

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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In the Matter of the Petition of:

TAK YUET KONG AND YU FU ZHANG AND
KING'S RICE, INC. (T/A KING'S RICE
RESTAURANT, INC.),

Petitioners,

To Review Under Section 101 of the Labor Law:
An Order to Comply with Article 19 and an Order to
Comply with Articles 5, 6 and 19 of the Labor Law, both
dated February 15, 2017,

- against -

THE COMMISSIONER OF LABOR,

Respondent.
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DOCKET NO. PR 17-065

RESOLUTION OF DECISION

APPEARANCES

Law Offices of Vincent S. Wong Attorneys at Law, New York, (Vincent S. Wong of Counsel).

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

WITNESSES

Yujing Luo, Tak Yuet Kong and Yu Fu Zhang, for petitioner.

Quiong Wen Li and Labor Standards Investigator Cuiyuan Zhu, for respondent.

WHEREAS:

Petitioners Tak Yuet Kong (hereinafter "Kong"), Yu Fu Zhang (hereinafter "Zhang") and King's Rice, Inc. (T/A King's Rice Restaurant, Inc.) (hereinafter "King's Rice" or "the restaurant") filed a petition with the Industrial Board of Appeals (hereinafter "Board") in this matter on April 17, 2017, pursuant to Labor Law § 101, seeking review of an order issued against them by respondent Commissioner of Labor (hereinafter "Commissioner" or "the Department") on February 15, 2017. Respondent filed an answer to the petition on May 19, 2017.

Upon notice to the parties a hearing was held in this matter on January 10 and February 7, 2018 and in New York, New York, before Vilda Vera Mayuga, the then Chairperson of the Board

and a designated hearing officer in this proceeding. A third day of hearing was held on April 9, 2019, in New York, New York, before Matthew Robinson-Loffler, Associate Counsel for the Board and a 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.

Petitioners did not appear at the second day of hearing until after the record was closed. One claimant, Quiong Wen Li testified on that date on direct examination. Li was not cross examined by petitioners because petitioners had not appeared during her testimony. The hearing record was closed at the conclusion of the second date of hearing but was subsequently re-opened for an additional date after petitioners requested that the matter be reopened for Zhang to testify. The petitioners did not request to be able to cross examine Li for the reopening of the hearing. A third date of hearing was held on April 9, 2019.

The order to comply with Article 19 of the Labor Law under review (hereinafter “minimum wage order”) directs compliance with Article 19 and payment to respondent for unpaid wages due to three claimants, Tian Xin Fang, Quiong Wen Li¹ and Yujing Luo² in the total amount of \$60,639.87 for the time period from October 15, 2013 to August 2, 2015, interest continuing thereon at the rate of 16% calculated to the date of the order in the amount of \$16,964.10, 100% liquidated damages in the amount of \$60,639.87, assesses a 100% civil penalty in the amount of \$60,639.87, for a total amount due of \$198,883.71.

The order under Articles 5, 6 and 19 (hereinafter “penalty order”) assesses an \$800.00 civil penalty for each of five counts for violating the following provision of law: Labor Law § 661 and Department of Labor Regulations (12 NYCRR) § 146-2.1 by failing to keep and/or furnish true and accurate payroll records for each employee during the period from on or about July 23, 2012 through July 23, 2015, Labor Law § 661 and Department of Labor Regulations (12 NYCRR) § 146-2.2 by failing to furnish to each employee at the start employment, written notice in English and any other language spoken by the new employee as their primary language, of the employee’s regular hourly rate of pay, overtime rate of pay, the amount of tip credit, if taken and the regular payday during the period October 15, 2013 to April 20, 2014, Labor Law § 661 and Department of Labor Regulations (12 NYCRR) § 146-2.3 by failing to furnish to each employee a statement with every payment of wages, listing the hours worked, rates paid, gross wages earned, any allowances claimed, deductions and net wages during the period from on or about October 15, 2013 to August 2, 2015, Labor Law § 162 by failing to provide employees of or in connection with a mercantile or other establishment a least thirty minutes off for the noon day meal when working a shift of more than six hours extending over the noon day meal period from eleven o’clock in the morning to two o’clock in the afternoon during the period from on or about October 15, 2013 to August 2, 2015, Labor Law § 191.1 (a) by failing to pay wages weekly to manual works not later than seven calendar days after the end of the week in which the wages were earned during the period from on or about October 15, 2013 to August 2, 2015. The total amount due is \$4,000.00.

¹ While throughout the record and on the Order to Comply, Quiong Wen Li’s name is spelled Qiongwen Li, on the February 7, 2018 hearing date, Quiong Wen Li spelled her name Quiong Wen Li on the record. Thus, throughout this decision the Board uses the spelling that Quiong Wen Li herself used at the hearing.

