

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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In the Matter of the Petition of:

JOSE D. SANTOS SR. AND JS RESTAURANT
CORP. (T/A CARIDAD RESTAURANT),

Petitioners,

To Review Under Section 101 of the Labor Law:
Orders to Comply with Article 19 of the Labor Law,
both dated June 9, 2017,

- against -

THE COMMISSIONER OF LABOR,

Respondent.
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DOCKET NO. PR 17-116

RESOLUTION OF DECISION

APPEARANCES

Rodriguez Law, P.C., New York (*Argilio Rodriguez* of counsel), for petitioners.

Pico Ben-Amotz, General Counsel, NYS Department of Labor, Albany (*Roya Sadiqi and Steven J. Pepe* of counsel), for respondent.

WITNESSES

Jose Santos, Juan Perez Batista, Frederico Diaz, Jose Felio Ortiz, Neysa Cruz, Luiz Manuel Lora, and Pura Ievar, for petitioners.

Elias Guerrero Morales and Labor Standards Investigator Hope Martinez, for respondent.

WHEREAS:

Petitioners Jose D. Santos Sr. (hereinafter "Santos") and JS Restaurant Corp. (T/A Caridad Restaurant) (hereinafter "the restaurant") filed a petition in this matter on July 19, 2017, pursuant to Labor Law § 101, seeking review of orders issued against them by respondent Commissioner of Labor on June 9, 2017. Respondent filed her answer to the petition on August 31, 2017.

Upon notice to the parties a hearing was held in this matter on March 6, and June 20, 2018 in New York, New York before Devin A. Rice, then Counsel, 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 (hereinafter “minimum wage order”) under review directs compliance with Article 19 and payment to respondent for unpaid minimum wages to Niza Cruz (hereinafter “Cruz”), Federico Diaz (hereinafter “Diaz”), and Elias Guerrero (hereinafter “Guerrero”) in the amount of \$29,797.42 for the time period from January 28, 2014 to August 31, 2015, interest continuing thereon at the rate of 16% calculated to the date of the order in the amount of \$9,061.92, liquidated damages in the amount of \$29,797.42, and assesses a civil penalty in the amount of \$29,797.42, for a total amount due of \$98,454.18.

The order under Article 19 (hereinafter “penalty order”) assesses a \$1,000.00 civil penalty for violating Labor Law § 661 and 12 NYCRR 146-2.1 by failing to keep and/or furnish true and accurate payroll records for each employee from on or about January 28, 2014 to August 31, 2015; and, a \$1,000.00 civil penalty for violating Labor Law § 661 and 12 NYCRR 146-2.3 by failing to provide each employee with a wage statement from on or about January 28, 2014 to August 31, 2015. The total amount due in the penalty order is \$2,000.00.

Petitioners allege that the orders are invalid and unreasonable because (1) respondent disregarded certain records provided by the petitioners during the investigation; (2) the number of hours Guerrero claims to have worked is exaggerated and contradicted by petitioners’ records; and (3) the claimants’ period of employment contained in the orders under review is inaccurate. Petitioners further challenge the interest, liquidated damages and civil penalties included in the order under review.

SUMMARY OF EVIDENCE

Petitioner’s Evidence

Testimony of Jose Santos

Santos testified that he has been the President of JS Restaurant Corp., since February 2, 2013. He used “time sheets” to record the hours worked by his employees, which were a weekly schedule created by Santos’ secretary and reviewed by Santos, containing the daily hours that each employee was scheduled to work. The employees signed the schedule each day. Santos testified that each employee signed their name when they arrived at work and signed their name when they left work and said:

“[e]veryone has their weekly schedule, time in, time out, and lunchtime. They sign when they come in, and if time they come out and as they go out, I pay for those hours. And I cannot be babysitting or be on top of them, you know, signing in. They have to work the hours that are scheduled to work.”

Santos provided his accountant with the “time sheets” and the accountant issued payroll checks based on the information contained in them. The restaurant then paid its employees according to the hours they were scheduled to work. If an employee worked fewer hours, he would not deduct that time and, instead, paid them based on the schedule contained in the “time sheet”. Santos also testified that in 2014 and 2015, there was a computer system where staff could punch in and punch out but he changed it in 2016 because “employees sometimes forget to punch in the time

for lunch or when they come back from lunch, that the lunchtime was over, so for that reason [he] decided not to use it anymore." The restaurant employees were paid by check.

