STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of: ARLINA A. CONTRERAN AKA ARLINA WAHEED BUTT AKA ARLINA A. CONTRERAS AND NYCS FRIED CHICKEN DINNER INC., Petitioners, To Review Under Section 101 of the Labor Law: An Order to Comply with Article 6 and Article 19 of the Labor Law, dated June 6, 2018, - against - THE COMMISSIONER OF LABOR, Respondent.	DOCKET NO. PR 18-042 RESOLUTION OF DECISION

APPEARANCES

Joseph F. Kasper, Esq., Ozone Park, Queens, for petitioners.

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

WITNESSES

Abdol Waheed, for petitioner.

Senior Labor Standards Investigator Shaun Abrilz, for respondent.

WHEREAS:

Petitioners Arlina A. Contreran A/K/A Arlina Waheed Butt A/K/A Arlina A. Contreras and NYCS Fried Chicken Dinner Inc. filed a petition in this matter on August 6, 2018, pursuant to Labor Law § 101, seeking review of an order issued against them by respondent Commissioner of Labor on June 6, 2018. Respondent filed her answer to the petition on September 14, 2018.

Upon notice to the parties a hearing was held in this matter on April 8, 2019, in New York, New York before Gloribelle J. Perez, Member 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 Articles 6 and 19 (hereinafter "unpaid wages order") under review directs compliance with Articles 6 and 19 and payment to respondent for unpaid wages due to claimant in the amount of $703.15 for the time period from December 7, 2016 to December 17, 2016, interest continuing thereon at the rate of 16% calculated to the date of the order in the amount of $165.21, 100% liquidated damages in the amount of $703.15, assesses a 100% civil penalty in the amount of $703.15, and assesses a separate civil penalty for violations of Article 19 of the Labor Law, Section 661, and Department of Labor Regulations (12 NYCRR) § 146-2.1 in the amount of $350.00, for a total amount due of $2,624.66.

Petitioners allege that the order is invalid and unreasonable because the claimant was never employed by petitioners and the store is only open from 7:00 a.m. until 5:00 p.m. each day.

SUMMARY OF EVIDENCE

Wage Claim

Claimant filed a claim for unpaid minimum wages and overtime and a claim for unpaid wages. The unpaid minimum wages and overtime claim form states that the agreed pay rate for her work was $40.00 per day. The form also states that she worked from 7:00 a.m. until 6:00 p.m. Monday through Friday and from 7:00 a.m. until 7:00 p.m. on Saturday. The claim for unpaid wages states that she worked 27 hours over three days during the first week of work that ended on December 11, 2016 and 58.5 hours over six days during the second week of work that ended December 18, 2016 at an agreed rate of $9.00 per hour. That form states that she was only paid $100.00 for that work and as a result is owed a total of $669.50 in unpaid wages from December 7, 2016 to December 17, 2016.

Abdol Waheed's Testimony

Abdol Waheed (hereinafter "Waheed") is the husband of petitioner Arlina Contreras[1] (hereinafter "Contreras"). Waheed manages the subject business. The business has been open for about four to five years and it serves breakfast and lunch. The only people who work in the business are Waheed and Contreras. They have only ever hired people for the business to do construction work such as painting and other work outside but never to do the actual work of the business. The business is open Monday through Friday from 7:00 a.m. until 5:00 p.m. It is not open on Saturdays or Sundays. Contreras opens the business each morning at 7:00 a.m. Waheed arrives at about 10:00 a.m.

Waheed testified that the claimant came to the business sometime around early December 2016 asking for a job but she had no identification so they did not offer her a job. Waheed told her to return with identification. She returned the next day, but she still did not have identification with her so Waheed told her that he cannot give her work without identification. The claimant returned another day with several people and they were all being very loud outside of the business. Contreras signed a check made out to the claimant for $100.00 just so that the claimant would leave them alone. Waheed later signed a September 7, 2017 letter that was sent to respondent and was written by his insurance broker, which states that the claimant only worked for them for one

[1] The Board notes that Arlina Contreras and Arlina Contreran are the same person for purposes of this decision.

day. Waheed followed the insurance broker's advice and signed the letter as it was drafted even though it was not true that the claimant worked for them.

