STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of: MUHAMMAD IRFAN AND FM HALAL MEAT AND GROCERY INCORPORATED (T/A FRESH MEADOWS HALAL MEAT & GROCERY), Petitioners, To Review Under Section 101 of the Labor Law: An Order to Comply with Article 19 and an Order Under Article 19 of the Labor Law, both dated June 7, 2016, - against - THE COMMISSIONER OF LABOR, Respondent.	DOCKET NO. PR 16-096 RESOLUTION OF DECISION

APPEARANCES

The Law Offices of Muhammad Shabbir, New York (*Muhammad Shabbir* of counsel), for petitioners.

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

WITNESSES

Muhammad Irfan, for petitioners.

Labor Standards Investigator Emelina Alejandra Garcia, and Amado Munguia Reyes, for respondent.

WHEREAS:

On August 8, 2016, petitioners Muhammad Irfan and FM Halal Meat and Grocery Incorporated (T/A Fresh Meadows Halal Meat & Grocery), filed a petition with the Industrial Board of Appeals seeking review of two orders issued by respondent Commissioner of Labor on June 7, 2016. Respondent answered on September 9, 2016.

Upon notice to the parties, a hearing was held on June 1, 2017, in New York, New York, before Gloribelle J. Perez, Board Member and designated hearing officer in this proceeding. The parties were afforded a full opportunity to present documentary evidence, examine and cross-examine witnesses, make statements relevant to the issues, and submit post-hearing briefs.

The order to comply with Article 19 of the Labor Law (minimum wage order) directs payment of wages due and owing to claimants Wilmar Arnoldo Angel Lopez, Amado Munguia Reyes, and Mirnain Damian Rodriguez Lopez in the sum of $47,982.46 for the period from March 4, 2012 through March 8, 2015. The order assesses interest continuing thereon at the rate of 16% calculated to the date of the order in the amount of $9,612.26, 100% liquidated damages in the amount of $47,982.46, and a 100% civil penalty in the amount of $47,982.46. The total amount due is $153,559.64.

The order under Article 19 of the Labor Law (penalty order) assesses a civil penalty in the amount of $1,000.00 for violation of Labor Law § 661 and 12 NYCRR 142-2.6 by failing to keep and/or furnish true and accurate payroll records for each employee for the period from March 1, 2012 through March 1, 2015, and a civil penalty in the amount of $1,000.00 for violation of Labor Law § 661 and 12 NYCRR 142-2.7 by failing to give each employee a complete wage statement with every payment of wages for the period from March 1, 2012 through March 1, 2015.

Petitioners contend that the orders are unreasonable and invalid because (1) they violate petitioners' due process as they were not afforded a compliance conference prior to the issuance of the orders at issue and (2) petitioners paid claimants in full.

As set forth below, we affirm the minimum wage and penalty orders.

SUMMARY OF EVIDENCE

On or about August 26, 2014, respondent received a complaint from Amado Munguia Reyes, alleging that Irfan and his meat shop Fresh Meadows Halal Meat & Grocery had not paid him the state's minimum wage for all hours worked. Specifically, Amado[1] claimed that he had been working for petitioners since May 2014 and worked more than 70 hours per week for a weekly pay rate of $550.00. Emelina Garcia was respondent's lead investigator assigned to Amado's complaint and visited petitioners on March 4, 2015. During this visit, Garcia and another investigator interviewed claimants Wilmar and Mirnain. Wilmar told respondent that he could not recall when he started working for petitioners, but he worked 66 hours per week for a weekly pay rate of $750.00. Mirnain told respondent that he had been working for petitioners since March 2012 and he worked an average of 70 to 80 hours per week for an hourly pay rate of $6.50 for the first two years and $9.00 thereafter. During this visit, Irfan told respondent that all payroll documents were stored at his accountant's office.

On March 25, 2015, Garcia met with Irfan's accountant, Asma Ahmed, who confirmed Amado and Wilmar started working for petitioners in 2014. Ahmed provided Garcia with petitioners' NYS-45 forms for the years 2013 and 2014, and a spreadsheet containing the names of employees with their corresponding hourly rate of pay, overtime hours worked, and the amount of pay earned on a weekly basis. The end of each line of the spreadsheet was signed by the named employee. During this visit, Ahmed told Garcia that Irfan did not maintain other payroll records because petitioners paid their workers using cash and did not maintain cash receipts. After meeting with Ahmed, Garcia contacted the three claimants to ask about the spreadsheet that contained their signatures. All three told Garcia that the spreadsheets were always blank when they signed, and

[1] Since two claimants have last name Lopez, each will be referred to by first name in this decision.

the filled-in version of the spreadsheets did not indicate the correct number of hours worked. Claimants also confirmed that there was no time-clock at the meat shop to indicate the hours worked.

