STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of: ALI AL RAHAIMI (T/A SANCHEZ GROCERY & DELI), Petitioner, To Review Under Section 101 of the Labor Law: Orders to Comply with Article 19 and an Order Under Article 6 of the Labor Law, both dated July 7, 2017, - against - THE COMMISSIONER OF LABOR, Respondent.	DOCKET NO. PR 17-127 RESOLUTION OF DECISION

APPEARANCES

Ali Mohammad Al Rahaimi, New York, for petitioner pro se.

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

WITNESSES

Ali Mohammad Al Rahaimi, Nagi Elqeferi, Waddah Alnamer, for petitioner.

Claimant and Senior Labor Standards Investigator Pierre Magloire, for respondent.

WHEREAS:

Petitioner Ali Rahaimi filed a petition in this matter on August 15, 2017, pursuant to Labor Law § 101, seeking review of orders issued against them by respondent Commissioner of Labor on July 7, 2017. Respondent filed her answer to the petition on October 5, 2017.

Upon notice to the parties a hearing was held in this matter on July 19, 2018, in New York, New York, before Molly Doherty, Chairperson of the Industrial Board of Appeals, 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 of the Labor Law (minimum wage order) under review directs compliance with Article 19 and payment to respondent for underpaid wages to one claimant in the amount of $16,859.50 for the period from June 1, 2014 to July 11, 2015, interest continuing thereon at the rate of 16% calculated to the date of the order in the amount of $5,372.87, liquidated damages in the amount of $16,859.50, and assesses a civil penalty in the amount of $16,859.50, for a total amount due of $55,951.37.

The order under Article 6 of the Labor Law (unpaid wages order) under review directs compliance with Article 6 and payment to respondent for unpaid wages to one claimant in the amount of $140.00 for the period from June 1, 2014 to July 11, 2015, interest continuing thereon at the rate of 16% calculated to the date of the order in the amount of $44.62, liquidated damages in the amount of $140.00, and assesses a civil penalty in the amount of $140.00, for a total amount due of $464.62.

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 true and accurate payroll records for each employee from on or about June 1, 2014 to July 11, 2015 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 on or about June 1, 2014 to July 11, 2015. The total amount due in the penalty order is $2,000.00.

Petitioner alleges that the orders are invalid and unreasonable because he did not hire claimant, therefore petitioner was not his employer under the Labor Law.

SUMMARY OF EVIDENCE

Wage Claim

On August 3, 2015, claimant filed a claim against petitioner alleging that he worked 70 hours per week from June 1, 2014 to July 11, 2015, that he was paid $400.00 per week for each of those weeks, and that for the week ending July 11, 2015, he was only paid $260.00 for 70 hours of work.

Petitioner's Evidence

Ali Mohammad Al Rahaimi's Testimony

Petitioner Ali Mohammad Al Rahaimi (hereinafter "petitioner" or "Al Rahaimi") owned a store/deli named 358 Famous Deli located at 358 Bedford Park Boulevard, Bronx, New York. The name of the deli was above the store, as reflected in a photograph. He purchased the store in 2014 and it burned down in a fire in October 2015. It never re-opened at that location after the fire. The store did not earn a lot of income per petitioner's testimony and tax records. Al Rahaimi testified that his step-son, Waddah Alnamer, worked at the store every day in the mornings from 7:30 or 8:00 A.M., when he opened the store, until Al Rahaimi arrived at 11:00 am or noon. Al Rahaimi did not pay Alnamer wages but Al Rahaimi supported him since they lived together. Al Rahaimi closed the store daily, at 8:00 P.M. on weekdays and at 9:00 P.M. on weekends. Al Rahaimi testified that no one else worked in the store when he was there except his wife, who would occasionally

mop the store for him. Al Rahaimi stated that the store is very small, approximately 500-600 square feet and so he worked in the store alone. The store wasn't very busy and there was a much bigger deli across the street. If he needed to take a bathroom break, he would lock the store and go to use the bathroom. He would eat food while standing at the counter in the store. If he was unpacking product or supply shipments and a customer came in, he would set aside what he was unpacking and go to manage the customer. If a customer was in the store and another customer wanted to get something from the store, they would wait outside until the first customer left because the store was tiny.

