

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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In the Matter of the Petition of:

CARLOS M. HERNANDEZ D/B/A YORK STREET
GROCERY,

Petitioner,

To Review Under Section 101 of the Labor Law:
An Order to Comply with Article 5 and Article 19 of
the Labor Law, dated February 13, 2019,

- against -

THE COMMISSIONER OF LABOR,

Respondent.
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DOCKET NO. PR 19-039

RESOLUTION OF DECISION

APPEARANCES

Carlos M. Hernandez, petitioner pro se.

Pico P. Ben-Amotz, General Counsel, NYS Department of Labor, Albany (Kevin E. Jones of counsel), for respondent.

WITNESSES

Carlos M. Hernandez, for petitioner.

Claimant and Senior Labor Standards Investigator Pierre Magloire, for respondent.

WHEREAS:

Petitioner Carlos M. Hernandez D/B/A York Street Grocery filed a petition in this matter on March 25, 2019, pursuant to Labor Law § 101, seeking review of an order issued against him by respondent Commissioner of Labor (hereinafter "Commissioner" or "Department") on February 13, 2019. Respondent filed an answer to the petition on May 6, 2019.

Upon notice to the parties a hearing was held in this matter on October 11, 2019, in New York, New York before Molly Doherty, Chairperson of the Board and the designated hearing officer in this proceeding. Each party was afforded a full opportunity to present documentary evidence, to examine and cross-examine witnesses, and to make statements relevant to the issues.

The order under review directs compliance with Articles 5 and 19 of the Labor Law and payment to respondent for wage underpayments due to claimant in the amount of \$37,992.75 for the time period from May 7, 2010 to May 7, 2013, interest continuing thereon at the rate of 16% calculated to the date of the order in the amount of \$35,024.11, 100% liquidated damages in the amount of \$37,992.75, assesses a 100% civil penalty in the amount of \$37,992.75, and assesses separate civil penalties, each in the amount of \$800.00, for violations of Article 5 of the Labor Law, Section 162; Article 19 of the Labor Law, Section 661, and Department of Labor Regulations (12 NYCRR) § 142-2.6; and Article 19 of the Labor Law, Section 661, and Department of Labor Regulations (12 NYCRR) § 146-2.7, for a total amount due of \$151,402.36.

Petitioner alleges that the order is invalid and unreasonable because the claimant was paid minimum wage for the work that he performed. Petitioner also alleged at hearing that the order is invalid and unreasonable because he did not own the subject business during some or all of the relevant period. For the reasons set forth below, the Board finds that petitioner failed to meet his burden of proof and affirms the order under review.

SUMMARY OF EVIDENCE

Wage Claim

Claimant filed a claim for unpaid minimum wages from May 7, 2010 through May 7, 2013. The unpaid minimum wages claim form states that he was paid \$5.00 per hour. The form also states that he worked from 12:00 p.m. until 11:00 p.m. Sunday through Wednesday and on Fridays and Saturdays.

Carlos M. Hernandez's Testimony

Carlos M. Hernandez (hereinafter "Hernandez") owned York Street Grocery. He purchased it in 1999 or 2000 and he testified that he sold it in December or January, he believed in 2013, to his cousin, Carlos Ortiz (hereinafter "Ortiz"). Hernandez offered documents to evidence that he sold the store during the claim period and the documents reflect both March 2012 and March 2013 as the date that the ownership or control of the store was transferred from Hernandez to another party. The documents state that the agreement was entered into in March 2013, but the signatures on the documents are notarized in March 2012. Hernandez could not remember which month and year he actually sold the store. After selling the store, Hernandez left the country for about a year. When Hernandez returned to New York, he asked Ortiz to hire him to work in the store. He then worked in the store as a cashier in 2014 or 2015.

Hernandez testified that the claimant worked from 3:00 p.m. until 9:00 p.m. Mondays through Saturdays and he had Thursdays off, so he worked a total of five days per week. Hernandez paid him \$500.00 per week in cash. Hernandez testified that claimant did not work on Sundays. Ramirez also testified that he paid the claimant on Sundays. Hernandez worked every day in the store from 6:00 a.m. until after the store closed at 10:00 p.m. Some days he would leave right at 10:00 p.m., some days he would stay until 10:30 p.m. Each day, Hernandez would leave the store around 3:00 p.m. or 4:00 p.m. but he would then return around 9:00 p.m. each night to close the store.

Hernandez testified that he did not give the employees pay stubs and he had no records of how many hours the claimant worked each week or how much he paid to the claimant.