Santos testified that he hired claimant Guerrero to help the restaurant's cooks. His responsibilities included looking for ingredients, making rice, peeling potatoes and plantains, making salads, and, if needed, working at the grill or the fryer. Santos hired Guerrero on August 4, 2014 and had him sign a Notice of Acknowledgement of Pay Rate and Payday, along with a JS Restaurant Notice of Pay Rate and Payday for New Hires (hereinafter "notice(s)"). He was initially paid \$8.00 per hour as a food preparer and Guerrero signed the notices saying as much on his date of hire. He signed another set of notices on January 1, 2015 that state that his rate of pay was \$8.75 per hour. Guerrero never worked as a delivery person at the restaurant.

Santos supplied payroll records for each of the restaurant's employees to respondent when he was first asked for the records. After Santos provided the documents, the investigator, Roberto Soto (hereinafter "Soto"), told him that the records were in order and the investigation was concluded. Soto also told Santos that Guerrero was the employee who filed the claim. Soto later told Santos that Guerrero had another claim that he also worked a second shift as a delivery person, working 96 hours per week, six days a week. Santos testified that no one at the restaurant works overtime because there are enough employees and there is no need for anyone to work overtime.

Santos scheduled Guerrero to work from 7:00 a.m. to 4:00 p.m. for five days per week with a one-hour lunch. Guerrero may have arrived at the restaurant at 6:00 a.m., but he was not permitted to start working until 7:00 a.m. In fact, no one was permitted to start working until 7:00 a.m., which was when the restaurant opened, as the restaurant only served coffee and tea at 7:00 a.m. and did not serve breakfast food until 8:00 a.m. or 8:30 a.m. Guerrero sometimes traveled to the Dominican Republic and did not work. There was a time when Guerrero did not work for a month because he traveled to the Dominican Republic. At some point, Guerrero worked thirty hours a week or less because he was also working at another restaurant. Santos testified about payroll records showing that claimant was paid \$320.00 for 40 hours of work beginning August 4, 2014 and that beginning in February 2015, his hours began to decrease from 40 hours per week. During his final week of work, Guerrero was only paid for four hours of work.

Testimony of Juan Perez Batista

Juan Perez Batista (hereinafter "Batista") has worked at the restaurant for 10 years as a delivery person. He works the morning shift until anywhere from 2:00 p.m. to 4:00 p.m., depending on the day, but never later than 4:00 p.m. Batista knows Guerrero, who worked in the restaurant as a cook during the morning shift. Batista testified that he and Guerrero ended their shifts at the same time and Batista never saw Guerrero working after 4:00 p.m. but Batista was not always at the restaurant after 4:00 p.m.

Testimony of Frederico Diaz

Diaz¹ worked at the restaurant as a waiter for a number of years but he did not work there for about a year in 2015 or 2016. He began working at 4:00 p.m. and ended work around 11:30 p.m. or 12:00 a.m. If it was slow, however, he would leave earlier. He knows who Guerrero is but testified that he never spoke with him and did not work with him because Guerrero did not work the same afternoon/evening shift that Diaz worked. Diaz further testified that he did not interact with any delivery people during his shift though he knew that there were delivery persons named Kenny, Javier and Victor who worked the same shift as Diaz. Diaz testified that he was working elsewhere from 2012 until 2015 and that he may have returned to work at the restaurant in 2015 or 2016.

Testimony of Jose Felio Ortiz

Jose Felio Ortiz (hereinafter "Ortiz") testified that he has worked at the restaurant for about 19 years as an assistant butcher. He starts work at 10:00 a.m. and leaves work at 4:00 or 5:00 p.m. He worked with Guerrero in the kitchen. Ortiz has known Guerrero since 2014. Guerrero cooked rice and helped with frying. Ortiz testified that he was not sure of Guerrero's schedule, but Guerrero finished his shift before Ortiz did. Ortiz never worked the evening shift during the claim period and testified that he did not know who performed deliveries during the evening shift.