² While throughout the record and on the Order to Comply, Yujing Luo’s name is spelled Yujing Luo or Yuying Luo, on the January 10, 2018 hearing date, Yujing Luo spelled his name Yujing Luo on the record. Thus, throughout this decision the Board uses the spelling that Yujing Luo himself used at the hearing.

The petition alleges that the minimum wage order is invalid and unreasonable because claimant Quiong Wen Li was paid for all hours worked and she worked less hours than respondent determined that she worked. Petitioners also allege they were denied due process by being forced to participate in a hearing held by respondent instead of a compliance conference, which petitioners requested during the investigation, and because respondent did not provide enough time during the investigation for petitioners to get the required records together. Petitioners further allege that respondent failed to articulate its assessment of a 100% civil penalty in the minimum wage order. The petition asserts that Kong and Zhang operated the subject restaurant. The petition does not allege that Kong was not an employer but asserted that for the first time at the hearing, although petitioners did not seek to amend the petition to include this. Petitioners further asserted at hearing that the liquidated damages assessed in the wage order should be revoked because respondent did not determine that petitioners intentionally violated the Labor Law. For the reasons discussed below, we affirm the order issued against petitioners.

SUMMARY OF EVIDENCE

Wage Claims

Quiong Wen Li (hereinafter “Li”) filed a minimum wage/overtime claim dated June 2, 2015 as well as a claim for unpaid wages dated August 3, 2015. Li’s minimum wage/overtime claim states that she began working at the restaurant located at 6515 18th Avenue, Brooklyn, N.Y. as a waitress on October 15, 2013 until June 22, 2015. It states that she was hired and supervised by Zhang, and that she worked 11:00 a.m. to 10:30 p.m. Sunday, Monday, Wednesday and Friday, earning \$280.00 per month, which she received in cash on the first of the month. The claim also states that Li received approximately \$400.00 per week in tips. The minimum wage/overtime claim also states that Zhang was only present in the late afternoon; and, Kong, who Li identified on the claim as the “big boss,” was present and in the basement doing kitchen work during the day. The minimum wage/overtime claim states that Li received two free meals per day that she ate while working. Li’s claim for unpaid wages is for the period June 1, 2015 to June 22, 2015, the last day she worked for the restaurant. Li’s claim states that she worked 46 hours each week for the period June 1, 2015 through June 21, 2015 and worked 11.5 hours on June 22, 2015. Li’s claim states that she was not paid wages for June 2015 but did receive tips.

Yujing Luo (hereinafter “Luo”) filed a minimum wage/overtime complaint that states that he began working at the restaurant located at 6515 18th Avenue, Brooklyn, N.Y. as a waiter on January 4, 2014 until January 30, 2015 and that he was hired and supervised by Zhang. The complaint further states that Luo worked 11:00 a.m. to 10:30 p.m. Sunday, Monday, Tuesday, Thursday, Friday and Saturday, with two free meals but no uninterrupted meal breaks. The complaint states that his last agreed rate of pay was \$400.00 per month, which he received in cash on the first of each month, and that he received approximately \$400.00 per week in tips.

Tian Xin Fang (hereinafter “Fang”) filed a minimum wage/overtime complaint that states that Fang began working at the restaurant located at 6515 18th Avenue, Brooklyn, N.Y. as a waiter on April 20, 2014 until August 2, 2015 and that he was hired and supervised by Zhang. The complaint further states that Luo worked 11:00 a.m. to 10:30 p.m. Sunday, Tuesday, Wednesday, Thursday, Friday and Saturday and that he was paid \$400.00 per month, which he received in cash on the first of each month. Fang’s complaint also states that he received approximately \$500.00

per week in tips. The complaint states that Fang received two free meals per day but was not provided with a meal break.

Petitioners' Evidence

Testimony of claimant Yujing Luo

Luo testified that he completed a minimum wage/overtime complaint with the assistance of Cantonese speaking staff at the Department of Labor and that he reviewed the form once it was completed and signed it. Luo testified that the information contained in the form was accurate and that he would not change any of the information contained in the form.

Luo testified that Zhang is a partial owner of the restaurant and that there was a "bigger boss," who also owned the restaurant, who Luo knew as Big Brother Chun. Luo testified that he was hired and fired by Zhang and Zhang set his wages and schedule. Luo testified that the first time he saw Kong was at the Department of Labor and that he did not know him. Luo testified that Kong never gave Luo any instructions during his employment at the restaurant and that he did not know if Kong ever hired, fired or supervised anyone else at the restaurant.

