STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of: YAJAIRA L. ROJAS AND AURA M. HERNANDEZ AND EXPRESS HAND CAR WASH & DETAILING, INC., Petitioners, To Review Under Section 101 of the Labor Law: An Order to Comply with Article 19 of the Labor Law and an Order Issued Under Article 19, both dated November 15, 2017, - against - THE COMMISSIONER OF LABOR, Respondent.	DOCKET NO. PR 18-005 RESOLUTION OF DECISION

APPEARANCES

Jonathan Bobrow Altschuler P.C., New York, (*Jonathan Altschuler* of counsel), for petitioners.

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

WITNESSES

Aura Hernandez for petitioners.

Senior Labor Standards Investigator Favio Escudero for respondent.

WHEREAS:

Petitioners filed a petition in this matter on January 11, 2018, pursuant to Labor Law § 101, seeking review of an order issued against them by respondent Commissioner of Labor on November 15, 2017. Respondent filed her answer to the petition on March 16, 2018.

Upon notice to the parties a hearing was held in this matter on September 13, 2018, in New York, New York before Molly Doherty, Chairperson of the Board, 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 (minimum wage order) under review directs compliance with Article 19 and payment to respondent for unpaid wages to eight claimants in the amount of $22,437.06 for the time period from May 31, 2009 to July 9, 2012, interest continuing thereon at the rate of 16% calculated to the date of the order in the amount of $19,523.32, liquidated damages in the amount of $22,437.06, and assesses a civil penalty in the amount of $22,437.06, for a total amount due of $86,834.50.

The order under Article 19 of the Labor Law (penalty order) assesses a $1,000.00 civil penalty for violating Labor Law § 661 and 12 NYCRR 142-2.6 by failing to keep and/or furnish payroll records for each employee from May 31, 2009 through June 9, 2012 and a $1,000.00 civil penalty for violating Labor Law § 661 and 12 NYCRR 142-2.7 by failing to give each employee a complete wage statement with every payment of wages from May 31, 2009 through June 9, 2012. The total amount due in the penalty order is $2,000.00.

Petitioners allege that the orders are invalid and unreasonable because the respondent miscalculated the wages due because respondent failed to consider dates the car wash was closed due to weather and holidays; failed to give the petitioners credit for tips that employees received; and the statute of limitations prohibits the respondent from going back to May 31, 2009. Petitioners further allege that the interest, liquidated damages, and civil penalty were improperly assessed since respondent made errors in assessing the wage underpayment.

SUMMARY OF EVIDENCE

Testimony of Petitioner Aura Hernandez

Aura Hernandez (Hernandez) is an owner of Express Hand Car Wash and the President of Express Hand Car Wash & Detailing, Inc. Yajaira Rojas (Rojas) was a previous owner of the car wash and an officer of the corporate petitioner. Hernandez testified that Rojas stopped being an owner and an officer of the corporation approximately two years prior to the date of the hearing. Hernandez pays the employees of the car wash each day in cash and their pay varies depending on how many cars are washed each day. The employees are paid per car. The employees also receive tips but she does not know how much they receive in tips because tips are put in a box by the customers and she does not access the money in the box. The employees access the tip money from the box. The car wash is closed when it rains but is otherwise open every day from 8:00 a.m. to 7:00 p.m. Hernandez has about twelve employees but sometimes not all employees show up. She does not keep track of when employees work and she did not keep records of how much she paid employees.

Testimony of Senior Labor Standards Investigator Favio Escudero

Senior Labor Standards Investigator Favio Escudero (Escudero) testified that respondent received a complaint from the United States Department of Labor regarding the car wash and after receiving that complaint, he went to the car wash with other investigators to interview the employer and employees. The investigators filled out employee interview sheets, which the employees also signed. The only records that Escudero received from the employer were unemployment insurance

tax records that did not contain employee names, hours worked or wages paid. Because petitioners did not provide respondent with any payroll records, Escudero based the wage calculations on employee interviews. He took the information about the hours worked and what the employees had been paid to determine how much was owed in wages during the claim period. He then applied what respondent calls the "6/5/4 formula" which is used to deduct for days that a car wash is closed due to rain. Escudero also determined, based on employee interviews, that employees were given thirty minute or one hour meal breaks, so petitioners were given credit for that break time in the wage calculations. Because the petitioners never provided any records or responded to some of respondent's letters, respondent assessed a 100% civil penalty. Escudero testified that the correspondence sent to respondent regarding wages owed did not reflect that respondent applied the "6/5/4 formula" to credit petitioners for rain days but the total amount in wages determined to be owed did include credit for rain days.