Testimony of Neysa Cruz

Cruz² has been working as a waitress at the restaurant for 18 years. She begins work at 4:00 p.m. and her shift ends at 11:00 p.m. or 12:00 a.m. She leaves earlier if the restaurant is slow. She would see Guerrero when he left the restaurant at the end of his shift. She never saw Guerrero working during her shift. The delivery people who worked during her shift were Javier, Rafael, Kenny, Victor and some others whose names she did not remember. Cruz could not remember where the delivery persons would retrieve the deliveries that they had to make but the delivery persons used the back door of the restaurant to come and go with deliveries and she worked in the front of the restaurant. She saw the delivery people take breaks and eat food during her shift, but she never saw Guerrero during her shift. Cruz testified that she knew who was doing deliveries and Guerrero never did deliveries.

Cruz testified that she always earned what the government said she should earn and in 2014-2015 she earned what the government said she should earn, which was "seven-something plus tips".

¹ Diaz's given name is spelled "Frederico" in the transcript and "Federico" in documents admitted into the record. Neither party attempted to clarify this discrepancy. The Board finds that for purposes of this hearing, Frederico Diaz and Federico Diaz are the same person.

² Cruz's given name is spelled "Neysa" and "Nesya" in the transcript. The name "Nisa" Cruz appears in documents admitted into the record. While neither party attempted to clarify these discrepancies, the Board finds that for purposes of this hearing, Neysa Cruz, Nesya Cruz and Nisa Cruz are the same person.

Testimony of Luiz Manuel Lora

Luiz Manuel Lora (hereinafter "Lora"), began working at the restaurant in 2013 as a cook. He started his work day at 7:00 a.m. and ended it at 4:00 p.m. He worked with Guerrero for two years. Guerrero would fry food and cook rice. Lora never saw Guerrero handle deliveries. Lora and Guerrero both left the restaurant each day at the same time, 4:00 p.m., when their shift ended. Lora never saw Guerrero work an evening shift. Lora did not work the evening shift himself and does not know the restaurant's evening shift delivery staff.

Testimony of Pura Iavar

Pura Iavar (hereinafter "Iavar") has worked at the restaurant for about six years. She is a waitress. She works either 7:00 a.m. to 12:00 p.m. or 12:00 p.m. to 4:00 p.m. She also helped behind the counter, preparing orders for delivery. She knew Guerrero. Guerrero helped in the kitchen and helped with cooking rice and frying. She would stay after her shift ended at 4:00 p.m. to count the tips and she never saw Guerrero stay after his shift working in the kitchen ended at 4:00 p.m.

Respondent's Evidence***Testimony of Claimant Elias Guerrero Morales***

On April 17, 2015, Guerrero filed a claim for unpaid minimum wage/overtime. The claim form states that Guerrero began working at the restaurant in 2009. The claim period listed is for April 14, 2012 to April 13, 2015, the date the claim form was signed by the claimant, and a weekly wage rate of \$400.00 from September 7, 2014 to April 13, 2015, a weekly wage rate of \$350.00 from September 8, 2013 to September 6, 2015, and a weekly wage rate of \$332.00 from April 14, 2012 to September 7, 2013, working Monday, Tuesday, Thursday, Friday, and Saturday from 6:00 a.m. until 4:00 p.m. with no meal period provided. The claim form shows Guerrero did not work one week in December of 2014 but worked the holidays.

Guerrero testified that he worked at the restaurant for five years, from 2009 to 2015. Initially, Guerrero worked from 6:00 a.m. to 4:00 p.m., Monday, Tuesday, Thursday, Friday, and Saturday, as a kitchen helper. In 2014, he also worked as a delivery person for the restaurant when one of the delivery persons left the country. Santos asked him if he was willing to handle the deliveries, which Guerrero assumed would only be for a short period of time. When the person did not return, Santos gave him the added delivery responsibilities permanently.