Luo worked six days per week. Luo testified that he had Thursdays off but when asked about the discrepancy between his claim form, which said he had Wednesdays off, and his testimony that he had Thursdays off, Luo explained that he had either Wednesday or Thursday off but he never had more than one day off per week. Luo also explained that he would sometimes trade days off with another employee. Luo was required to show up prior to the opening of the restaurant each day that he worked. He did not use a timecard or time clock and was never asked to sign anything about his schedule. Luo testified that he worked on holidays such as Thanksgiving and Chinese New Year. Luo testified that he did take some time off to care for his injured father and for other matters but he did not recall when or how much time he took off.

Luo initially testified that he was paid either \$150.00 or \$200.00 every two weeks. He later testified that he was paid monthly while working at the restaurant and that he was thinking of a different job when he testified that he was paid every two weeks. When he was hired Zhang told Luo he would be paid \$300.00 per month. Zhang later raised his salary to \$400.00 per month. He was paid in cash and was not provided with a wage statement.

Luo testified that while he was a bus boy, he received a portion of the tips received by the waiters each day at the end of the workday, which was a smaller portion than the waiters would receive. The tips would be put into a tip box after they were collected from a table and divided up at the end of the workday. Luo did not know exactly how the payout from the tip share was calculated but Zhang or the manager would decide how to divide the tips.

Testimony of petitioner Tak Yuet Kong

In response to yes/no questions on direct examination, Kong testified that, during the relevant period, he did not have the power to hire, fire or set the rate or method of pay for any employees; he did not supervise or otherwise control any King's Rice employees; and, he did not maintain employment records for the restaurant. Kong also testified that he did not know Luo, Fang, and Li. Kong further testified that he never held an ownership interest in the restaurant and

that he never worked at King's Rice. Kong testified that he learned of the restaurant from his friend Zhang. In response to Kong being asked "do you have any type of a business relationship with Mr. Zhang related to King's Rice Restaurant," Mr. Kong testified, "[n]o. Now, no."

Testimony of petitioner Yu Fu Zhang

Zhang testified that he was an owner and manager of the restaurant and that he was responsible for the operation of the restaurant including hiring, firing, and setting employee schedules and rates of pay. Zhang testified that the restaurant closed around September 2015. He testified that Kong did not hire or fire any employees and was never in the restaurant but gave Zhang money for the restaurant, like a business partner.

Zhang was responsible for maintaining the restaurant's records, which, he testified, included the time sheets for some employees that recorded the employees' hours. Zhang later testified that he kept time sheets for all employees. Zhang handwrote information about hours worked that he gave to the accountant, who created timesheets from Zhang's handwritten notes, except for Fang who had handwritten time sheets, which Zhang created. Zhang's handwritten information for Luo's and Li's timesheets was not offered as evidence at the hearing and the accountant did not testify. Zhang testified that he compares his handwritten information with the computer time sheets the accountant prepares and "[i]t's not 100 percent . . . it's pretty complete." The time sheets contain space for the employee's name, the work period and the hourly rate, as well as the following columns: MM/DD, Time In, Time Out, Hours and Tips.

Zhang testified that he hired Fang as a waiter in May 2012 and that he left his job in 2015. Zhang testified, based on the time sheets, which contained his handwriting of hours that Fang worked, that covered the period January 2, 2015 through July 31, 2015, that he hired Fang in January 2015 and that he had forgotten when he previously testified about his hire date. Zhang testified that the time sheets show that Fang was paid \$8.75 per hour plus tips and that the time sheet included his hourly rate, how many hours he worked and how much he was paid in wages. The time sheets do not include information about tips that were paid. Zhang testified that Fang only worked "roughly" 4 or 5 hours per day. The time sheets show Fang worked 3 or 3½ hours per day when he worked one shift and 6 or 7 hours per day when he worked two shifts. Fang's time sheets were signed, purportedly, by Fang.

Zhang testified that he hired Li in a part time capacity in approximately 2013 and he also fired her. Zhang testified that when he hired Li, he paid her around \$5.00 or \$6.00 per hour plus tips and later paid her around \$8.00 or \$8.75 per hour plus tips. Zhang testified that Li worked "roughly" 5 or 6 hours a day and "[i]n the morning, around 11:30 or 12:00 to 2:30, something like that."³ And nighttime, around 6 to 9." The time sheets that were offered for Li were for October 27, 2013 through June 19, 2015 and stated that she worked 7 hours each day and was paid \$5.00 per hour. The time sheets were not signed by Li.