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 (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; *Garcia v Heady*, 46 AD3d 1088, 1090 [3d Dept 2007]; *Matter of Angello v Natl. Fin. Corp.*, 1 AD3d 850, 854 [3d Dep't 2003]; *Matter of RAM Hotels, Inc.*, Docket No. PR 08-078, at p. 24 [October 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]).

The Wages Included in the Orders Are Not Barred by the Statute of Limitations

Petitioners assert that the statute of limitations bars a portion of the wages determined to be owed by respondent. We reject this claim. Labor Law § 663 (3) provides that the Commissioner may bring administrative action to recover back wages within six years and the statute of limitations shall be tolled from the date an employee files a claim or the Commissioner commences an investigation, whichever is earlier. The respondent commenced its investigation in at least June 2012, when it conducted interviews of employees of the car wash during a visit to the car wash. The order includes wages dated back to May 31, 2009. Respondent only went back a little over three years from the date that the investigation was commenced, which is within the permissible six-year period that the Commissioner could have sought wages (*see e.g. Matter of Fred Barthelman III and North Coast Sealing, Inc.*, Docket No. PR 14-114, at pp. 28-29 [December 13, 2017]).

Petitioners' Failure to Maintain Payroll Records

Article 19 of the Labor Law requires employers to maintain, for six years, certain records of the hours their employees worked and the wages they paid them (Labor Law § 661). 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, if any (*id.*; 12 NYCRR 142-2.1 [a]). Employers must keep such records open for inspection by the Commissioner or a designated representative or face issuance of a penalty (Labor Law §§ 661 and 662 [2]; 12 NYCRR 142-2.1 [e]). In the absence of required payroll 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 if results may be merely approximate (*Matter of Ramirez v Commissioner of Labor*, 110 AD3d 901, 901-902 [2d Dep't 2013]; *Matter of Mid Hudson Pam Corp. v Hartnett*, 156 AD2d 818, 820-821 [3d Dep't 1989]).

It is undisputed that the petitioners did not maintain wage and hour records for the claim period. As such, the Commissioner correctly determined that petitioners failed to maintain legally required payroll records.

The Wage Order is Affirmed

Article 19 of the Labor Law, entitled "Minimum Wage Act" provides that every employer must pay each of its non-exempt employees a minimum hourly wage for each hour of work (Labor Law § 652 [1]), and one and one-half of their regularly hourly wage rate for hours worked over 40 in a week (12 NYCRR 146-1.4).

In the absence of wage and hour records for the relevant period, petitioners then bear the burden of proving that the disputed wages were paid (Labor Law § 196-a; *Garcia v Heady*, 46 AD3d at 1090 [3d Dept 2007]; *Matter of Angello,* 1 AD3d at 854). As the Appellate Division stated in *Matter of Mid Hudson Pam Corp v Hartnett*, (156 AD2d at 821), "[w]hen an employer fails to keep accurate records as required by statute, the Commissioner is permitted to calculate back wages due to employees by using the best available evidence and to shift the burden of negating the reasonableness of the Commissioner's calculations to the employer." Therefore, the petitioners have the burden of showing that the Commissioner's order is invalid or unreasonable by a preponderance of the evidence of the specific hours that the claimants worked and that they were paid for these hours, or other evidence that shows the Commissioner's findings to be invalid or unreasonable (*Matter of Ram Hotels, Inc.*, Docket No. PR 08-078, at p. 24). Here, petitioners offered no evidence to show that the wage order is invalid or unreasonable. They asserted that respondent did not correctly credit petitioners for days that the car wash was closed due to rain. However, they did not offer any probative evidence through testimony or records of the basis of this assertion or what credit they should have been given. Hernandez testified that the car wash was closed when it rained but she did not give any testimony or other evidence about what those days were. She admitted that she does not have any knowledge about when employees work and when they do not work. While the respondent's explanation of the 6/5/4 formula, or weather formula, that was used to give petitioners credit for rain days was limited, it was petitioners' burden to show that the respondent's order was invalid and unreasonable and they failed to offer any factual evidence to meet their burden. Thus, we credit the Commissioner's reliance on employee interviews and a weather formula as the best available evidence of wages owed and affirm the wage order.

