STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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| In the Matter of the Petition of: | : | |
| IOANNIS KAPSALAS AKA IONNIS KAPSALAS AKA JOHN KAPSALAS AND FIRST CHOICE DELI & GROCERY, INC., | : | |
| Petitioners, | : | DOCKET NO. PR 12-201 |
| To review under Section 101 of the New York Labor Law an Order to Comply with Article 6, and an Order under Article 19 of the Labor Law, both dated December 7, 2012, | : | RESOLUTION OF DECISION |
| - against - | : | |
| THE COMMISSIONER OF LABOR, | : | |
| Respondent. | : | |

**APPEARANCES**

Ioannis Kapsalas, petitioner pro se, and for First Choice Deli & Grocery, Inc.

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

**WITNESSES**

Ioannis Kapsalas for petitioners.

Jeremy Kuttruff, Senior Labor Standards Investigator, and Yannis Bonikos, claimant, for respondent.

**WHEREAS:**

The petition was filed with the Industrial Board of Appeals (Board) on December 27, 2012, and seeks review of two orders issued against petitioners Ioannis Kapsalas AKA Ionnis Kapsalas AKA John Kapsalas, and First Choice Deli & Grocery, Inc. (T/A First Choice Deli) by the Commissioner of the Department of Labor (Commissioner or respondent) on December 7, 2012. On June 14, 2013, the Commissioner filed an answer. Upon notice to the parties, a hearing was held in New York, New York on April 4, 2014 before Jeffrey M. Bernbach, then Executive Director of the Board, and the designated hearing officer in this proceeding. Each party was

afforded a full opportunity to present documentary evidence, examine and cross-examine witnesses, make statements to the issues and file legal briefs.

The order to comply with Article 6 (wage order) finds that petitioners were employers as defined by New York Labor Law § 190 (3), having employed Yannis Bonikos (claimant) as a manager from September 14, 2010 to September 26, 2010 and failed to pay him wages. The order seeks payment of $1,500.00 in unpaid wages, $528.00 in interest, $375.00 in liquidated damages, and $1,500.00 in civil penalties, for a total due of $3,903.00.

The order under Article 19 (penalty order) assesses petitioners a civil penalty of $1,000.00 for failing to keep and/or furnish true and accurate payroll records pursuant to Labor Law § 661 and 12 NYCRR 142-2.6 for the period of September 14, 2010 to September 26, 2010.

The petition admits that First Choice Deli, Inc. employed claimant, but disputes that Kapsalas was his employer. The petition also disputes claimant's pay rate, job description and claim period. Lastly, the petition asserts that claimant was paid all wages he was owed.

## SUMMARY OF EVIDENCE

### *Wage Claim*

On October 15, 2010, Yannis Bonikos filed a claim for unpaid wages in the amount of $1,500.00 for work as a manager and "grillman" for the period of September 14, 2010 to September 26, 2010 at a pay rate of $1,000.00 per week.

### *Testimony of Petitioner Ioannis Kapsalas*

Kapsalas testified that he hired claimant, who worked at his deli and grocery store in Bellerose, New York for 25 weeks until it closed on September 20, 2010 for lack of business, and that claimant worked as a "counter person" and was paid $290.00 per week. He testified that he met with claimant on October 21, 2010 and paid him "in full until the twenty-third, which was the pay day. I think I owed him one and a half week of salary." He testified that he paid claimant $750.00 in cash and had him sign a receipt, which claimant did "right in front of" him.

Kapsalas testified that the store was open six or seven days a week from 7 a.m. to 5 p.m., that he was there most days and his wife worked there some 12 hours a week while claimant and another employee both worked 40 hours a week. He testified that claimant worked at the counter, made sandwiches and took deliveries and the other employee worked at the grill while he and his wife worked at the register. Kapsalas testified that at the end of 2010, he gave claimant a W-2 showing wages in the amount of $7,250.00 that claimant had earned in 2010, to which claimant did not object. Kapsalas also testified that two 2010 Quarterly Combined Withholding Wage Reporting, and Unemployment Insurance Returns confirmed claimant's rate of pay of $290.00 a week, with $40.00 a week taken out for taxes. Further, Kapsalas testified that claimant had been concerned about losing his Medicaid eligibility if he earned more than $15,000.00 a year, so he declined petitioners' offers for overtime.