In 2014, Guerrero worked from 6:00 a.m. to 4:00 p.m. in the kitchen five days per week. When his shift as a kitchen helper ended, he would punch out. He would then punch back in to work as a delivery person from 4:00 p.m. until 9:00 or 10:00 p.m. He did deliveries six days a week, Monday through Saturday. He was paid \$400.00 per week for the kitchen helper work and he was paid \$3.00 per hour plus tips for the delivery person work. He was paid in check and in cash for the kitchen helper work and he was paid entirely in cash for the delivery person work. He was usually paid on Mondays and sometimes he was paid on Sundays. When performing both kitchen work and handling deliveries, Guerrero worked between 78 and 90 hours per week. He worked 6 hours per day, 6 days per week doing deliveries and worked 10 hours per day, 5 days per week in the kitchen resulting in an average of 86 hours per week. Guerrero stopped

working as a delivery person for the restaurant in December 2014 because the restaurant found other people to perform deliveries while he was out of the country for a month.

After he submitted his initial claim to respondent in April 2015, the restaurant started using time sheets to record hours worked. Three "time sheets" were entered into evidence for May 23, 2015 to May 29, 2015, May 30, 2015 to June 5, 2015, and June 6, 2016 to June 12, 2015 and each contained Guerrero's signatures. The "time sheets" contain seven columns: Date, Start, Lunch, End, Employee Signature, Supervisor Signature, and Comments. In each of the days that the time sheet shows Guerrero worked the Lunch column is blank and the Start and Stop times are exact to the minute. On at least one occasion, Guerrero was directed by the restaurant's manager to sign the "time sheet" or he would not receive his pay. Guerrero testified that he did not sign similar "time sheets" prior to May 2015. Rather, he punched in and out to record his time. With respect to the notices, Guerrero signed the 2014 notice. Guerrero testified that he was out of the country on January 1, 2015 and while the January 1, 2015 notice had a signature that he testified was his, he testified that he could not have signed it on that date when he was out of the country.

Guerrero explained that his initial claim was discontinued because he informed investigator Soto that he wanted to pursue his claim with a private attorney. The case was re-opened upon his request when he could not find a private attorney. Guerrero asked Soto if he could add the hours he worked handling deliveries to his claim, which Soto permitted him to do.

Testimony of Labor Standards Investigator Hope Martinez

Hope Martinez (hereinafter "Martinez") testified that in 2016 she was a senior investigator and she supervised Soto's work on this case. She reviewed Soto's underpayment calculations, service documents and personally attended a compliance conference held by the respondent for this case.

During the investigation, respondent requested payroll records from petitioners for the relevant claim period. Limited payroll records, consisting of wage statements, were provided in response. Soto calculated an underpayment based on the claimants' statements. Martinez testified that during the compliance conference, petitioners stated that there were additional records that would refute Guerrero's claim, but respondent did not receive any additional documents.

Martinez personally prepared the order to comply cover sheet. She recommended a 100% civil penalty in the minimum wage order based on the good faith of the employer, the gravity of the monetary violations, and the record keeping violations found during the course of the investigation. She recommended a \$1,000.00 civil penalty for failing to maintain the required records properly and a \$1,000.00 civil penalty for failing to provide wage statements to the restaurant's employees.

Martinez testified that she would amend respondent's calculation based on the testimony provided by Guerrero that he only worked in the kitchen five days per week and performed deliveries for the restaurant six days per week.

STANDARD OF REVIEW

Petitioners' burden of proof in this matter is 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 Dep't 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]).

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 (NYCRR 65.39).

The Minimum Wage Order is Affirmed as to Claimants Cruz and Diaz

Petitioners failed to offer any evidence challenging the amounts calculated as due and owing in the minimum wage order with respect to Cruz and Diaz. Accordingly, we affirm the amounts calculated as due and owing for Cruz and Diaz. (State Administrative Procedure Act § 306 [1]; Labor Law §§ 101; Board Rules [12 NYCRR] § 65.30; *Matter of Ram Hotels, Inc.*, Docket No. PR 08-078, at p. 24).

Petitioners Failed to Maintain Required Records

The Labor Law requires employers to maintain accurate payroll records that include, among other things, their employees' daily and weekly hours worked, wage rate, gross and net wages paid, and any allowances claimed as part of the minimum wage (Labor Law § 661; 12 NYCRR 146-2.1). Employers are required to keep such records open to inspection by the Commissioner or a designated representative at the place of employment and maintain them for no less than six years (*id.*). Employers are further required to furnish each employee a statement with every payment of wages listing the hours worked, rates paid, gross and net wages, and any allowances claimed as part of the minimum wage (Labor Law § 661; 12 NYCRR 146-2.3). The required recordkeeping provides proof to the employer, the employee, and the Commissioner that the employee has been properly paid.

