalties on the minimum wage order were set at 100% out of a possible 200% because, although Toolsee Wash Corp. is a small business, petitioners did not respond to the notice that was served on them, nor the recapitulation sheet.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

The Minimum Wage Order is Affirmed

Article 19 of the Labor Law 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 $7.15 an hour (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). In addition to the applicable minimum wage, an employee must receive an additional hour's pay at the minimum wage rate if they work a spread of hours exceeding 10 hours (12 NYCRR 142-2.4).

Article 19 of the Labor Law also 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 § 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, 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 employee's 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 showing the dates and hours worked or wages paid claimant during the time she was employed by petitioners. In fact, Toolsee testified that he did not maintain payroll records. While petitioner Toolsee testified that claimant usually worked from 7:00 a.m. until 4:00 p.m., five days a week, or a total of 45 hours per week, we do not credit his testimony as it is contradicted many times – first, by himself in his petition which states that Martinez usually worked 40 hours a week; then by respondent's field-visit notes, which indicate that Toolsee said Martinez usually worked from 7:00 a.m. until 7:00 p.m., five days a week, for a total of 60 hours a week; and by Martinez who testified that while she worked from 7:00 a.m. until 4:00 p.m. at the Westchester Avenue laundromat during the first six to eight weeks of employment, she started working 7:00 a.m. until 10:00 p.m. as soon as she was transferred to work at the Morrison Avenue laundromat that Toolsee also owned.

Petitioner Toolsee's testimony concerning the number of hours worked by Martinez and wages paid to her was unreliable. We credit Martinez's credible, detailed, and unrebutted testimony regarding same, and find the Commissioner's approximation of wages owed drawn from information on her written claim form to be reasonable. Petitioners failed to overcome that approximation with sufficient and reliable evidence establishing the precise hours she worked, and that she was paid for those hours, or with other credible and reliable evidence showing the Commissioner's determination to be unreasonable.

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 Article 19, she must issue an order directing payment of wages found to be due, "plus the appropriate civil penalty." The wage order assesses a 100% civil penalty.

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."

The wage order imposes liquidated damages in the amount of 25% of the wages owed. 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.

Inasmuch as petitioner failed to challenge the civil penalty, interest, or liquidated damages assessed in the minimum wage order, the issue is waived pursuant to Labor Law § 101 (2).

Penalty Order

The penalty order imposes a $1,000.00 civil penalty for violating Labor Law § 661 and 12 NYCRR 142-2.6 for failing to keep and/or furnish true and accurate payroll records for the period from June 17, 2007 through April 27, 2008, a civil penalty of $1,000.00 for violating Labor Law § 661 and 12 NYCRR 142-2.7 for failing to give each employee a complete wage statement with every payment of wages for the period from June 17, 2007 through April 27, 2008, and a $750.00 civil penalty for violating Labor Law § 162 for failing to provide employees with a break of at least 30 minutes for the noon day meal for the period from January 14, 2008 through April 27, 2008. As to the first two civil penalties, Toolsee admitted that he did not maintain payroll records. Petitioners did not submit evidence challenging the civil penalties assessed in the penalty order, including the ones assessed for failing to provide a meal break to employees, 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 order is affirmed; and

2. The penalty order is affirmed; and

3. The petition be, and the same hereby is, denied.

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
July 26, 2017.