Senior Labor Standards Investigator Shawn Abrilz's testimony

Senior Labor Standards Investigator Shawn Abrilz (hereinafter "Abrilz") testified for the respondent. Abrilz testified that the employer never provided the requested information about hours worked and wages paid to the claimant and instead the employer said the claimant only worked for them briefly and that she was paid for that work. Abrilz also testified that he recommended a $350.00 penalty be assessed for a record-keeping violation because petitioners did not provide respondent with any records and it was a first-time offense. Abrilz testified that even though claimant asserted in her claim form that she worked longer hours than the Waheed testified the restaurant was open, Abrilz believed it was reasonable that she stayed an hour after the restaurant closed, still working. Abrilz also testified that during the investigation, the employer never stated that the restaurant was not open on Saturdays.

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 Industrial Board of Appeals Rules of Procedure and Practice (hereinafter "Board Rules") (12 NYCRR) § 65.39.

Petitioners' burden of proof in this matter was to establish by a preponderance of the evidence that the order issued by the Commissioner is invalid or unreasonable (State Administrative Procedure Act § 306 [1]; Labor Law §§ 101, 103; Board Rules [12 NYCRR] § 65.30; *Matter of Garcia v Heady*, 46 AD3d 1088, 1090 [3d Dept 2007]; *Matter of Angello v National Fin. Corp.*, 1 AD3d 850, 854 [3d Dept 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 (Labor Law § 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]). Petitioners argue that they never hired the claimant and that the store is not open for all of the days and hours that claimant stated she worked.

Petitioners Employed Claimant

"Employer" as used in Labor Law Article 6 includes "any person . . . 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]). 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]).

Petitioners' burden was to prove at the hearing that they were not, as a matter of economic reality, the claimant's employer (*Herman v RSR Sec. Servs. Ltd.*, 172 F3d 132, 139 [2d Cir 1999]; *see also Matter of Serafino Tomassetti*, Docket No. PR 18-023, at p. 4 [March 6, 2019]; *Matter of Jocelyne Wildenstein*, Docket No. PR 15-269, at pp. 4-5 [October 26, 2016]). Petitioners' evidence that they were not the claimant's employer was Waheed's testimony, a copy of the $100.00 check

made payable to the claimant, and the September 7, 2017 letter signed by Waheed and sent to respondent.

We find Waheed was not credible because his testimony was either vague, inconsistent or directly contradicted by petitioners' own documentary evidence. Waheed initially testified that only he and Contreras ever worked at the business. Waheed also testified, however, that when the claimant approached the business looking for work, he instructed her to return with identification in order to hire her. Waheed testified that the claimant ultimately never worked for petitioners as she was unable to produce the required documentation. This testimony is contradicted by Waheed's own September 7, 2017 letter that was sent to respondent in which he acknowledged that the claimant worked for petitioners for at least one day and that they paid the claimant $100.00 by check signed by Contreras. Waheed's testimony that the letter was prepared by an insurance broker who advised him to sign the untrue statement and that the $100.00 payment was made to induce the claimant to leave the premises was unsupported and we deem it incredible. We find petitioners have failed to carry their threshold burden of showing that the challenged order is invalid or unreasonable with respect to respondent's determination that petitioners were the claimant's employer sufficient to shift the burden to respondent (State Administrative Procedure Act § 306 [1]; Labor Law § 103 [1]; Board Rules [12 NYCRR] § 65.30; *cf. Matter of Ibrahim Issa A/K/A Anthony Isaa and Bronxdale Auto Care, Inc.*, Docket No. PR 16-020, at p. 7 [July 26, 2017] [initial showing that order is invalid or unreasonable required before burden shifts to respondent]. As such, the Board affirms respondent's finding that petitioners were an employer of the claimant.