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 the employees were not paid all wages owed and petitioners did not offer sufficient evidence to challenge the wage order or imposition of interest. We affirm the interest imposed in the unpaid wages order.

Liquidated Damages

Labor Law § 218 (1) also requires respondent to include liquidated damages in the amount of 100 % of the wages found due with the order. Liquidated damages must be paid by the employer unless the employer "proves a good faith basis to believe that its underpayment was in compliance with the law." Liquidated damages in the amount of 100% were assessed against petitioners in this matter.[1] Here, respondent correctly determined that employees were not paid all wages owed and petitioners did not offer sufficient evidence to challenge the wage order or the imposition of the liquidated damages. We affirm the liquidated damages imposed in the unpaid wages order.

The Civil Penalty

Labor Law § 218 (1) provides that if respondent determines an employer has violated certain provisions of Article 19, including failure to pay minimum wages and overtime, she must assess an "appropriate civil penalty." A civil penalty of up to 200% shall be assessed if respondent finds the violation was willful or egregious, or if the employer has previously violated the Labor Law. Otherwise, in assessing the amount of the penalty, the respondent must "give due consideration to the size of the employer's business, the good faith basis of the employer to believe that its conduct was in compliance with the law, the gravity of the violation, the history of previous violations and, in the case of wages . . . the failure to comply with recordkeeping or other non-wage requirements" (Labor Law § 218 [1]). Respondent assessed a 100 % civil penalty against petitioners, which did not exceed the amount allowed by the statute. We affirm the civil penalty because petitioners presented no evidence that the civil penalty was unreasonable.

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 a $1,000.00 penalty against petitioners for failing to keep and/or furnish true and accurate payroll records for each employee for the claim period, which petitioners conceded. Respondent assessed a $1,000.00 penalty against petitioners for failure to furnish each employee with a wage statement for the claim period, which petitioners conceded. Thus, we affirm those two counts of the penalty

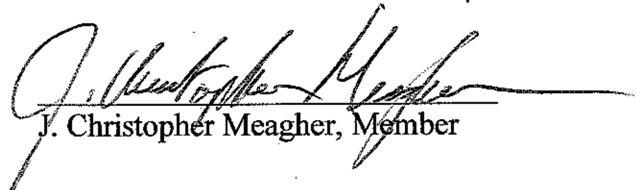
[1] While Labor Law § 218 (1) requires the Commissioner to include 100 % liquidated damages in her orders to comply, Labor Law § 663 (2) provides that liquidated damages shall be calculated by the Commissioner as "no more than" 100 % of the underpayments found due.

order since petitioners did not present any evidence challenging the validity or reasonableness of those counts.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

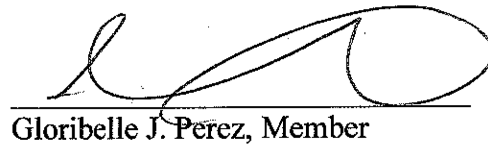
1. The unpaid wages order is affirmed; and
2. The penalty order is affirmed; and
3. The petition for review be, and it hereby is, denied.

Molly Doherty, Chairperson



J. Christopher Meagher, Member

Michael A. Arcuri, Member



Gloribelle J. Perez, Member

Date and signed by the Members
of the Industrial Board of Appeals
in New York, New York, on
December 12, 2018.

order since petitioners did not present any evidence challenging the validity or reasonableness of those counts.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The unpaid wages order is affirmed; and

2. The penalty order is affirmed; and

3. The petition for review be, and it hereby is, denied.

Molly Doherty, Chairperson

J. Christopher Meagher, Member

Michael A. Arcuri, Member

Gloribelle J. Perez, Member

Date and signed by a Member
of the Industrial Board of Appeals
in Utica, New York, on
December 12, 2018.