Al Rahaimi testified that the claimant never worked for him and he didn't know who he was until after he saw the claimant testify. He then remembered that the claimant did come into the store when two women were in the store. He stole the phone of one woman while outside of the store and then ran into the store and a fight broke out between the two women and the claimant inside the store. The police came to the store and the claimant said he didn't have anyone's phone and after searching, Al Rahaimi and the police found the phone under a shelf in the store. Sometime after that incident, the claimant came to the store again and asked Al Rahaimi to be a witness for him but Al Rahaimi declined. The claimant told Al Rahaimi that he would regret not being a witness for him. Al Rahaimi believes the claimant filed a wage claim against him to get revenge against Al Rahaimi because he was not a witness for the claimant.

Al Rahaimi did not receive any communications from respondent. He learned about the issuance of the orders to comply because the prior owner of the subject store, who was also named in the orders to comply as an employer, brought the orders to comply to another grocery store in the Bronx and that grocery store owner contacted petitioner to tell him about the orders to comply. He did not receive any mail at the subject store location after the store burned down.

Nagi Elqeferi's Testimony

Nagi Elqeferi (hereinafter "Elqeferi") delivered supplies, mostly shopping bags and plastic bags, to petitioner's store. He began delivering bags to the store in October 2014 and continued to do so until the store burned down in 2015. Elqeferi testified that he would visit the store at least once a week and he would usually go toward the end of the day, around sunset, so he could chat and laugh with Al Rahaimi. He would usually stay for about 15-30 minutes, sometimes longer, sometimes less time. Elqeferi only ever saw Al Rahaimi working in the store, and very occasionally, he saw Al Rahaimi's wife there too.

Waddah Alnamer's Testimony

Waddah Alnamer is Al Rahaimi's step son. They have known each other for about five years. He used to help Al Rahaimi by working in the subject store, 358 Famous Deli. He would work in the store every day from 7:00 or 8:00 in the morning until about 10:00 or 11:00 in the morning. When Al Rahaimi arrived, Alnamer would leave for the day. Alnamer testified that the store was like a candy store and was about 500 square feet.

Respondent's Evidence

Department of Labor Investigator's Testimony

Senior Labor Standards Investigator Pierre Magloire (hereinafter "Magloire") testified for the respondent. Magloire did not have any knowledge about the respondent's investigation for this case and only looked at documents relating to the investigation on the date of the hearing. He testified that respondent never received any response from petitioner in their efforts to communicate about the wage claim filed by claimant. He testified that petitioner's failure to respond to DOL's efforts to communicate with him about the wage violation was part of the basis of the decision to issue 100% civil penalties. Magloire was unaware that the subject store burned down nor did he have any knowledge about whether respondent sent correspondence to the petitioner at an address other than that of the store that burned down.

Claimant's Testimony

Claimant testified that he worked for petitioner for about one year and three months. He did not remember exactly which month in 2014 that he began working for petitioner, but he did testify that he stopped working for petitioner in July 2015. Claimant testified that he referred to the store as Deli Grocery Sanchez because he was told by a friend to look for a job at the store and that friend referred to the store name Deli Grocery Sanchez and he knew the prior owner's name to be Domingo Sanchez. Claimant was a general helper/stock clerk in a deli/grocery store owned by petitioner. He worked from 4:00 P.M. to 2:00 A.M. every day of the week. Claimant earned $400.00 per week from petitioner. He was supposed to work from 4 P.M. until midnight at the rate of $400.00 per week but the store always stayed open until 1:30 or 2:00 A.M. He didn't get extra pay for the one and a half to two hours extra that he worked every day. The claimant was paid in cash on Monday nights by Al Rahaimi. Claimant testified that he worked his shift with Al Rahaimi and petitioner's son, "Sammy," opened the store in the mornings. Claimant said he knew petitioner's son as "Sammy" but didn't know if it was his name. He identified "Sammy" as one of the petitioner's witnesses who had given testimony at the hearing. Claimant was responsible for re-stocking the refrigerator and preparing sandwiches or other food. The store was not very busy. It stayed open late because people would come into the store after midnight to buy beer and other things. The store did receive some deliveries of food products and napkins but the claimant never spoke to the delivery people and most of the deliveries happened before he started his shift at 4 P.M. Claimant never saw deliveries of plastic bags but said the petitioner would bring those items to the store themselves. The store was long and narrow and it was located between a church and a laundromat and across the street from a deli.

