

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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 In the Matter of the Petition of: :
 :
 OMAR H. THABET AND LA GALLINA, INC., :
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 Petitioners, :
 :
 To Review Under Section 101 of the Labor Law: :
 An Order to Comply with Article 6, An Order to :
 Comply with Article 19, and an Order Under Article :
 19 of the Labor Law, all dated April 18, 2008, :
 :
 - against - :
 :
 THE COMMISSIONER OF LABOR, :
 :
 Respondent. :
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DOCKET NO. PR 08-083

RESOLUTION OF DECISION

APPEARANCES

Lazarowitz & Manganillo, LLP, Marc J. Held and Thomas J. Solomon, of Counsel, for Petitioners.

Maria L. Colavito, Counsel, NYS Department of Labor, Benjamin A. Shaw of Counsel, for Respondent.

WITNESSES

Omar H. Thabet, Jimmie Ramos, Enrique Mercado, and Annie Tu for Petitioners; Rashid Allen, Senior Labor Standards Investigator (SLSI) for Respondent.

WHEREAS:

The Petition in this matter was filed with the Industrial Board of Appeals (Board) on June 17, 2008 and seeks review of two of three Orders issued by the Commissioner of Labor (Commissioner) against Petitioners Omar H. Thabet and La Gallina, Inc. (together, Petitioners) on April 18, 2008. Upon notice to the parties, a hearing was held on May 11 and August 17, 2010 in New York, New York before Anne P. Stevason, Chairperson of the Board and the Board's designated Hearing Officer in this proceeding. Arabic, Spanish, and Chinese interpreters translated the testimony of various witnesses. Each party was afforded a full opportunity to present documentary evidence, examine and cross-examine witnesses, and make statements relevant to the issues.

The first Order (Wage Supplements Order) directs Petitioners to pay to the Commissioner vacation pay owed to employee Octavio Abreu in the amount of \$600.00, with interest continuing thereon at the rate of 16% to the date of the Order in the amount of \$124.66, and a civil penalty in the amount of \$1,200.00, for a total amount due of \$1,924.66.

The second Order (Wage Order) directs Petitioners to pay to the Commissioner back wages, including overtime wages, owed to employees Octavio Abreu (\$21,069.38) and Enrique Mercado (\$9,044.30) in the total amount of \$30,113.68, with interest continuing thereon at the rate of 16% to the date of the Order in the amount of \$4,870.98, and a civil penalty of \$60,226.00, for a total amount due of \$95,210.66.

A third Order (Penalty Order) directs Petitioners to pay a civil penalty of \$500.00 (Count 1) for failure to keep and/or furnish true and accurate payroll records for its employees, and \$500.00 (Count 2) for failure to issue wage statements to its employees, for a total amount due of \$1,000.00. Petitioners did not challenge the Penalty Order.

The Petition asserts that the Wage Supplements and Wage Orders should be reversed because Claimant Abreu "was never employed by Petitioner"; "never filed a labor complaint against the Petitioner"; "has a history of using illicit means for financial gains"; and "attempted to bribe a person to advance his complaint filed with the Labor Department." Petitioners further allege that the Wage Order regarding Claimant Mercado should be reversed because it "incorrectly finds that [Mercado] worked below minimum wage"; "incorrectly states [his] date of employment by Petitioners"; and "incorrectly states [his] occupational classification." Finally, the Petition asserts the Orders should be reversed because Petitioners acquired ownership of the business on April 29, 2005 and the Order "incorrectly states that the Petitioner owned the business since April 11, 2005. [sic]"

The Commissioner filed an Answer denying the Petition's material allegations and asserting that the calculation of wages, interest, and penalties in the Orders is in all respects valid and reasonable. The Commissioner filed a motion pursuant to Board Rule 65.13 (a) to strike references in the Petition to Claimant Abreu's history and reputation in the community as irrelevant, scandalous, and prejudicial. By interim decision dated May 5, 2009, the Board found the issue best addressed at a hearing on the merits and denied the motion. The Hearing Officer ruled at hearing that evidence concerning the allegations was inadmissible as irrelevant and unduly prejudicial.