Zhang testified that he hired Luo in the beginning of 2015 and initially paid him an hourly rate of around \$6.00 or \$7.00 per hour and that Luo worked approximately six or seven hours each day. Petitioners offered time sheets for Luo from January 5, 2014 until January 17, 2015. The time

³ The interpreter clarified later during Zhang's testimony that "approximately" could also be an accurate translation when she said "something like that".

sheets state that Luo was paid \$5.00 per hour in 2014 and for the weeks of January 4, 2015 to January 17, 2015, he was paid \$5.50 per hour. The time sheets are not signed by Luo.

Zhang testified that he personally paid the restaurant's employees weekly. He denied owing any unpaid wages to the claimants stating that he had paid them on time. Zhang did not recall receiving a letter from respondent requesting records but testified that he does not understand English.

Respondent's Evidence

Testimony of claimant Quiong Wen Li

Li testified that she was hired by Kong and worked at the restaurant from October 15, 2013 to June 23, 2015. Li testified that she was present during Kong's testimony and recognized him as a boss from the restaurant and that he had the authority to hire, fire and supervise employees at the restaurant. Li believed Kong was also an owner of the restaurant because he was the boss. Li testified that Zhang was also one of the bosses at King's Rice. Li testified "[t]here are three bosses and the three bosses, two Kongs and one Zhang. The bigger brother . . . supervises in the 18th Avenue. The younger brother is more on the 20th Avenue restaurant. Li also testified that she knew Luo. Li explained that Luo would not have recognized Kong because Kong was not present at the restaurant most of the time during the period when Luo worked there.

Li testified that she worked from 11:00 a.m. to 10:30 p.m. five and a half days per week and that she later worked four days per week. While employed at the restaurant, Li never received overtime pay when she worked more than 40 hours in a week.

Testimony of Senior Labor Standards Investigator Cuiyuan Zhu

Investigator Cuiyuan Zhu (hereinafter "Zhu") testified she was assigned the investigation of this matter after it was initially assigned to a different investigator. She testified that she did not receive any records from the employer during the course of her investigation, so she performed wage computations based on the information provided by the claimants as contained in the claim forms and in telephone statements. Once the computations were complete, Zhu served petitioners' attorney with a recapitulation letter outlining the details of the investigation, the computations and the violations. Zhu testified that the time sheets for Li entered into evidence by petitioners at the hearing, which she did not receive prior to the issuance of the orders under review, would not have changed her computations because they were inconsistent with the claimants' account of the days and hours worked.

Zhu testified that she did not prepare the order to comply referral document but that in her opinion, petitioners lacked good faith and did not cooperate with respondent's investigation because they did not provide the requested records in a timely fashion and the records provided were deemed inaccurate by respondent based on the information collected from the claimants.

Zhu testified that Fang did request that his claim be withdrawn. Zhu did not mail him a close out letter because she would not have been responsible for the file at that time. Zhu made an entry in the contact log admitted into evidence on October 12, 2016 stating that a closeout letter would be mailed to Fang. There is no entry in the contact log indicating that a close out letter was

sent to Fang but there is an entry made by Frank King stating that Fang made a written request to withdraw his claim but that his claim would be included in the order. Zhu also testified that none of the claim forms identify Kong as an employer.

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's Rules of Procedure and practice (hereinafter "Board Rules") (12 NYCRR) § 65.39.

Burden of Proof

Petitioners' burden of proof in this matter is 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. (T/A Rodeway Inn)*, 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]). For the reasons discussed below, we affirm the minimum wage order and penalty order issued against petitioners.

Petitioners Were Not Denied Due Process

Petitioners' contention that they were denied due process because they were denied the opportunity to participate in a compliance conference but were instead forced to participate in a hearing held by respondent is without merit. The Board has repeatedly held that due process is satisfied by the opportunity to contest the orders at a *de novo* hearing before the Board, where petitioners are able to present all relevant documentary evidence and witnesses, as well as challenge any evidence offered by respondent (*See Matter of Clifton J. Morello (T/A Iron Horse Beverage LLC)*, Docket No. PR 14-283, at p. 6 [Sept. 14, 2016]; *Matter of Angelo A. Gambino and Francesco A. Gambino (T/A Gambino Meat Market, Inc.)*, Docket No. PR 10-150, at p. 6 [July 25, 2013]; *Matter of David Fenske (T/A Amp Tech and Design, Inc.)*, Docket No. PR 07-031, at p. 8 [Dec. 14, 2011]).

