

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

-----X
In the Matter of the Petition of:

RONG H. ZHENG AND RONG TRADING CORP.,

Petitioners,

To Review Under Section 101 of the Labor Law:
An Order to Comply with Article 19, and an Order
Under Articles 6 and 19 of the Labor Law, both dated
October 8, 2015,

- against -

THE COMMISSIONER OF LABOR,

Respondent.
-----X

DOCKET NO. PR 15-390

RESOLUTION OF DECISION

APPEARANCES

Chen and Associates, New York City (*Michael E. Talassazan* of counsel), for petitioners.

Pico P. Ben-Amotz, General Counsel, NYS Department of Labor, Albany (*John-Raphael Pichardo J.D.*), for respondent.

WITNESSES

Desiderio Animas and Chi Kan Lau, Labor Standards Investigator, for petitioners and respondent.

WHEREAS:

On December 7, 2015, petitioners Rong H. Zheng and Rong Trading Corp. filed a petition with the Industrial Board of Appeals seeking review of two orders issued by respondent Commissioner of Labor on October 8, 2015. The petition was amended on March 8, 2016. The Commissioner filed an amended answer on March 16, 2016.

Upon notice to the parties, a hearing was held on April 28, 2016 in New York, New York before J. Christopher Meagher, Esq., Member of the Board and the 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 file 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 claimant employee Desiderio Animas in the amount of

\$17,674.00 for the period from August 28, 2010 to February 5, 2013, interest continuing thereon at the rate of 16% calculated to the date of the order in the amount of \$7,553.82, 100% liquidated damages in the amount of \$17,674.00, and a 100% civil penalty in the amount of \$17,674.00. The total amount due is \$60,575.82.

The order under Articles 6 and 19 of the Labor Law (penalty order) assesses petitioners a civil penalty for each of the following violations for the period from August 28, 2010 through February 5, 2013: (1) \$500.00 for violation of Labor Law § 661 and 12 NYCRR 142-2.6 by failing to keep and/or furnish the Commissioner true and accurate payroll records for each employee; (2) \$500.00 for violation of Labor Law § 661 and 12 NYCRR 142-2.7 by failing to furnish each employee a complete wage statement with every payment of wages, and; (3) \$500.00 for violation of Labor Law § 195.1 by failing to provide employees a written notice at their time of hire stating their rate of pay and the regular payday designated in advance by their employer, or by failing to obtain a written acknowledgement of receipt of such notice. The total amount due is \$1,500.00.

The petition alleges that the Commissioner's calculation of wages is in error and the liquidated damages and penalties assessed are unreasonable because: (1) petitioner Zheng did not assume ownership and start the business operations of Rong Trading Corp. until October 28, 2011; (2) there is no evidence that petitioners employed claimant before such time; and (3) claimant was employed from January 2012 to January 2013, was paid \$480.00 to \$500.00 per week for a 40 hour week, and was paid above minimum wage for all hours worked.

SUMMARY OF EVIDENCE

The Wage Claim

On August 28, 2013, claimant Desiderio Animas filed a claim for unpaid minimum wages with the Department of Labor (DOL) alleging that he was employed by petitioner Rong H. Zheng as a general helper at his trading company in Brooklyn, New York from approximately 2003 to February 5, 2013. The claim stated that he worked 67.5 hours per week – Monday, Tuesday, and Saturday from 8:00 a.m. to 4:30 p.m. and Wednesday, Thursday, and Friday from 10:30 a.m. to 1:30 a.m. – with a half-hour for lunch. He was paid a flat rate of \$450.00 per week from 2003 to April 1, 2011 and \$480.00 per week from April 2, 2011 to February 5, 2013 for all hours worked, including those over 40 per week.