The matter before the Board involves whether, in the absence of payroll records establishing the identity of those employed by Petitioners during the period covered by the Orders and the hours and wages paid those employees, Petitioners' proof at hearing was sufficient to overcome the presumption favoring the Commissioner's calculation of wages pursuant to Labor Law § 196-a and the principles of *Anderson v Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 (1946).

For the following reasons, we find Petitioners' proof insufficient and affirm the Orders under review. However, we modify the wages owed both Claimants and the interest and penalty assessed in the Wage Order accordingly.

SUMMARY OF EVIDENCE

Petitioner Omar H. Thabet (Thabet) is the sole owner and manager of Petitioner La Gallina, Inc. (La Gallina), a business located on Humboldt Street in Brooklyn, New York that slaughters and sells live poultry.

In September, 2007, the Department of Labor (DOL) initiated an investigation of Petitioners to insure their employees were properly paid minimum wage and overtime. The investigation was triggered by a telephone complaint to DOL on August 1, 2005 alleging that Petitioners were not keeping payroll records, issuing wage statements, or paying overtime to their employees. At the conclusion of the investigation, the Commissioner issued the Orders under review.

DOL's Investigation

Senior Labor Standards Investigator Rashid Allen (Allen) testified that he and investigator David An (An) made a site visit to Petitioners' premises on September 13, 2007, spoke with Thabet, and demanded payroll records. Records were not available, however, so a revisit date of September 20, 2007 was scheduled for the records to be produced. The notice of revisit demanded that Petitioners produce payroll records of the hours worked and wages paid to Petitioners' employees from 2005 to the present, including time records, payroll registers, bank statements, cash book, and the names, addresses, positions, dates of employment, and quarterly tax reports for Petitioners' employees. Allen told Thabet "if there is anything on the request sheet you don't have, have a letter of explanation ready indicating what you don't have and why."

Allen testified that the investigators interviewed three employees who were present and working at the time of their visit on September 13, 2007 and recorded their answers in interview reports entered in DOL's investigative file. The investigators are both Spanish speaking. Each of the employees reported that he was paid in cash and did not receive a wage statement.

Walid Al Sereti (Sereti) was interviewed by investigator Allen. Sereti reported that he was employed as a chicken "killer" and "supervisor" and usually worked 4 days per week from 8 AM to 3 PM. Robert Roman (Roman) and Enrique Mercado (Mercado) were interviewed by investigator An. Roman reported that he was employed as a chicken "killer" and worked 3 or 4 days per week from 8:00 AM to 5:30 PM, but his schedule varied depending on business and he worked when it was busy. Mercado reported that he worked as a chicken "killer" and had been employed for 3 years; worked 6 days per week Monday through Saturday from 7:30 AM to 5:30 PM; had a half hour for lunch from 12:00 to 12:30; and was paid a weekly salary of \$325 his first year, \$425 his second, and \$500 his third year. Mercado provided his address and cell phone number and reported that Saturday was his payday, there was no uniform allowance, and he received \$8 to \$10 daily in tips. The tips averaged to \$50 weekly. Allen was asked on cross examination if An had inquired whether Mercado had flexible hours. Allen said he was not present during the interview but believed An would have done so since investigators are trained to ask follow up questions, including

whether the employee works the same hours every day or has a flexible schedule. According to their interview reports, Mercado reported a regular schedule whereas Roman said his hours fluctuated with the volume of business.

On September 20, 2007, Allen and another investigator revisited Petitioners' establishment. No records were produced. Thabet said he had not kept time or payroll records since starting the company in 2005 and submitted a letter that he signed, dated September 18, 2007, stating, "In accordance with law I am not required to file quarterly report, (NYS 45), etc, because I do not have any employee. I am a very small business owner who obtained help from family members, sometimes, to do some services, but I am the only responsible and the only one who do work in my business [sic]."