Claimant's Testimony

Claimant testified that he worked at York Grocery stocking the refrigerators and shelves, preparing deliveries and, at times, working at the counter. Claimant testified that he worked seven days a week except for when he was given a day off and that he arrived at work at 11:00 a.m. and he would leave at 11:00 p.m. Claimant testified that he did not receive a meal break and that he was paid \$5.00 per hour by York Grocery. Claimant was paid on Sundays in cash.

Senior Labor Standards Investigator Pierre Magloire's Testimony

Senior Labor Standards Investigator Pierre Magloire (hereinafter "Magloire") testified for the respondent. Magloire testified that the employer never provided the requested records about hours worked and wages paid to the claimant and instead the employer said the claimant worked fewer hours than he claimed and that he did not always perform work when he was at the store. Magloire testified that he recommended assessing a 100% civil penalty because there was a prior labor law violation issued against the petitioner. He testified that he also considered the size of the business and underpayment, as well as the lack of any records being maintained by the employer in making a recommendation for a civil penalty.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Board makes the following findings of fact and conclusions of law pursuant to the provisions of the Industrial Board of Appeals Rules of Procedure and Practice (hereinafter "Board Rules") (12 NYCRR) § 65.39.

Petitioner's burden of proof in this matter was to establish by a preponderance of the evidence that the order issued by the Commissioner is invalid or unreasonable (State Administrative Procedure Act § 306 [1]; Labor Law §§ 101, 103; Board Rules [12 NYCRR] § 65.30; *Matter of Garcia v Heady*, 46 AD3d 1088, 1090 [3d Dept 2007]; *Matter of Angello v National Fin. Corp.*, 1 AD3d 850, 854 [3d Dept 2003]; *Matter of RAM Hotels, Inc.*, Docket No. PR 08-078, at p. 24 [October 11, 2011]). A petition must state "in what respects [the order on review] is claimed to be invalid or unreasonable," and any objections not raised shall be deemed waived (Labor Law § 101 [2]). The Labor Law provides that an order of the Commissioner shall be presumed valid (*id.* § 103 [1]). The hearing before the Board is *de novo* (Board Rules [12 NYCRR] § 66.1 [c]). The petition alleges that the order to comply is invalid or unreasonable because petitioner paid the claimant \$450.00 per week. At the hearing, petitioner also alleged that the order is invalid and unreasonable because he did not own the store during the entirety of the claim period.

Petitioner's 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] § 142-2.1 [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] § 142-2.1 [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]). Petitioner did not offer the legally required records of the hours and days that the claimant worked, and the wages paid to him either at the investigative phase of this matter or at the hearing before the Board. Petitioner testified at the hearing that he did not keep any records of hours that the claimant worked or the wages that were paid to him and he testified that he paid the claimant in cash without any document reflecting those payments. As such, the Commissioner’s determination that petitioner failed to maintain legally required payroll records was reasonable and valid.

The Minimum Wage Order is Affirmed

Article 19 of the Labor Law, entitled “Minimum Wage Act” provides that every employer must pay each of its non-exempt employees a minimum hourly wage for each hour of work (Labor Law § 652 [1]), and one and one-half of their regularly hourly wage rate for hours worked over 40 in a week (12 NYCRR 146-1.4).

In the absence of wage and hour records for the relevant period, petitioner then bears 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*, 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 petitioner has 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*, PR 11-394, at p. 7 [December 9, 2015]; *Matter of RAM Hotels, Inc.*, Docket No. PR 08-078, at p. 24). The Board has consistently held that general, conclusory and incomplete testimony 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. Adebawale*, Docket No. PR 17-050, at p. 4 [June 6, 2018]; *Matter of Young Hee Oh*, Docket No. PR 11-017, at p. 12 [May 22, 2014]). Here, we find petitioner’s testimony about wages that he paid to claimant was not credible because it was unsubstantiated and inconsistent with the statement about wages paid to claimant in the petition. Petitioner testified that he paid the claimant \$500.00 per week in cash on Sundays, but his petition, that he signed, states that he paid claimant \$450.00 per week. Petitioner did not offer any sufficiently detailed evidence through testimony or records to prove that he paid claimant \$500.00 per week. We do not credit petitioner’s unsubstantiated testimony that claimant only worked five days per week and that he did not work on Sundays, which, according to petitioner, was the day that he paid claimant each week. It was petitioner’s burden to show that the respondent’s order

was invalid or unreasonable and he failed to offer any probative evidence to meet his burden. Thus, we credit the Commissioner's reliance on the claim form and interviews with claimant as the best available evidence of wages owed.