Tak Yuet Kong Was an Employer

As used in Article 19 of the Labor Law, "employer" means any "individual, partnership, association, corporation, limited liability company, business trust, legal representative, or any organized group of persons acting as employer," and in Article 6, "employer" is defined as "any person, corporation, limited liability company, or association employing any individual in any occupation, industry, trade, business or service" (Labor Law §§ 651 [6], 190 [3]). "Employed" includes permitted or suffered to work" (Labor Law § 2 [7]). The federal Fair Labor Standards Act (FLSA), like the New York Labor Law, defines "employ" to include "suffer or permit to work" (29 USC § 203 [g]), and the test for determining whether an entity or person is an "employer"

under the New York Labor Law is the same test used for analyzing employer status under the FLSA (*Crawford v Coram Fire Dist.*, 2015 U.S. Dist. LEXIS 57997, *24 [ED NY, May 4, 2015, No. 12-3850] citing *Chu Chung v The New Silver Palace Restaurant*, 272 F. Supp. 2d 314, 319 n 6 [SDNY 2003] (“Section 190 of N.Y. Labor Law defines ‘employer’ as ‘any person, corporation or association employing any individual in any occupation, industry, trade, business or service.’ Most courts agree that the test for determining whether an entity or person is an ‘employer’ under New York Labor Law is the same as the test set forth in *Herman* for analyzing employer status under the Fair Labor Standards Act.”); *Matter of Yick Wing Chan v New York State Industrial Board of Appeals*, 120 AD 3d 1120, 1121 [1st Dept 2014].

There is no dispute that Zhang was an employer during the relevant period. The threshold issue, as petitioners presented it during the hearing, is whether or not Kong is individually liable as an employer. Despite this being the thrust of petitioners’ prima facie case, petitioners did not assert that Kong was not an employer in their petition, nor did petitioners seek to amend their petition at hearing to plead this issue. Nonetheless, here the Board considers the full record presented at the hearing and in the pleadings. Petitioners’ burden was to prove at the hearing that Kong was not, as a matter of economic reality, the claimants’ employer. (*Herman v RSR Sec. Servs. Ltd.*, 172 F3d 132, 139 [2d Cir 1999]; see also *Matter of Panagiotis Kalligeros A/K/A Peter Kalligeros and Theodore Calligeros and Golden Dolphin Restaurant Corp. (T/A The Golden Dolphin)*, Docket No. PR 15-303, at pp. 8-10 [October 24, 2018]). We find that petitioners did not meet that burden.

In *Herman*, the Second Circuit Court of Appeals explained the “economic reality test” used for determining employer status:

“[T]he 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 the 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” (*Herman*, 172 F3d at 139) (internal quotations and citations omitted).

No one of these factors is dispositive. The purpose of examining them is to determine economic reality based on a “totality of circumstances” (*id.*) (internal quotation marks omitted). Under the economic reality test, employer status “does not require continuous monitoring of employees, looking over their shoulders at all times, or absolute control of one’s employees. Control may be restricted, or exercised only occasionally, without removing the employment relationship from the protections of the FLSA, since such limitations on control do not diminish the significance of its existence” (*id.*) (internal quotation marks omitted). Under the broad New York and FLSA definitions of “employer,” more than one person or entity can be found to be an employee’s employer (*Zheng v Liberty Apparel Co.*, 355 F3d 61, 66 [2d Cir 2003]; *Matter of Stephen B. Sacher, Travco Inc., and Sacher & Co., CPA, P.C.*, Docket No. PR 11-151, at p. 6 [April 10, 2014]; *Matter of Robert Lovinger and Miriam Lovinger and Edge Solutions, Inc.*, Docket No. PR 08-059, at p. 8 [Mar. 24, 2010]).

The evidence in the record regarding Kong's employer status from both parties was nominal and not detailed. On the issue of his status as an employer, Kong's testimony was limited to four single-word denials in response to questions which consisted solely of a recitation of the factors enumerated in *Herman*.

Q. Okay. Did you have the power to hire or fire any employees at the restaurant for that time period?

A. No.

Q. Did you supervise or control any of the employees in any manner including their work schedule for the restaurant during that time period?

A. No.

Q. Did you determine the pay rate or the method of payment for any of the employees for the restaurant in that time period?

A. No.

Q. Did you maintain any of the employment records for the restaurant during that time period?

A. No.

Kong's testimony failed to offer any details beyond these wanting denials. Kong also denied ever having an ownership interest in King's Rice, working at King's Rice at any time or knowing the claimants. Kong did testify that he had been to the restaurant, during its grand opening and at times after the grand opening. Kong also characterized his relationship with Zhang as being limited to friendship only. When asked "[d]o you have any type of business relationship with Mr. Zhang relating to King's Rice Restaurant?" Kong replied, "[n]o. Now, no."