In support, petitioners only offered three purported "time sheets" for Guerrero for May 23, 2015 through June 12, 2015. Petitioners did not offer any evidence regarding the actual hours that Guerrero worked prior to May 23, 2015 nor was there any evidence of actual hours worked of any other employees for any period of time other than general conclusory testimony about schedules and that no one worked overtime.

Santos testified that the restaurant used "time sheets" similar to those entered in evidence to track employees' daily hours worked at the restaurant stating, "[e]veryone has their weekly

schedule, time in, time out, and lunchtime. They sign when they come in, and if time they come out and as they go out, I pay for those hours.” The “time sheets” entered, however, contain only a single signature by Guerrero under the column titled, “Employee Signature.” Santos himself described the records as schedules and further testified that restaurant employees were paid according to the scheduled time, even when the “time sheets” did not correspond to the actual hours worked. The purported “time sheets” are consistent with this description. The “Start” and “Stop” times are exact to the minute. Records that utilize such a rounding methodology are not reliable evidence sufficient to support an accurate estimate of the hours worked (*see Matter of Longia*, Docket No. PR 11-276, at p. 10 [Sept. 16, 2010] [discrediting petitioners' handwritten payroll journals in part because “[w]hen weekly and then daily hours are listed, they are stated in exact even numbers to the minute.”]). While Guerrero’s signature does appear on the records, Guerrero credibly testified that on at least on one occasion, he was directed by the restaurant’s manager to sign a “time sheet” in order to receive his pay. His testimony on this issue was uncontested by petitioners and further undermines the reliability of these records.

Additionally, Santos testified that at least one other method, a computerized record keeping system, was used to record hours worked. This is consistent with Guerrero’s testimony that he did not use time sheets to record his time but instead punched in and out as did at least one of petitioners’ own witness, Lora, who testified similarly. Accordingly, we find that the three purported “time sheets” are not reliable evidence of the specific hours worked by Guerrero during that three-week period. (*Matter of Ram Hotels, Inc.*, Docket No. PR 08-078, at p. 24).

Petitioners also offered payroll summaries for Guerrero covering the period of August 4, 2014 through July 3, 2015. These records do not include actual daily hours worked and only serve to demonstrate what was reported to the restaurant’s accountant as the total hours worked by the claimants in a pay period. These records do not satisfy the required records that must be kept on actual hours worked and wages paid (Labor Law § 661; 12 NYCRR 146-2.1). The payroll summaries lack the specificity and the reliability to establish by a preponderance of the evidence the specific hours that the claimants worked and that they were paid for these hours (*Matter of Ram Hotels, Inc.*, Docket No. PR 08-078, at p. 24). We find the payroll documents that are part of the record are insufficient evidence to meet petitioners’ burden to negate the reasonableness of the respondent’s calculation of hours worked. As such, the Commissioner correctly determined that petitioners failed to maintain legally required payroll records.

The Minimum Wage Order is Affirmed

In the absence of accurate records required by the Labor Law, an employer bears the burden of proving that the disputed wages were paid (Labor Law § 196-a). Where the employer has failed to keep such 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 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 2010]). As the Appellate Division stated in *Matter of Mid Hudson Pam Corp v Hartnett*, (156 AD2d at 830-821) “[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 of other evidence that shows the Commissioner's findings to be invalid or unreasonable (*Matter of Joseph Baglio and the Club at Windham*, PR 11-394, at p. 7 [December 9, 2015]; *Matter of Ram Hotels, Inc.*, Docket No. PR 08-078, at p. 24).