We also give no credence to petitioner's assertion that he did not own the store for the duration of the claim period. Petitioner's documentary evidence that he sold the store was inconsistent in that it had different dates when the purported transaction selling the store occurred. His testimony about when he sold the store was also inconsistent with the documentary evidence. As stated above, it is the petitioner's burden to prove that the Commissioner's order was unreasonable or invalid (State Administrative Procedure Act § 306 [1]; Labor Law §§ 101, 103; Board Rules [12 NYCRR] § 65.30; *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.*, Docket No. PR 08-078, at p. 24). We find that the petitioner failed to prove that the Commissioner's determination that he was the employer for the entirety of the claim was unreasonable or incorrect.

We affirm the minimum wage order.

Interest

Labor Law § 219 (1) provides that when the Commissioner determines that wages are due, then the order directing payment of those wages shall include "interest at the rate of interest then in effect as prescribed by the superintendent of financial services pursuant to section fourteen-a of the banking law per annum from the date of the underpayment to the date of payment." Banking Law § 14-a sets the "maximum rate of interest" at "sixteen per centum per annum." Here, respondent correctly determined that the employee was not paid all wages owed and petitioner did not offer sufficient evidence to challenge the wage order or any evidence to challenge the imposition of interest. We affirm the interest imposed in the minimum wage order.

Liquidated Damages

Labor Law § 218 (1) also requires respondent to include liquidated damages in the amount of 100 % of the wages found due with the order.¹ Liquidated damages must be paid by the employer unless the employer "proves a good faith basis to believe that its underpayment was in compliance with the law." Liquidated damages in the amount of 100% were assessed against petitioner in this matter. Here, respondent correctly determined that claimant was not paid all wages owed and petitioner did not offer sufficient evidence to challenge the wage order or the imposition of the liquidated damages. We affirm the liquidated damages imposed in the minimum wage order.

The Civil Penalty

Labor Law § 218 (1) provides that if respondent determines an employer has violated certain provisions of Article 19, including failure to pay minimum wages and overtime, she must assess an "appropriate civil penalty." A civil penalty of up to 200% shall be assessed if respondent

¹ While Labor Law § 218 (1) requires the Commissioner to include 100 % liquidated damages in her orders to comply, Labor Law § 663 (2) provides that liquidated damages shall be calculated by the Commissioner as "no more than" 100 % of the underpayments found due.

finds the violation was willful or egregious, or if the employer has previously violated the Labor Law. Otherwise, in assessing the amount of the penalty, the respondent must "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 . . . the failure to comply with recordkeeping or other non-wage requirements" (Labor Law § 218 [1]). Respondent assessed a 100 % civil penalty against petitioner, which did not exceed the amount allowed by the statute. We affirm the civil penalty because petitioner presented no evidence that the civil penalty was unreasonable.

The Penalty Order is Affirmed

Labor Law § 218 (1) provides that where a violation is for a reason other than an employer's failure to pay wages, the order shall direct payment to respondent of a civil penalty in an amount not to exceed \$1,000.00 for a first violation. In this case, respondent assessed an \$800.00 penalty against petitioner for failing to provide at least 30 minutes for a meal break, in violation of Labor Law § 162; an \$800.00 penalty against petitioner for failing to keep and/or furnish true and accurate payroll records for each employee for the claim period, which petitioner conceded, in violation of Labor Law § 661; and an \$800.00 penalty against petitioner for failing to give each employee a wage statement, which petitioner also conceded, in violation of Labor Law § 661. Petitioner failed to present any evidence that he provided a 30 minute meal break and he testified that he did not maintain any records of hours worked or wages paid, nor did he give wage statements to employees. Thus, we affirm all three counts of the penalty order.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The minimum wage order, interest, liquidated damages, civil penalty and the Article 5 and 19 civil penalties are affirmed; and
2. The petition for review be, and it hereby is, denied.

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



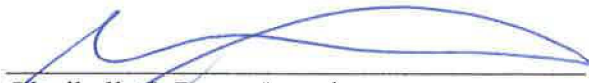
Molly Doherty, Chairperson
New York, New York



Patricia Kakalec, Member
New York, New York



Najah Farley, Member
New York, New York



Gloribelle J. Perez, Member
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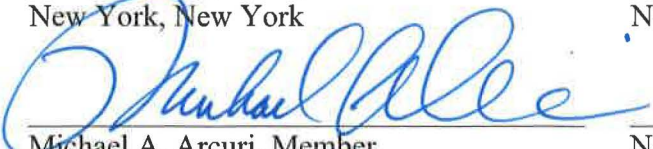
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New York, New York



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Utica, New York

Najah Farley, Member
New York, New York

Gloribelle J. Perez, Member
New York, New York