Zhang's testimony, however, directly contradicted Kong's description of their relationship and Kong's relationship to the restaurant. Zhang testified that he had a business relationship with Kong and that Kong was a business partner in the restaurant.

Luo did testify that he had never seen Kong before and that Kong was not his employer. Luo also testified that Zhang "has a share in this restaurant and I know there is a bigger boss. There are two partners in this restaurant."

Li testified that Kong hired her and that he was a "boss" of the restaurant along with Zhang and one other person. Li detailed her testimony to say that there were two brothers, Kong being one, who owned two restaurants and they each operated one of the restaurants. Li also testified that Kong operated the restaurant that is the subject of this matter and possessed the authority to hire, fire and supervise the employees at the restaurant.

We find that the evidence presented by both parties on the issue of whether Kong was an employer was minimal; but, the fact that Kong's testimony regarding his relationship to the restaurant was contradicted by statements made in petitioners' own pleading and by Zhang's testimony regarding the nature of their relationship undermines the credibility and reliability of Kong's testimony in toto. Li, on the other hand, provided the most detailed and credible testimony of the entire hearing about who was involved in owning the restaurant, naming Kong as the "boss" with the authority to hire, fire and supervise employees at the restaurant. Li's testimony regarding the various partners who owned the restaurant was also not inconsistent with Luo's testimony on

this fact, who also testified about partners owning the restaurant. While, Li testified that Luo would not have recognized Kong as Kong was not present at the restaurant during Luo's period of employment, this fact does not, in and of itself, eliminate or otherwise contradict a finding that Kong was an employer because Li credibly testified, without contradiction, that Kong held such authority and whether Kong exercised this authority in a limited fashion does not "diminish the significance of its existence" (*Herman*, at 139) (internal quotation marks omitted).

Based on the record evidence, we find that petitioners failed to meet their burden to prove by a preponderance of the evidence that the order was incorrect or unreasonable in this respect and we affirm the Commissioner's finding that Kong is individually liable as an employer.

Petitioners' Failure to Maintain Payroll Records

Article 19 of the Labor Law requires employers to maintain, for six years, certain records of the hours their employees worked and the wages they paid them (Labor Law § 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.*; Department of Labor Regulations [12 NYCRR] § 146-2.1 [a]). 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]; Department of Labor Regulations [12 NYCRR] § 146-2.1 [e]). 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 (*Matter of Baudo v New York State Indus. Bd. of Appeals*, 154 AD3d 535, 536 [1st Dept 2017]; *Matter of Ramirez v Commissioner of Labor*, 110 AD3d 901, 901-902 [2d Dept 2013]; *Matter of Mid Hudson Pam Corp. v Hartnett*, 156 AD2d 818, 820-821 [3d Dept 1989]).

Petitioners entered time sheets⁴ for Fang for the period January 2, 2015 through July 31, 2015, which purportedly showed the correct number of hours Fang worked per week. The Board is unable to credit these records as they are not legally sufficient, inaccurate, and are contradicted by Zhang's own testimony. The time sheets allegedly attributed to Fang are not legally sufficient because they do not comply fully with the requirements of Department of Labor Regulations (12 NYCRR) § 146-2.1. For example, they do not include any information about tips received by Fang despite containing a column for tips which was left blank for each time sheet despite Zhang's testimony that cash tips were paid on a daily basis, nor do they include any information about deductions from gross wages.

Fang's time sheets are also inaccurate because the hours are stated in exact rounded numbers from day-to-day, across every week from January 2, 2015 through and including July 31, 2015. For example, the first time sheet, which covers the fourteen day period of January 2, 2015 through January 16, 2015 contains the start times of 5:30 p.m. or 6:00 p.m. and end times of 9:00 p.m. for each day worked during this two-week period. Petitioners' rounding methodology demonstrates that petitioners' records are not reliable evidence sufficient to support an accurate estimate of the hours worked (*see Matter of James Michael Foley and Reel Fast Fishing*

⁴ Time sheets for the claimants Li and Luo were also offered but only entered, after objection by respondent, for the limited purpose of demonstrating that some records regarding the claimants' hours were kept by petitioners during the relevant claim period.

Adventures, Inc. (T/A Hampton Lady Beach Bar and Grill), Docket No. PR 17-097, at p. 8 [January 30, 2019]; *Matter of Sodhi Longia and Guaran Ditta Corp. (T/A Happy Days Diner)*, 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"]).

Lastly, Fang's time sheets include the total number of hours worked and total amount paid for two-week periods of time which is directly contradicted by Zhang's testimony that he paid the claimants weekly.