Petitioners argue that the amounts that Commissioner determined to be owed in the minimum wage order are incorrect because Guerrero only worked five days per week for eight hours per day, for a total of 40 hours per week and that no employee in the restaurant ever worked overtime. Santos' testimony was not specific enough to make up for the lack of required records showing actual hours worked. He testified generally that Guerrero worked five days per week, eight hours per day, from 7:00 a.m. to 4:00 p.m. with a one-hour meal break but the only records that petitioners offered showing actual hours worked do not reflect that schedule. Without specific evidence of precise hours worked, we give little credibility to Santos' testimony about Guerrero's hours of work. The Board has repeatedly held that general, conclusory and incomplete testimony concerning the work schedules of employees is insufficient 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]). Santos also testified generally and without any specificity that there was no need for overtime because there are enough employees working at the restaurant. This testimony is directly contradicted by the payroll summaries petitioners entered into evidence at hearing, which demonstrate Guerrero received payment for overtime on at least one occasion.

Six employees of the restaurant also testified that Guerrero was not a delivery person. Five of the witnesses, Batista, Diaz, Ortiz, Ievar and Lora each testified that they either did not work the evening shift or did not interact with the delivery staff. Diaz testified that he did not work at the restaurant in 2014, during the part of the claim period when Guerrero testified that he worked as a delivery person. Thus, the Board gives no weight to the testimony of Batista, Diaz, Ortiz, Ievar and Lora with respect to the specific hours worked by Guerrero. Cruz, the only witness who worked during the evening shift when Guerrero said he worked as a delivery person, testified that she never saw Guerrero during her shift which started at 4:00 p.m. She also testified that she was not involved with deliveries and could not remember or otherwise describe how deliveries were handed to the delivery people. She further testified that her work was limited to the dining area. The Board gives little credence to Cruz's testimony because she was unable to recall any details about the work of the delivery persons except that Guerrero did not work as a delivery person. We also give little weight to Cruz's testimony because of her economic interest in testifying in support of petitioner since she is still employed by petitioner (*Matter of Fred Barthelman III and North Coast Sealing, Inc.*, Docket No. PR 14-114, at p. 18 [December 13, 2017] citing *Matter of Rafael Almonte and D'Almonte Enterprises Parking Garage, Inc.*, Docket No. PR 12-040, at p. 7 [December 9, 2015]). Cruz's general, conclusory and incomplete testimony concerning Guerrero's work schedule is insufficient 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*, Docket No. PR 15-287, at p. 6 citing *Matter of Young Hee Oh*, Docket No. PR 11-017, at p. 12).

Finally, petitioners argue, that Santos's testimony and the August 4, 2014 and January 1, 2015 wage rate notices, demonstrate that Guerrero's employment with the restaurant started on

August 4, 2014, more than seven months into the claim period for Guerrero in the minimum wage order, reducing his total time of employment to less than one year at the restaurant. Santos testified that he hired Guerrero on August 4, 2014 and had him sign the notices in his presence. The August 4, 2014 date is also consistent with the extremely limited payroll summaries that petitioners offered into evidence.

Santos, however, lacks credibility as a witness, as demonstrated with his inconsistent testimony regarding the restaurant's use of time sheets and whether the restaurant required overtime and because his testimony was too general in nature. Moreover, Santos's testimony and payroll summaries are contradicted by petitioners' own witness, Lora, who testified that he began working for the restaurant in 2013 and had worked with Guerrero for approximately two years. It is undisputed that Santos stopped working for the restaurant in 2015. Ortiz testified that he has known Guerrero since 2014 but provided no specific timeframe as to when Ortiz met Guerrero in 2014 sufficient to infer Guerrero's start to his employment with the restaurant. We found Ortiz's testimony too vague and Lora's testimony credible, thus, we do not accept petitioners' assertion that Guerrero began working for the restaurant on August 4, 2014.

Accordingly, we find petitioners have failed to meet their burden to demonstrate the specific hours that the claimants worked and that they were paid for these hours. Because petitioners provided no evidence of legally required records of the daily and weekly hours worked or wages paid to the claimants, and no proof that they were paid for those hours, the Commissioner was entitled to use the best available evidence as a basis for her calculation of underpayment (Labor Law, §196-a; *Matter of Ramirez v Commissioner of Labor*, 110 AD3d at 901-902; *Hy-Tech Coatings v New York State Dept. of Labor*, 226 AD2d at 379 [2d Dept 1996] citing *Matter of Mid Hudson Pam Corp. v Hartnett*, 156 AD2d at 820-821; *Matter of Joseph Baglio and the Club at Windham*, PR 11-394, at p. 7; *Matter of Ram Hotels, Inc.*, Docket No. PR 08-078, at p. 24). Here, the Commissioner used the best available evidence, which was the information contained in the claim forms and information obtained by the respondent from the claimants. We affirm the minimum wage order but modify the amount of wages due to Guerrero based on his testimony given at hearing that when performing both kitchen work and handling deliveries, Guerrero testified that he worked 6 hours per day, 6 days per week doing deliveries and worked 10 hours per day, 5 days per week in the kitchen resulting in an average of 86 total hours worked per week.