Petitioners' records showed that claimants worked that same hours and earned the same wages each week. Since the information contained in the spreadsheets could not be corroborated by claimants or other contemporaneous payroll records, Garcia used the information provided during the initial inspection to calculate underpayments of minimum wage and overtime.

Amado testified that Irfan hired him on or around May 8, 2014, and told him that the job paid $525.00 for a 72-hour work-week. The first week, Amado worked seven days, from 10:30 a.m. until sometime between 11:30 p.m. and 1:00 a.m. the following day. Thereafter, Amado worked six days a week, from 10:30 a.m. until 10:30 p.m. For the first four or five weeks, Irfan paid Amado $525.00 per week in cash, and increased the weekly pay to $550.00 in cash until Amado left the job in June 2016. Irfan often asked Amado to work past 10:30 p.m. and paid him $10.00 per hour for those additional hours. Before Irfan gave Amado his weekly pay, he asked Amado to sign blank timesheets, to which figures were later added.

Amado further testified that there were four other workers at the meat shop, including Mirnain and Wilmar. Mirnain often worked more hours than Amado, sometimes 18 hours a day, while Wilmar worked similar hours to Amado and quit in or around May 2016.

Amado quit his employment with petitioners in June 2016 because he had surgery in March 2016, which prevented him from performing some of the tasks assigned to him at the meat shop. About a week later, Amado demanded from Irfan his wages owed, and in exchange for $500.00, Irfan asked Amado to sign a statement in English. Amado testified that he does not read or write in English, but thought he was signing a document confirming receipt of the $500.00.

Irfan testified that Amado signed a letter indicating that petitioner did not owe him money as he was paid in full. Irfan wrote the letter in English and asked Amado to sign it prior to leaving Irfan's business.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Board makes the following findings of fact and conclusions of law pursuant to the provision of Board Rules of Procedure and Practice (Board Rules) (12 NYCRR) § 65.39.

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 Rule [12 NYCRR] § 65.30; *Matter of Ram Hotels, Inc.*, PR 08-078, at 24 [Oct. 11, 2011]). For the reasons stated below, we find that petitioners failed to meet their burden of proof to show that the orders are unreasonable. We affirm both orders.

Petitioners Were Not Denied Due Process

We reject petitioners' assertion that they were denied due process because they were unable to participate in a compliance conference prior to respondent's issuance of the orders at issue. The Board has repeatedly held that due process is satisfied by the opportunity to contest the orders at a hearing before the Board (*Matter of Clifton J. Morello [T/A Iron Horse Beverage LLC]*, PR 14-283 [Sept. 14, 2016] at 6; *Matter of Angelo A. Gambino and Francesco A. Gambino [T/A Gambino Meat Market, Inc.]*, PR 10-150 [July 25, 2013] at 6; *Matter of David Fenske [T/A Amp Tech and Design, Inc.]*, PR 07-031 [Dec. 14, 2011], at 8).

Petitioners Did Not Maintain Legally Sufficient Records

To assure that employees are properly paid their wages for the actual hours worked, the Labor Law requires employers to maintain 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 142-2.6). Employers are required to keep such records open to inspection by the Commissioner or a designated representative at the place of employment (*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 (12 NYCRR 142-2.7). The required recordkeeping provides proof that the employee has been properly paid.

During the investigation, petitioners indicated that they maintained records and provided them to investigator Garcia who determined that they did not comply with the requirements of the Labor Law. The only document produced by petitioners that contained some of the information required by the Labor Law were spreadsheets that purportedly showed the number of hours worked, hourly wage, overtime hours worked, over time wage, total wage and total number of hours worked, and amounts paid, to each employee. The final column included the employees' signatures. Respondent challenged the credibility of the records by presenting testimony that the hours and wages paid were not accurate and that employees signed blank spreadsheets that were later completed by petitioners with fictitious information. Petitioners failed to rebut respondent's evidence. We find that petitioners did not maintain legally required payroll records.