While the time sheets for Li and Luo were only admitted into evidence for the purpose of showing records of hours worked were kept, the Board does not find them to be credible evidence even of just that because Zhang's testimony was inconsistent with the information reflected in the time sheets. Zhang testified that Fang only worked "roughly" 4 or 5 hours per day despite the time sheets showing that he consistently worked three or 3½ hours per day when he worked one shift and 6 or 7 hours per day when he worked two shifts. Fang's time sheets were signed, purportedly, by Fang. Zhang testified that Li worked "roughly" five or six hours a day and was paid \$8.75 per hour plus tips but the time sheets petitioners offered for Li show that she worked 7 hours each day and that she was paid \$5.00 per hour. Zhang testified that he hired Luo in 2015 but petitioners offered time sheets for Luo that began in January 2014. Additionally, Zhang testified that Luo was paid \$6.00 or \$7.00 per hour but Luo's time sheets show that he was paid \$5.00 per hour in 2014 and \$5.50 per hour in 2015.

Petitioners' only evidence that it maintained the requisite time and payroll records were the time sheets that we give no credence to, thus, the Commissioner's determination that petitioners failed to maintain legally required payroll records was reasonable and valid.

The Minimum Wage Order is Affirmed

In the absence of wage and hour records for the relevant period, petitioners then bear the burden of proving that the disputed wages were paid (Labor Law § 196-a; *Garcia v Heady*, 46 AD3d at 1090 [3d Dept 2007]; *Matter of Angello v National Fin. Corp.*, 1 AD3d at 854). As the Appellate Division stated in *Matter of Mid Hudson Pam Corp v Hartnett* (156 AD2d at 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 calculations 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 claimant worked and what he was paid for those hours, or other evidence that shows the Commissioner's findings to be invalid or unreasonable (*Matter of Joseph Baglio and the Club at Windham, Ltd.*, PR 11-394, at p. 7 [December 9, 2015]; *Matter of RAM Hotels, Inc. (T/A Rodeway Inn)*, Docket No. PR 08-078, at p. 24).

As discussed above, the records offered by petitioners lack the reliability to establish by a preponderance of the evidence the specific hours that the claimants worked and that they were paid for those hours (*Matter of Garcia v Heady*, 46 AD3d at 1090; *Matter of Angello v National Fin. Corp.*, 1 AD3d at 854; *Matter of RAM Hotels, Inc. (T/A Rodeway Inn)*, Docket No. PR 08-078, at p. 24).

Zhang's testimony was not sufficiently specific to make up for the lack of credible records and Zhang's testimony was inconsistent such that the Board did not find it credible. Zhang testified that Fang was hired in 2012 but he later corrected his testimony to say that he was hired in 2015. Zhang also testified that Luo was hired in 2015 but the time sheets offered by petitioners included time sheets for Luo beginning in January 2014. Zhang's testimony was similarly inconsistent with respect to the daily hours worked by claimants and their hourly rate of pay. The Board has consistently held that general, conclusory and incomplete testimony about 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 complete and accurate required records (*Matter of Kehinde O. Adebowale (T/A Saramik Day Care)*, Docket No. PR 17-050, at p. 4 [June 6, 2018]; *Matter of Young Hee Oh AKA Young H. Oh, and Cheong Hae Corp. (T/A Cheong Hae Restaurant)*, Docket No. PR 11-017, at p. 12 [May 22, 2014]). We find that Zhang's testimony did not satisfy the high burden of precision required to make up for the lack of complete records.

Because petitioner provided insufficient evidence of legally required records of the daily and weekly hours worked or wages paid to the claimants, and 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 Baudo v New York State Indus. Bd. of Appeals*, 154 AD3d at 536; *Matter of Ramirez v Commissioner of Labor*, 110 AD3d at 901-902; *Matter of Joseph Baglio and the Club at Windham, Ltd.*, PR 11-394, at p. 7; *Matter of RAM Hotels, Inc. (T/A Rodeway Inn)*, Docket No. PR 08-078, at p. 24). Here, we find the hours utilized by the Commissioner from the claim forms to be a reasonable approximation of the hours worked by the claimants and their rates of pay during the relevant period and affirm the Commissioner's wage calculations in the minimum wage order.

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. The issue is thereby waived pursuant to Labor Law § 101 (2). As such, we affirm the interest in the 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. Petitioners only asserted a challenge to the liquidated damages during their attorney's opening statement at the hearing and, otherwise, failed to offer evidence challenging the imposition of liquidated damages. We find that the inaccurate and insufficient records provided by petitioners, as well as the vague, unreliable and at times contradictory testimony regarding the information contained in those records, does not demonstrate the good faith necessary to avoid liquidated damages. As such, we affirm the liquidated damages in the unpaid wages order.