Petitioners' Failure to Maintain Payroll Records

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]). Petitioners did not offer the legally required records of the days that the claimant worked, and the wages paid to her either at the investigative phase of this matter or at the hearing before the Board. As such, the Commissioner's determination that petitioners failed to maintain legally required payroll records was reasonable and valid.

The Unpaid Wages Order is Affirmed

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 (Labor Law § 196-a; *Ramirez v Commissioner of Labor of State of N.Y.*, 110 AD3d 901, 901 [2d Dept 2013]; *Hy-Tech Coatings v New York State Dept. of Labor*, 226 AD2d 378, 379 [2d Dept 1996] citing *Matter of Mid Hudson Pam Corp. v Hartnett*, 156 AD2d 818, 820-821 [3d Dept 1989]). As the Appellate Division stated in *Mid Hudson*, (156 AD2d at 820-821) "[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 calculation 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 Joseph Baglio and the Club at Windham*, Docket No. PR 11-394, at p. 7 [December 9, 2015]; *Matter of RAM Hotels, Inc.*, Docket No. PR 08-078, at p. 24).

Waheed testified that the business was only open from 7:00 a.m. until 5:00 p.m. Monday through Friday, thus making it impossible for the claimant to have worked later than 5:00 p.m. or on Saturdays. We find Waheed's testimony alone about the hours and days that the business was open is insufficient to meet petitioners' burden to prove that the respondent's calculation of hours worked by the claimant was incorrect. Petitioners offered no other evidence, such as additional witness testimony about days and hours the restaurant is open or a sign or document reflecting the days and hours the business is open. Waheed's testimony is not enough to satisfy the high burden of precision required to meet an employer's burden of proof in the absence of required records (*Matter of Frank Lobosco and 1378 Coffee, Inc.*, Docket No. PR 15-287, at p. 6 [May 3, 2017] citing *Matter of Young Hee Oh*, Docket No. PR 11-017, at p. 12 [May 22, 2014] [employer cannot shift its burden to DOL with arguments, conjecture, or incomplete, general, and conclusory testimony]). Moreover, as Abrilz testified, it is reasonable that the claimant worked for an hour after the restaurant closed. As such, we affirm the unpaid wages 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 claimants were not paid all wages owed and petitioners did not offer any evidence to challenge the imposition of interest. As such, we affirm the interest in unpaid 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 claimants were not paid all wages and petitioners failed to offer any evidence challenging the imposition of liquidated damages. As such we affirm the liquidated damages in the unpaid wages order.

The Civil Penalty is Affirmed

The unpaid wages order includes a 100% civil penalty. Labor Law § 218 (1) provides that when determining an amount of civil penalty, 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."

Petitioners did not introduce any evidence to challenge the civil penalty. As such, we affirm the civil penalty in the unpaid wages 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 a $350.00 penalty against petitioners for failure to keep and/or furnish true and accurate payroll records for each employee from on or about December 4, 2016 through December 17, 2016. Petitioners did not challenge the penalty order. We affirm the penalty order.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The petition for review be, and it hereby is, denied; and
2. The unpaid wages order, interest, liquidated damages, civil penalty and the Article 19 civil penalty are affirmed.

Molly Doherty, Chairperson
New York, New York

Michael A. Arcuri, Member
Utica, New York

Gloribelle J. Perez, Member
New York, New York

Dated and signed by the Members
of the Industrial Board of Appeals
on September 11, 2019.

Patricia Kakalec, Member
New York, New York

Najah Farley, Member
New York, New York

previous violations and, in the case of wages, benefits or supplements violations, the failure to comply with record-keeping or other non-wage requirements."

Petitioners did not introduce any evidence to challenge the civil penalty. As such, we affirm the civil penalty in the unpaid wages order.

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