Following the revisit, Allen spoke with a representative from Petitioners' tax/bookkeeping service concerning the records that were to be produced. The representative submitted two letters dated September 25, 2007, signed by the representative and Thabet, asserting that Petitioners did not furnish or maintain wage statements, time, or payroll records because the business was family owned and operated and did not have employees. The latter submission added that Mercado was an independent contractor, not an employee, and enclosed a copy of a "Services Agreement" signed by Thabet and Mercado and dated April 11, 2005. The Agreement identified Mercado as an independent contractor and provided that he would perform 6 days of services per week; work at least 4 to a maximum of 6 hours per day; and be paid \$500 for every six days of services.¹

On September 24, 2007, Claimant Octavio Abreu (Abreu) filed claims with DOL for unpaid wages and vacation accrued during the period of his employment from 2002 to April 14, 2007 at the "live poultry" business located on Humboldt Street, Brooklyn, New York. Allen testified that An was assigned to take the claims because Abreu was Spanish speaking. In order to assure that a Spanish speaking claimant understands the claim he is filing, DOL assigns a Spanish speaking investigator to speak to the claimant in Spanish, question him in Spanish, and write his responses in English on the form. At the end of the interview, the investigator reviews the answers with the claimant and asks him if he understands. If the claimant does, the investigator asks him to sign the form.

Abreu's claims listed the responsible person of the firm as "Wally - owner" and the employer's trade name as "Humboldt Live Poultry." The box on the forms for the corporate name of the employer was blank. Abreu's wage claim stated that he was hired in 2002 by "Steve - old owner" and he worked at the site as a "cleaner/killer/floor worker" six days per week from 9/1/02 to 4/14/06 and five days per week from 4/14/06 to 4/14/07. His hours of work were 7:00 AM to 6:00 PM with 15 minutes for lunch. Claimant stated that he was paid \$300 per week in cash with no wage statement and left his employment for medical reasons. Claimant submitted copies of his medical records and social security card with his claim to verify his medical condition and his signature.

¹ The Petition does not claim that Mercado was an independent contractor and states "That it is not in dispute that Enrique Mercado was employed by the Petitioner[s]."

Abreu's vacation claim asserted there was an agreement with the employer whereby employees received two weeks paid vacation per year and he was paid the benefit every year from 2002 to 2005. Claimant asserted he was owed \$600 for 10 days vacation for the period 1/1/06 to 12/30/06 and had made several demands for the benefit that were refused by "the owner - Wally" for the reason "did not owe him vacation."

Wage calculations were based solely on the statements taken from the employees interviewed and the claims filed by Abreu since Petitioners failed to submit payroll records. In a report summarizing the investigation, Allen stated that Thabet and Mercado confirmed that employees were to receive two weeks paid vacation after completing a full calendar year of service. However, Thabet denied knowledge of Abreu's identity when questioned whether he had paid Claimant the benefit when he was separated from service.

Allen testified that Sereti and Roman were excluded from overtime calculations because Sereti was a supervisor and Roman did not work over 40 hours per week. A review of the information provided by Mercado and Abreu, however, revealed that both worked over 40 hours per week and received a set salary. Allen performed a computer audit based on the hours and salaries reported by the two Claimants to calculate their respective underpayments. The audit found Mercado was owed \$9,044.30 for the period 4/11/05 to 9/16/07 and Abreu \$21,669.38 for the period 4/11/05 to 4/14/07, including \$600 for 2 weeks vacation pay. Allen said he computed the audit from the date when Thabet told him he started the business, as confirmed by a report from the Department of State (DOS) showing the company was incorporated on Humboldt Street, Brooklyn, New York on April 7, 2005.

On October 2, 2007, Allen issued Petitioners a "Notice of Labor Law Violation" citing them, for among other things, failure to provide wage statements, maintain accurate time and wage records, pay vacation pay according to policy, and correctly pay employees for work over 40 hours in a given week. The notice enclosed a "Recapitulation Sheet" listing wage underpayments owed Mercado (\$9,044.30) and Abreu (\$21,669.38) for the period 4/11/05 to 4/14/07, for a total amount owing of \$30,713.68.