Interest

Labor Law § 219 [1] provides that when the Commissioner determines that wages are due, the order directing payment of those wages shall include "interest at the rate of interest 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 offer any evidence to challenge the imposition of interest. As discussed above, we modified the amount of wages owed to Guerrero. Interest, therefore, shall be reduced proportionally.

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. Petitioner failed to offer evidence challenging the imposition of liquidated damages. As discussed above, we modified the amount of wages owed to Guerrero. The liquidated damages, therefore, shall be reduced accordingly.

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 to assess against an employer who has violated a provision of Article 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.”

Petitioners did not introduce any evidence to challenge the civil penalty. We affirm the 100% civil penalty, but the dollar amount shall be reduced proportionally because we modified the amount of wages owed to Guerrero.

Penalty Order

The penalty order assesses a \$1,000.00 civil penalty for violating Labor Law § 661 and 12 NYCRR 146-2.1 by failing to keep and/or furnish true and accurate payroll records for each employee from on or about January 28, 2014 to August 31, 2015; a \$1,000.00 civil penalty for violating Labor Law § 661 and 12 NYCRR 146-2.3 by failing to provide each employee with a wage statement from on or about January 28, 2014 to August 31, 2015. 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. Petitioners failed to demonstrate that they maintained the required payroll records for their employees for the entire claim period and failed to prove that they provided wage statements to each of their employees. The penalty order is affirmed.

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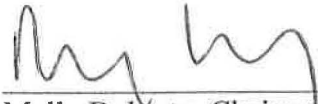
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NOW, THEREFORE, IT IS HEREBY RESOLVED AND ORDERED THAT:

1. The minimum wage order is affirmed with respect to Niza Cruz and Federico Diaz;
2. The minimum wage order is modified to reduce the wages calculated due and owing as to Elias Guerrero consistent with his testimony that he worked 86 hours per week during the period week ending February 1, 2014 to December 13, 2014, and the civil penalty, liquidated damages, and interest are modified proportionally;
3. The minimum wage order as modified is affirmed;
4. The penalty order is affirmed; and
5. The petition for review be, and the same hereby is, otherwise denied.


Molly Doherty, Chairperson
J. Christopher Meagher, Member

Michael A. Arcuri, Member

RECUSED
Gloribelle J. Perez, Member

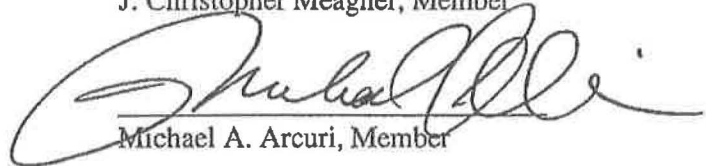
Dated and signed by the Members
of the Industrial Board of Appeals
in New York, New York, on
March 6, 2019.

NOW, THEREFORE, IT IS HEREBY RESOLVED AND ORDERED THAT:

1. The minimum wage order is affirmed with respect to Niza Cruz and Federico Diaz;
2. The minimum wage order is modified to reduce the wages calculated due and owing as to Elias Guerrero consistent with his testimony that he worked 86 hours per week during the period week ending February 1, 2014 to December 13, 2014, and the civil penalty, liquidated damages, and interest are modified proportionally;
3. The minimum wage order as modified is affirmed;
4. The penalty order is affirmed; and
5. The petition for review be, and the same hereby is, otherwise denied.

Molly Doherty, Chairperson

J. Christopher Meagher, Member


Michael A. Arcuri, Member

RECUSED

Gloribelle J. Perez, Member

Dated and signed by a Member
of the Industrial Board of Appeals
in Utica, New York, on
March 6, 2019.