Petitioner fired claimant in July 2015 after there was a fight in the store during which claimant was injured. He testified that two women came into the store and got into a fight and one of the women dropped her cell phone during the fight. The woman who lost her cell phone could not find it and reached into claimant's pants pocket, trying to grab his phone. He was struggling with her, she pushed him and he hit the ATM machine, hurt his back and fell to the floor. The two women jumped on top of him, trying to take his phone. Al Rahaimi was in the store but went outside the store while the two women were on top of claimant and locked the door from the outside and called the police. When the police arrived, someone found the missing phone and gave it to the police and an ambulance came and brought claimant to the hospital. The next day at about 10:00 A.M., the police went to claimant's house and brought him to the police station, where he

was until about 4:00 P.M. Al Rahaimi called claimant at 4:00 P.M. to say he needed to be at work. Claimant went to the store with his paperwork from the hospital and said he needed three days off from work. Al Rahaimi told him he was fired if he did not begin work at that moment. Claimant left the store and never returned. A Bronx County Criminal Court document signed by a New York City police officer described a similar incident as the one claimant testified about. The document, which contains a police officer's statement based on information provided by claimant, names two individuals as defendants in a criminal case who physically assaulted claimant at a location with the same address as the subject store in this proceeding. Additionally, claimant signed a supporting deposition attached to the police officer's statement.

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.

Petitioner's 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 Dep't 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 argues that he was not claimant's employer because claimant never worked at the store. We find, as discussed below, that claimant was an employee of petitioner.

Claimant Was Employed by Petitioner

"Employer" as used in Labor Law Articles 6 and 19 means "any person, corporation or association employing any individual in any occupation, industry, trade, business or service" (Labor Law § 190 [3]; *see also* Labor Law § 651 [6]). "Employed" means "permitted or suffered to work" (Labor Law § 2 [7]).

We find claimant's testimony about his employment at the store to be credible. He described with some detail the location of the store and the work that he did for the store. He testified about the petitioner and the petitioner's son working at the store and while he may have misidentified the petitioner's stepson as petitioner's son, his misidentification of the familial relationship does not undermine that testimony. Claimant credibly testified at the hearing about the work that he did in the store. Claimant's testimony about being physically assaulted in the store on what became his last day of employment was also credible and bolstered by criminal court documents, including a police officer's statement based on a criminal investigation, that was consistent with the claimant's testimony. Claimant's credible testimony was sufficient to show petitioner was his employer under Articles 6 and 19 of the Labor Law (*Herman v. RSR Sec. Servs. Ltd.*, 172 F3d 132, 139 [2d Cir 1999]; *Matter of Yick Wing Chan et al.*, Docket No. PR 08-174, at pp. 6-7 [October 17, 2012]).

Petitioner's testimony was too general and inconsistent to be found credible. He testified about the store being too small to have more than one person working there but later testified that the petitioner, the claimant, and the two women that claimant had the altercation with were all in the store at the same time. Petitioner's testimony that he had no idea who claimant was until his rebuttal testimony when he testified that he did remember claimant asking him to be a witness in a criminal matter was not credible. We give little weight to the testimony of Alnamer and Elqeferi because each has a personal and financial interest in testifying in support of petitioner and offered no additional details to what Al Rahaimi testified about. Petitioner's and his witnesses' testimony was insufficient to meet petitioner's burden to show that he was not claimant's employer. (*See e.g. Matter of Winston Castillo and E-Z Parking Lot Corp.*, Docket No. PR 15-097, at pp. 6-7 [October 26, 2016]).

We find the evidence establishes that claimant was hired by petitioner and "permitted and suffered to work" as a general helper/clerk during the period of his claim. As such, petitioner is responsible for any wages owed under the Labor Law. (*Matter of Rafael Almonte and D'Almonte Enterprises Parking Garage Inc.,* Docket No. PR 12-040, at pp. 5-7 [December 9, 2015] *citing Matter of Rafael Martinez*, Docket No. PR 13-055 [December 14, 2014] and *Matter of Haull 4 PFS*, Docket No. PR 10-329 [July 22, 2015]).

Petitioner's Failure to Maintain Payroll Records

Article 6 of the Labor Law requires that an employer pay wages to its employees (Labor Law § 191). Labor Law § 190 (1) defines "wages" as the "earnings of an employee for labor or services rendered." Articles 6 and 19 of the Labor Law also require employers to maintain, for six years, certain records of the hours their employees worked and the wages they paid them (Labor Law §§ 195 [4] and 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.*). 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]). 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 (*Ramirez v. Commissioner of Labor*, 110 AD3d 901, 901-02 [2d Dep't 2013]; *Matter of Mid Hudson Pam Corp.* v. *Hartnett*, 156 AD2d 818, 820-21 [3d Dep't 1989]).