Petitioners' Evidence

Petitioner Rong H. Zheng did not appear or testify at the hearing. As evidence to support his contention that he did not own or start the business operations of Rong Trading Corp. before October 28, 2011, and that neither he nor Rong Trading Corp. employed claimant before such time, petitioners' attorney submitted a report showing that the company was registered as an active corporation with the Department of State (DOS) on that date. Rong Hua Zheng is listed as chief executive officer of the company, with a principal executive office on Humboldt Street in Brooklyn, New York. Petitioners called claimant and the DOL investigator as witnesses and examined them concerning the claim and investigation. No payroll records were submitted showing the time period that claimant was employed or the hours worked and wages paid him.

Testimony of Claimant Desiderio Animas

Claimant testified that petitioner Rong H. Zheng hired him in 2001 and employed him as a general helper at his trading company in Brooklyn, New York from 2001 to December 31, 2012. The company employed four to five drivers, claimant, and a second helper to receive, store, and deliver merchandise to customers in the New York City area. Petitioner moved the company's warehouse three times during the time period claimant was employed; all sites were in Brooklyn and the last address where he worked was on Humboldt Street. Petitioner's wife and the employees called petitioner "Ronnie."

Claimant testified that petitioner was his "boss" and was at the warehouse each day throughout his employment. Petitioner handled the money, assigned him his duties, supervised his work, set his rate of pay, and either petitioner or his wife paid him. Petitioner gave him keys to the warehouse and his responsibilities included opening and closing it each day, loading and unloading trucks, storing merchandise, cleaning the building, and assisting drivers with their deliveries. He worked six days per week, from Monday to Saturday. On days when he was assigned to stay in the warehouse all day and receive shipments, he worked from 8:00 a.m. to 3:30 p.m. or 4:30 p.m. On days when he was assigned to help drivers make deliveries, he worked from 8:00 a.m. to between 1:00 a.m. and 3:00 a.m. Petitioner paid him in cash at the rate of \$400.00 per week to start, raised him to \$450.00 per week, and raised him again to \$480.00 per week.

After an injury at work on December 31, 2012, claimant was unable to return to work and was terminated. With the help of an organization that assists workers with employment related problems, he filed a claim for unpaid wages with DOL on August 28, 2013. Claimant is of limited English proficiency and an attorney from the organization filled out the claim form for him and reviewed it with him before he signed it. Claimant authenticated the information concerning his wages and hours as true and accurate, except for the year he started and his last day of work.

DOL's Investigation

On March 10, 2015, Labor Standards Investigator Chi Kan Lau issued petitioners a notice advising them of the claim and requesting payroll records of the hours worked and wages paid claimant during the period from August 28, 2010 to February 5, 2013, including time cards, sign in sheets, computer logs, payroll journals, and any other payroll records in their possession. Lau also performed a records search to determine the owner of the company. Aside from the report submitted by petitioners, the search revealed a report stating that Rong Hua Trading Inc. was registered with DOS as an active corporation on July 21, 2005. Rong Hue Zheng was listed as chief executive officer of the company, with a principal executive office on Imlay Street in Brooklyn, New York.

No payroll records were received and Lau calculated an underpayment of wages based on claimant's statements drawn from his written claim. On March 25, 2015, he served petitioners a final collection notice, recapitulation of wages due, and Notice of Labor Law violations. Petitioners were advised to remit payment by April 14, 2015 or the matter would be referred for orders to comply, including additional interest and penalties. In response, petitioners' attorney contacted DOL and requested a compliance conference before final orders would be issued. A conference was held with the attorney on July 15, 2015, but the matter could not be resolved.

Based on DOL's investigation, and in the absence of adequate payroll records establishing the hours worked and wages paid claimant during the period of his claim, the orders under review were issued on October 8, 2015.

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 (12 NYCRR) § 65.30.

Claimant Was "Employed" by Petitioners Under the Labor Law Until December 31, 2012

Petitioners' burden of proof in this case was to establish by a preponderance of 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).

Labor Law § 651 (6) defines the term "employer" as including "any individual, partnership, association, corporation, limited liability company, business trust, legal representative, or any organized group of persons acting as employer." An "employee" is described as "any individual employed or permitted to work by an employer in any occupation" (*id.* § 651 [5]). "Employed" means that a person is "permitted or suffered to work" (*id.* § 2 [7]).