***Testimony of Senior Labor Standards Investigator Jeremy Kuttruff***

Senior Labor Standards Investigator Jeremy Kuttruff testified that he was the sole investigator on this matter. He testified that he had reviewed the original claim and returned it to claimant with instructions on how to complete it properly, with the result that claimant amended the wage claim and resubmitted it. Kuttruff testified that on January 13, 2011, respondent sent the claim to petitioners and that by letter dated January 28, 2011, petitioners responded by explaining that claimant had been paid in full. Kuttruff testified that on April 11, 2012, respondent sent this explanation to claimant, who on May 2, 2012, wrote to respondent denying that he had been paid in full. Kuttruff testified that respondent informed petitioners, by letter dated May 22, 2011, that their "evidence was not sufficient for [respondent] to take a position that the claim [was] not valid," and requested that petitioners send respondent payroll records or pay the claim to avoid issuance of an order to comply. Kuttruff testified that claimant's last day of work was September 26, 2010, per the claim form, but acknowledged that if the store had closed on September 20, 2010, as alleged by petitioners, claimant's last day of work could not have been September 26.

Kuttruff testified that on June 4, 2012, Kapsalas telephoned him to explain that petitioners disputed respondent's conclusion and would be sending "records to substantiate his position," and that on June 13, 2012, Kapsalas and his accountant called to ask if petitioners might submit a letter from a witness confirming that claimant had been paid wages owed. When no records and no payment were received from petitioners, the matter was referred for issuance of an order to comply. Regarding the penalty order, Kuttruff testified that the amount had been decided upon because petitioners not only had "failed to send time records, payroll records, and cancelled checks associated with wage payments," but also because "the statement [regarding prior payment of owed wages] sent by the employer appeared to be falsified." Kuttruff also explained, regarding the civil penalty amount of 100% in the wage order, that respondent considered that it was a first violation and the amount and duration of the claim.

***Testimony of Claimant***

Claimant testified that he was employed by Kapsalas at the store and normally worked "Monday to Sunday" from 5:30 a.m. to 5:00 p.m. and paid $1,000.00 a week in cash. He further testified that when he started working, he was told by Kapsalas that he had "to be on the records;" he acknowledged that his income as reported to tax authorities was $290.00 a week, yet he was paid $1,000.00 a week. He also testified that during the claim period, he "did his job . . . opened the store, cooked and closed the store" and because he was there from opening to closing, he did not keep track of his hours. Claimant testified that he had worked alone for the first few weeks of his employment and then, after Kapsalas so instructed him, had hired another worker to assist at the store. According to claimant, Kapsalas was most often at his other store and was not often at the store where claimant was employed. Claimant testified that he had not been paid the owed wages and that he had neither prepared, nor signed the release offered into evidence by petitioners. Regarding a merchandise receipt, placed into evidence by Kapsalas to show claimant's signature, claimant denied signing the receipt, saying that he had merely printed his name on it. Finally, claimant testified that he had completed the first page of the claim form himself, but had had help from respondent completing the remainder of the form.

## GOVERNING LAW

Standard of Review and Burden of Proof

The Labor Law provides that "any person . . . may petition the board for a review of the validity or reasonableness of any . . . order made by the commissioner under the provisions of this chapter" (Labor Law § 101 [1]); it also provides that a Commissioner's order shall be presumed "valid" (Labor Law § 103 [1]). If the Board finds that the order, or any part thereof, is invalid or unreasonable it shall revoke, amend, or modify the same (Labor Law § 101 [3]). A petition that challenges the validity or reasonableness of an order issued by the Commissioner shall "state . . . in what respects [the order on review] is claimed to be invalid or unreasonable" (Labor Law § 101 [2]). Board Rules provide that "[t]he burden of proof of every allegation in a proceeding shall be upon the person asserting it" (12 NYCRR 65.30); the burden is met by a preponderance of evidence (State Administrative Procedure Act § 306 [1]).

## 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 65.39 (12 NYCRR 65.39).

Petitioners Were Employers

The petition alleges Kapsalas was not claimant's employer. "Employer" as used in the Labor Law means "any person, corporation or association employing any individual in any occupation, industry, trade, business or service" (*see* Labor Law § 190 [3]; *see also* Labor Law § Labor Law 651 [6]). "Employed" means "suffered or permitted to work" (Labor Law § 2 [7]).

The federal Fair Labor Standards Act, like the New York Labor Law defines "employ" to include "suffer or permit to work" (29 USC § 230 [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 the Fair Labor Standards Act" (*Chu Chung v The New Silver Palace Rest., Inc.*, 272 F Supp 2d 314, 319 n6 [SDNY 2003]).