Petitioner neglected to offer the legally required records of the days and hours that claimant worked and the wages paid to him either at the investigative phase of this matter or at the hearing before the Board. As such, the Commissioner correctly determined that petitioner failed to maintain legally required payroll records.

The Wage Orders are Affirmed

Based on the record before us, we find that petitioner did not meet his burden to show that he was not claimant's employer nor did he maintain legally required records. Petitioner also did not introduce any evidence challenging the wages in the orders and the issue is thereby waived pursuant to Labor Law § 101 (2). As such, we affirm the wage orders.

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 did not offer any evidence to challenge the imposition of interest. As such, we affirm the interest in the wage orders.

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 claimants were not paid all wages and petitioner failed to offer any evidence challenging the imposition of liquidated damages. As such, we affirm the liquidated damages in the unpaid wages orders.

The Civil Penalty is Revoked

The unpaid wages order and the minimum wage order include a 100% civil penalty. Labor Law § 218 (1) provides that when determining an amount of civil penalty to assess against an employer who has violated a provision of Article 6 or 19 of the Labor Law, respondent shall 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, benefits or supplements violations, the failure to comply with record-keeping or other non-wage requirements."

Petitioner proved that the subject store burned down prior to respondent commencing the investigation and he testified that he never received any communications from respondent until he learned of the issuance of the orders to comply. He never re-opened the store at that location after it burned down and he did not receive any mail there after the store burned down. The record reflects that respondent only used the subject store's 358 Bedford Park, Bronx, NY address to communicate with petitioner and then based the imposition of 100% civil penalties in the wage orders on the fact that petitioner was not cooperative as he did not respond to DOL's efforts to communicate with him. Respondent's investigator witness did not know the store burned down nor did he know if respondent attempted to locate petitioner at another address because he had only looked at the subject investigative file for the first time on the day of the hearing and did no previous work on the case. We find it is unreasonable to impose a 100% civil penalty for petitioner's failure to respond to communication since the record shows respondent never tried to communicate with petitioner at an address other than that of a store that no longer existed. Accordingly, we revoke the civil penalties in the wage orders.

The Penalty Order is Affirmed

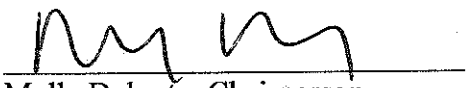
Labor Law § 218 (1) provides that where a violation is for a reason other than an employer's failure to pay wages, the order shall direct payment to respondent of a civil penalty in an amount not to exceed $1,000.00 for a first violation. In this case, respondent assessed a $1,000.00 penalty against petitioner for failure to keep and/or furnish true and accurate payroll records for each employee from on or about June 1, 2014 through July 11, 2015 and a $1,000.00 penalty against petitioner for failure to give each employee a complete wage statement from June 1, 2014 through July 11, 2015. Petitioner did not challenge the penalty order. We affirm the penalty order.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

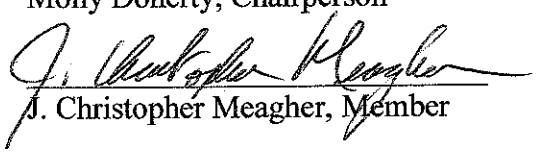
1. The orders to comply with Articles 19 and 6 of the Labor Law are modified to revoke the civil penalties, and are affirmed as modified; and

2. The penalty order is affirmed; and

3. The petition for review is hereby otherwise 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
October 24, 2018.

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 petitioner for failure to keep and/or furnish true and accurate payroll records for each employee from on or about June 1, 2014 through July 11, 2015 and a $1,000.00 penalty against petitioner for failure to give each employee a complete wage statement from June 1, 2014 through July 11, 2015. Petitioner did not challenge the penalty order. We affirm the penalty order.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The orders to comply with Articles 19 and 6 of the Labor Law are modified to revoke the civil penalties, and are affirmed as modified; and

2. The penalty order is affirmed; and

3. The petition for review is hereby otherwise denied.

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 Syracuse, New York, on
October 24, 2018.