Claimants Were Not Paid for Hours Worked

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]). In the absence of legally required records, the employer must come forward with evidence of the "precise" amount of work performed or with evidence to negate the reasonableness of the inferences to be drawn from the employee's evidence (*Anderson v Mt. Clemens Pottery*, 328 US 680, 687–88 [1949]; *Mid-Hudson Pam Corp.*, 156 AD2d at 821). Given the interrelatedness of wages and hours, the same requirement is applicable to wages and requires the employer to prove the "precise wages" paid for that work or to negate the inferences drawn from the employee's

credible evidence (*Doo Nam Yang v ACBL Corp.*, 427 F Supp 2d 327, 332 [SDNY 2005]; *Matter of Kong Ming Lee*, PR 10-293 at 15 [April 10, 2014]).

Amado testified that Irfan always asked him to sign the spreadsheets in exchange for his weekly pay, but at the time of signing, the form was always blank. Garcia testified that the other claimants stated the same and told her that they worked more hours than those reflected in the spreadsheets. As discussed above, the spreadsheets are not credible, do not comply with the payroll records requirements of the Labor Law, and claimants could not verify the information contained in them. Thus, Garcia was left to base her calculations on the information provided to respondent during employee interviews as that was the "best available evidence," even where approximate, of the hours claimants worked and wages they were paid (*Mid-Hudson Pam Corp.*, 156 AD2d at 821).

Petitioners' only piece of documentary evidence submitted at hearing was a self-serving note written in English by Irfan and signed by Amado, who does not read or write in English. Amado credibly testified that he was asked to sign the note in exchange for a portion of his last week's pay. The note is unpersuasive evidence that petitioners did not owe wages to Amado and we do not credit it. We credit claimant Amado's testimony regarding hours worked and monies paid because it was specific and credible. Amado testified to working 12 hour days, six days a week, usually from 10:30 a.m. until 10:30 p.m., and credibly testified about the hours worked by the other claimants, indicating that some worked even longer hours than he did.

Since petitioners failed to provide adequate records during the investigation, respondent was entitled to rely on the claimant interviews conducted by her investigators as the "best available evidence" and draw an approximation of their hours worked and wages owed drawn from such interviews, even where imprecise (*Mt. Clements Pottery Co.*, 328 US at 687-88 ["The employer cannot be heard to complain that the damages lack the exactness and precision of measurement that would be possible had he kept records in accordance with the (recordkeeping) requirements of . . . the Act"]; *Reich v Southern New England Telecommunications Corp.*, 121 F3d 58, 70 n.3 [2d Cir 1997] [finding no error in damages that "might have been somewhat generous" but were reasonable in light of the evidence and "the difficulty of precisely determining damages when the employer has failed to keep adequate records"]). Petitioners failed to overcome that approximation with any evidence at hearing establishing the precise hours claimants worked, or credible evidence that they were paid for those hours, or with other evidence showing the Commissioner's findings to be unreasonable.

We find petitioners failed to pay claimants their full wages for the hours worked during the claim period and, as such, the determination of wages owed in the minimum wage order is affirmed.

The Civil Penalty, Interest, and Liquidated Damages are Affirmed

Labor Law § 218 (1) provides that when the Commissioner determines that an employer has violated a provision of Article 19, she must issue an order directing payment of wages found to be due, "plus the appropriate civil penalty." The wage order assesses a 100% civil penalty.

Labor Law § 219 (1) provides that when the Commissioner determines that wages are due, the order directing payment 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 (1) sets the "maximum rate of interest" at "sixteen per centum per annum."

The wage order imposes liquidated damages in the amount of 100% of the wages owed. Labor Law § 663 (2) provides that when wages are found to be due, the Commissioner shall assess against the employer the full amount of the underpayment and an additional amount as liquidated damages, unless the employer proves a good faith basis for believing that its underpayment of wages was in compliance with the law. Such damages shall not exceed 100% of the total amount of wages found to be due.

Because petitioners failed to challenge the civil penalty, interest, or liquidated damages assessed the order to comply with Article 19 of the Labor Law, the issue is waived pursuant to Labor Law § 101 (2).

The Penalty Order is Affirmed

A petition must state in what respects the order on review is claimed to be invalid or unreasonable and any objections not raised in the petition shall be deemed waived (Labor Law § 101 [2]). Petitioners failed to challenge the penalties assessed in the penalty order and the issue is thereby waived pursuant to Labor Law § 101 (2).

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The minimum wage order is affirmed; and

2. The penalty order is affirmed; and

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

Vilda Vera Mayuga, Chairperson

J. Christopher Meagher, Member

Michael A. Arcuri, Member

Molly Doherty, Member

Gloribelle J. Perez, Member

Dated and signed by the Members
of the Industrial Board of Appeals
in New York, New York, on
March 7, 2018.

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Dated and signed by a Member
of the Industrial Board of Appeals
in Utica, New York, on
March 7, 2018.