In *Herman v RSR Sec. Servs. Ltd.*, 172 F3d 132, 139 (2d Cir 1999), the Second Circuit Court of Appeals stated that the test used for determining employer status by explaining that:

> "Because the statute defines employer in such broad terms, it offers little guidance on whether a given individual is or is not an employer. In answering that question, the 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 include whether the alleged employer (1) had the power to hire and fire 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).

When applying this test, "no one of the four factors standing alone is dispositive. Instead the 'economic reality' test encompasses the totality of the circumstances, no one of which is exclusive." (*Id.* [internal citations omitted]).

Petitioners presented no evidence at hearing that Kapsalas was not an employer under the Labor Law. Indeed Kapsalas' own testimony indicates he hired claimant and maintained his employment records, which indicates an employment relationship. We find Kapsalas was claimant's employer.

The Wage Order Is Affirmed

New York law requires that an employer maintain certain employment records, including payroll records, that set out, among other things, its employees' daily and weekly hours worked, wage rate, and gross and net wages paid (Labor Law §§ 195 and 661; 12 NYCRR 142-2.6). Employers are required to keep such records open to inspection by the Commissioner or a designated representative.

Kuttruff testified creditably that petitioners did not provide copies of requisite employment records. Instead, in an attempt to show that claimant was paid owed wages, petitioners submitted to respondent a purported release, obtained, according to Kapsalas's testimony, when he met with claimant in October 2010. The purported release sets out that claimant was paid "all the money that was owed from FIRST CHOICE DELI & GROSORY [*sic*] INC AND IOANNIS KAPSALAS for salary that was owed to [him] up to September 25, 2010 of [his] last day of work." We give little weight to this document. Not only does it contradict Kapsalas's own testimony that claimant could not have worked after the store closed on September 20, 2010, but it also, by its amount ($750.00 for a week and a half of wages), does not comport with claimant's version of what he was paid weekly ($1,000.00) or with petitioners' version of what claimant was paid weekly ($290.00). We also credit claimant's testimony that he neither prepared nor signed the release and that he was not paid owed wages. Petitioners failed to meet their burden to show that respondent's determination that claimant was not paid all wages owed was unreasonable.

Regarding the claim period, we note that the claim form set out September 26, 2010 as claimant's last day of work. Kapsalas offered conflicting testimony, testifying that claimant's last day could not have been after September 20, 2010, the last day the store was open, yet testifying that he paid claimant through September 25, 2010. Petitioners' unsigned copy of their quarterly federal tax return for the third quarter of 2010 sets out that they stopped paying wages on September 23, 2010. The purported release offered by petitioners showed claimant worked until September 25, 2010. Given that petitioners' documentary and testimonial evidence presented conflicting dates for claimant's last day of work, we find that their evidence was insufficient to overcome the presumption that the claim period in the wage order is reasonable and valid.

In the absence of employment 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 results may be merely 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]). Here, petitioners

submitted no relevant or credible evidence to challenge the Commissioner's calculation of wages, and required payroll records were never supplied. The wage order is affirmed.

*Liquidated Damages*

Where the Commissioner determines an employee has not been paid all wages owed, Labor Law § 198 requires him to assess liquidated damages in an amount not to exceed 100% of the amount of unpaid wages unless the employer proves a good faith basis to believe that its underpayment was in compliance with the law. Since petitioners did not challenge respondent's determination to assess liquidated damages, the issue is waived pursuant to Labor Law § 101 (2), and we affirm the imposition of liquidated damages.

*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." Petitioners did not challenge the interest assessed in the wage order and the issue is thereby waived pursuant to Labor Law § 101 (2). We affirm the rate of interest imposed in the wage order.

*Civil Penalty*

Labor Law § 218 (1) provides that when the Commissioner determines that an employer has violated a provision of Articles 6 or 19, he must issue an order directing payment of wages and wage supplements found to be due, "plus the appropriate civil penalty." The wage order assesses a 100% civil penalty. Petitioners did not challenge the penalty assessed in the wage order in their petition or at the hearing and the issue is thereby waived pursuant to Labor Law § 101 (2).

The Penalty Order Is Affirmed

Respondent imposed a $1,000.00 civil penalty against petitioners for violating Labor Law § 661 by failing to keep and/or furnish true and accurate payroll records. As petitioners did not challenge the penalty order, waiving any objection thereto, we affirm the penalty order.

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**NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:**

1. The wage order is affirmed; and

2. The penalty order is affirmed; and

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

Vilda Vera Mayuga, Chairperson

J. Christopher Meagher, Member

LaMarr J. Jackson, Member

Michael A. Arcuri, Member

Dated and signed in the Office
of the Industrial Board of Appeals
at New York, New York, on
September 16, 2015.