We credit claimant's testimony and find that petitioners failed to meet their burden of proof to establish by credible evidence that they did not employ claimant before the date Rong Trading Corp. was incorporated or before January 2012. Petitioner Zheng did not testify at hearing and petitioners submitted no evidence in support of their contentions beyond the report from DOS indicating that Rong Trading Corp. was registered with the State as an active corporation on October 28, 2011. The report is not proof that petitioner did not employ claimant before that time as an "individual" employer, however, but is simply evidence of the entity's incorporation date.

Claimant testified that he was hired by petitioner Rong H. Zheng in 2001 and was continuously employed as a general helper at his trading company from 2001 until December 31, 2012. Petitioner was his "boss" and was at the company's warehouse every day throughout his employment. Petitioner handled the money, assigned his duties, supervised his work, set his rate of pay, and petitioner or his wife paid him. Claimant described his duties in detail, which included opening and closing the warehouse, loading and unloading trucks, storing merchandise, cleaning the building, and assisting drivers with their deliveries. Petitioner moved the warehouse three times during the time he was employed. All the sites were in Brooklyn and the last address was on Humboldt Street. Claimant described the business operations and his hours of work at the warehouse in further detail. After an injury at work on December 31, 2012, he was unable to return to his employment and was terminated.

Claimant's testimony was detailed, specific, and credible and was not rebutted by petitioners. We find the record evidence establishes that claimant was hired by petitioner Rong H. Zheng and was "permitted and suffered to work" as a general helper during the period of underpayment covered by the Commissioner's orders until December 31, 2012. Regardless of what entity petitioner operated the business under throughout the time period claimant was "employed," an employment relationship thereby existed between petitioner and claimant and he is responsible for any wages owed under the Labor Law (*Matter of Rafael Martinez*, PR 13-055

[Dec. 17, 2014]; *Matter of Haul 4 PFS, Inc.*, PR 10-329 [July 22, 2015]). Since Rong Trading Corp. was not registered until October 28, 2011, that entity is responsible as an employer for any wages owed from that date forward to December 31, 2012 (*Matter of Rafael Almonte*, PR 12-040 [Dec. 9, 2015]). According to the audit calculation of wages submitted by the Commissioner, reducing the underpayment to this period results in a total underpayment of \$7,979.41 (weeks ending 11/5/11-12/29/12 at \$130.81 per week x 61 weeks = \$7,979.41). We modify the minimum wage order accordingly.

The Minimum Wage Order Is Affirmed, But Modified as to the Amount of Wages Owed

The Labor Law requires employers to maintain payroll records that include, among other things, its employees' daily and weekly hours worked, wage rate, and gross and net wages paid (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.

In the absence of accurate records required by the Labor Law, the Commissioner may draw reasonable inferences and calculate unpaid wages based on the "best available evidence" drawn from employee statements or other evidence, even though 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. 2013]).

In a proceeding challenging such determination, the employer must then 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 employees' evidence (*id.*; *Tyson Foods, Inc. v Bouaphakeo*, 136 SCt 1036, 1047 [2016]; *Mid-Hudson Pam Corp.*, 156 AD2d at 821). Given the interrelatedness of wages and hours, the same burden shifting applies 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 statements (*Doo Nam Yang v ACBL Corp.*, 427 FSupp2d 327, 332 [SDNY 2005]; *Matter of Kong Ming Lee*, PR 10-293 at 16 [April 10, 2014]).

Petitioners did not submit any time or payroll records showing the hours worked or wages paid claimant during the time he was employed. While petitioners argued in their closing brief that claimant's testimony concerning his hours and wages was unreliable, we credit his testimony and find the Commissioner's approximation of wages owed drawn from his written claim to be reasonable. Petitioners failed to overcome that approximation with sufficient and reliable evidence establishing the precise hours he worked, and that he was paid for those hours, or with other credible and reliable evidence showing the Commissioner's determination to be unreasonable. Since claimant acknowledged that his last day of employment was December 31, 2012, we modify the wages owed by petitioner Zheng to the period from August 28, 2010 to December 31, 2012. According to the audit calculation of wages submitted by the Commissioner, reducing the total underpayment of \$17,674.00 by the amount for the last six weeks from those ending on January 5, 2013 through February 9, 2013 (\$130.81/week x 6 weeks = \$784.86) results in a total underpayment of \$16,889.14 (\$17,674.00 - \$784.86 = \$16,889.14). We modify the minimum wage order accordingly.