On November 1, 2007, Petitioners' attorneys submitted an affidavit to DOL from Petitioner. The affidavit, signed and sworn on October 31, 2007, stated:

1. That I, Omar Thabet, am the C.E.O. of La Gallina, Inc., conducting a live poultry business at premises 214 Humboldt Street, Brooklyn, New York.
2. That upon purchasing said poultry business on April 29, 2005, the previous owner had three (3) employees.
3. That I hired only one (1) former employee, Enrique Mercado, to work for my business.
4. That I did not hire the other two (2) employees, one of which was Octavio Abreu.

5. That Octavio Abreu has never been employed by me and was never on my payroll. Therefore, there are no unpaid wages due to him in the gross amount of \$21, 669.38 (see attached recapitulation sheet).

I make this affidavit knowing the New York State Department of Labor will rely upon same and it is true in all respects.

By letter dated November 22, 2007, Allen wrote Abreu requesting that he contact DOL to respond to the information provided by the employer. Allen testified that he held a phone conversation with Abreu on November 30, 2007 where Abreu affirmed that he worked for Petitioners for the hours stated in his claim. Allen spoke with Abreu in Spanish, took notes, and recorded his notes in the following entry in the file:

On 11-30-07 at 12:30 PM, LSI Rashid N. Hart [now Allen], received a phone call from the claimant, Octavio Abreu, and he stated that the current owner took over the present business in April of 2005 and that he began working for the owner at that time. The claimant states that his last day of work was in April of 2007 and that he left the job for medical reasons. The claimant states that he is sure that he worked for the employer in the years 2005, 2006, and 2007.

The claimant states that he has no proof, as far as documentation, to show that he worked there because the employer never gave him any wage statements or cash stubs for the cash paid out to him on a weekly basis. The claimant alleges that the employer is somehow related to the previous owner and that they rotate ownership between each other every few years.

Responding to questions from the Hearing Officer, Allen testified that he went over the information on the claim form with Abreu, including his dates of employment, and that Abreu "didn't seem clear on who Omar was" but mentioned "Wali", "Steve", and the "names pretty much on the claim[s] form." Allen testified that Abreu "... said there was a previous manager that was Asian or Chinese. I went over his dates of employment. He said the same thing on the form. I stressed the part about lunch and had he received a lunch break. He said only 15 minutes."

Based on DOL's investigation, and Petitioners' failure to provide payroll records establishing who they employed and the hours and wages paid them, the Commissioner issued Petitioners the Orders under review on April 18, 2008. Mercado's back wages listed in the Wage Order are for the period 04/11/05 to 04/14/07 and are based on the "Recapitulation" served on Petitioners on October 2, 2007. However, the "Recapitulation" is based on the audit which calculated those same wages for the period 04/11/05 to 09/15/17, an extra 22 weeks. The Commissioner did not amend the Wage Order to correct this discrepancy

Petitioners' Evidence*Testimony of Petitioner Omar Thabet*

Thabet testified that he purchased the poultry business from Annie Tu (Tu) on April 29, 2005 and submitted an agreement between Ann America International Corp. d/b/a Humboldt Live Poultry Market and La Gallina, Inc. dated April 29, 2005 as evidence of the sale. Before the agreement was finalized, the parties agreed that Thabet would work in the store the three weeks prior to the sale to see if he wanted the business. Petitioner said he then incorporated his company and entered into the "Services Agreement" with Mercado to stay with him and show him how the business worked. The agreement was written by an accountant. Petitioner explained that he was running the business during this three week period of time.

Petitioner testified on cross examination there were three employees working for Tu when he bought the business and that Mercado was one of them. Petitioner said Mercado is also called Ricki or Kiki. When asked who the other two employees were, Petitioner replied "I don't remember exactly." The services Mercado provided Tu at the time were to "feed the chickens, clean, [and] prepare the orders" while the other two employees "clean[ed] the chicken and cut it." Petitioner testified that Mercado continued to perform the same services after he took over the business, but for less time, and he hired himself and Sereti to do the work the other employees had been doing. He also hired Roman to work during Ramadan in 2007. Petitioner said that Sereti is a distant cousin and worked as a supervisor at the time the investigators visited.