The Civil Penalty is Affirmed

The minimum wage 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. The issue is thereby waived pursuant to Labor Law § 101 (2). As such, we affirm the civil penalty in the unpaid wages order.

Articles 5, 6 and 19 Penalty Order

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. Here, respondent assessed an \$800.00 civil penalty for each of five counts for violating the following provision of law: Labor Law § 661 and Department of Labor Regulations (12 NYCRR) § 146-2.1 by failing to keep and/or furnish true and accurate payroll records for each employee during the period from on or about July 23, 2012 through July 23, 2015; Labor Law § 661 and Department of Labor Regulations (12 NYCRR) § 146-2.2 by failing to furnish to each employee with a wage notice written in the employee's primary language that includes the regular hourly rate of pay, overtime rate of pay, the amount of tip credit, if taken and the regular payday during the period October 15, 2013 to April 20, 2014; Labor Law § 661 and Department of Labor Regulations (12 NYCRR) § 146-2.3 by failing to furnish to each employee a wage statement with each wage payment that includes gross wages, deductions and net wages from on or about October 15, 2013 to August 2, 2015; Labor Law § 162 by failing to provide employees with a required uninterrupted meal period during the period from on or about October 15, 2013 to August 2, 2015; and Labor Law § 191.1 (a) by failing to pay wages weekly during the period from on or about October 15, 2013 to August 2, 2015. The total amount due as penalties is \$4,000.00.

As detailed above, petitioners did not have sufficient time and payroll records and, thus, we affirm the \$800.00 penalty for violation of Labor Law § 661 and Department of Labor Regulations (12 NYCRR) § 146-2.1. Petitioners offered no evidence that they provided claimants with wage rate notices, as required by Labor Law § 661 and Department of Labor Regulations (12 NYCRR) § 146-2.2 nor did they provide any evidence that they provided claimants with wage statements, as required by Labor Law § 661 and Department of Labor Regulations (12 NYCRR) § 146-2.3. Thus, we affirm the \$800.00 penalties assessed for each of those violations. Petitioners did not present any evidence to challenge the violation that employees were not provided with uninterrupted meal periods, as required by Labor Law § 162, thus, we affirm the \$800.00 penalty assessed for that violation. Finally, while Zhang testified that he paid employees weekly, his testimony was contradicted by the only documentary evidence that petitioners presented regarding hours worked and wages paid. The time sheets offered by petitioners were for two week periods.

Thus, we find petitioners failed to prove that the respondent's assessment of an \$800.00 civil penalty for failure to pay employees weekly as required by Labor Law § 191.1 (a) was incorrect or unreasonable and we affirm that penalty.

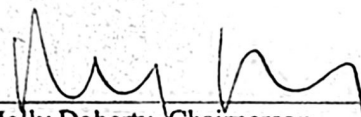
Respondent's Motion to Dismiss

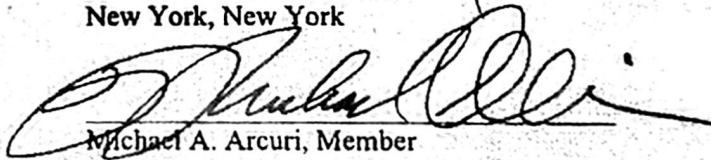
At the conclusion of petitioners' case, respondent moved to dismiss the petition on grounds that petitioners failed to establish a prima facie case or otherwise meet their burden of proof that the minimum wage and penalty orders are invalid or unreasonable and then proceeded to present additional witnesses for her case. As the Board heard and considered all of the evidence presented by both parties, as detailed above, the Board denies respondent's motion.

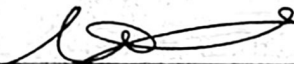
NOW, THEREFORE, IT IS HEREBY RESOLVED AND ORDERED THAT:

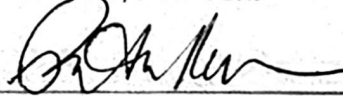
1. The unpaid wages order and penalty order is affirmed; and
2. The petition for review be, and the same hereby is, otherwise denied.

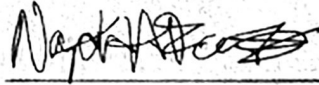
Dated and signed by the Members
of the Industrial Board of Appeals
on June 24, 2020.



Molly Doherty, Chairperson
New York, New York

Michael A. Arcuri, Member
Utica, New York

Glorabelle J. Perez, Member
New York, New York

Patricia Kakalec, Member
Brooklyn, New York

Najah Farley, Member
Brooklyn, New York