Interest

Petitioners did not challenge the interest assessed in the wage order and the issue is thereby

waived pursuant to Labor Law § 101 (2). The order is modified to reduce the amount of wages owed by petitioners and the interest shall be reduced proportionally.

Liquidated Damages

Petitioners did not submit evidence challenging the Commissioner's determination to assess liquidated damages in the wage order and the issue is thereby waived pursuant to Labor Law § 101 (2). The order is modified as to the total amount of wages owed by petitioners and the liquidated damages shall be reduced proportionally.

Civil Penalty

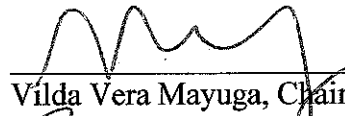
Petitioners did not submit evidence challenging the civil penalty assessed in the minimum wage order and the issue is thereby waived pursuant to Labor Law § 101 (2). The order is modified as to the total amount of wages owed by petitioners and the civil penalty shall be reduced proportionally.

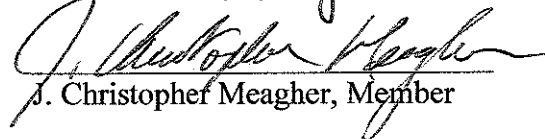
Penalty Order

Petitioners did not submit evidence challenging the civil penalties assessed in the penalty order and the issue is thereby waived pursuant to Labor Law § 101 (2).

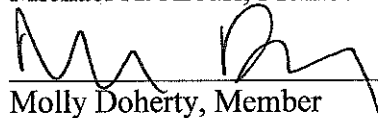
NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

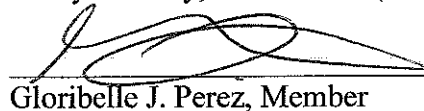
1. The minimum wage order is modified against petitioner Rong H. Zheng to reduce the wages owed to \$16,889.14, and against petitioner Rong Trading Corp. to \$7,979.41, with interest, liquidated damages, and civil penalty reduced proportionally, and is otherwise affirmed; and
2. The penalty order is affirmed; and
3. The petition be, and the same hereby is, otherwise dismissed.


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
May 3, 2017.

waived pursuant to Labor Law § 101 (2). The order is modified to reduce the amount of wages owed by petitioners and the interest shall be reduced proportionally.

Liquidated Damages

Petitioners did not submit evidence challenging the Commissioner's determination to assess liquidated damages in the wage order and the issue is thereby waived pursuant to Labor Law § 101 (2). The order is modified as to the total amount of wages owed by petitioners and the liquidated damages shall be reduced proportionally.

Civil Penalty

Petitioners did not submit evidence challenging the civil penalty assessed in the minimum wage order and the issue is thereby waived pursuant to Labor Law § 101 (2). The order is modified as to the total amount of wages owed by petitioners and the civil penalty shall be reduced proportionally.

Penalty Order

Petitioners did not submit evidence challenging the civil 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 modified against petitioner Rong H. Zheng to reduce the wages owed to \$16,889.14, and against petitioner Rong Trading Corp. to \$7,979.41, with interest, liquidated damages, and civil penalty reduced proportionally, and is otherwise affirmed; and
2. The penalty order is affirmed; and
3. The petition be, and the same hereby is, otherwise dismissed.

Vilda Vera Mayuga, Chairperson

J. Christopher Meagher, Member



Michael A. Arcuri, Member

Dated and signed by a Member
of the Industrial Board of Appeals
in Utica, New York, on
May 3, 2017.

Molly Doherty, Member

Gloribelle J. Perez, Member