Petitioner testified that he and Mercado upheld the terms of the "Services Agreement" and Mercado worked between four and six hours a day, never worked longer than those hours, and was paid \$500 for each six days of services. Petitioner paid Mercado in cash, except the first time when he gave him a check but voided it after Mercado said he didn't have a bank account. From 2005 to 2007 the store was open five days a week, and later six days, from 8:00 AM to 5:30 PM. Petitioner testified that he, Mercado, or Sereti would open the store in the morning and close it at night, depending on who came early or stayed late that day. He could not recall when the change from five to six days was made and had no records of who came early or stayed late on any particular day. Petitioner testified he did not give his employees a regular day off, but "[w]hen they need that day, they take it. Sometimes Sunday, sometimes Saturday, sometimes Wednesday." Petitioner testified that Sereti did not work a regular schedule and was paid the same amount no matter how many hours he worked. Petitioner has no records of the actual hours Sereti worked.

Petitioner testified he never kept payroll records for the business because "I didn't know I had to" and has no records of anyone who ever worked for him. When the investigator issued the demand for employment records on September 13, 2005, Petitioner went to a tax professional for assistance. Petitioner testified that his use of the word "employee" in his letter to DOL of September 18, 2007 meant "full-time employee[s]" and was because the professional "told me if you don't have full-time employee[s], you cannot put them in your record[s]." On cross examination, Petitioner testified that Allen told him to

write a letter stating he was a "small business" and didn't have any "full-time employees." Petitioner said the letter was drafted by an accountant and "I explained for him what is going on, and he did it for me and he asked me to sign it."

Petitioner testified that he never heard of Abreu before the DOL investigator came and told him that Abreu had filed a claim against the company. Petitioner said he later learned from Mercado that Abreu was a person in the neighborhood whom Petitioner knew as "Alex." Alex lent people money and sometimes came into the store. Petitioner was asked whether Abreu had ever worked for him by any name and replied, "No, he just asked me to work, and I refused."

On cross examination, DOL's attorney presented Petitioner with the affidavit he submitted to DOL on October 31, 2007. Counsel asked Petitioner whether he read over the affidavit to make sure the information contained in it was accurate before signing it. Petitioner replied that the information in paragraph four "is wrong." Counsel repeated the question and Petitioner replied "I don't pay attention to it, but now I see that it is wrong [sic]." Counsel asked Petitioner whether he swore to the affidavit without paying attention to its contents and Petitioner said "I signed it and I read it fast and I don't pay attention to number four, and now I am paying attention [sic]." Counsel next asked Petitioner to read his statement in paragraph four and Petitioner stated "When I fired the two employees, I didn't know that Octavio Abreu was one of them or not." Counsel inquired whether Petitioner had earlier testified that Abreu was "not" one of the employees still employed by Tu when he bought the business, and Petitioner replied "With me, he never worked, but with the Chinese lady, yes, he was working with her." Counsel then presented Petitioner with his statement from paragraph four of the affidavit: "I did not hire the other two employees, one of which was Octavio Abreu" and asked if it was correct. Petitioner replied "When I bought the business, there were three employees. When I fired one of them or two of them, I don't know that this was one of them or not." Petitioner was then asked and answered:

- Q. But you testified earlier today that Mr. Abreu was not one of the two people who worked for Ms. Tu when you bought the business, correct?
- A. I don't know that he was working there or not, but she told me, the old owner, that he was working there.
- Q. You heard your attorney say during his opening statement that Mr. Abreu had been terminated before you bought the business, correct?
- A. When I bought the business, he was not there. I don't know if he was one of the employees or not.
- Q. But back on October 31st of 2007 you swore he was one of those two employees, correct?
- A. I cannot remember something that happened two years ago, but I know that he was not there.

On redirect examination, Petitioner was asked whether he believed the contents of the affidavit on the day he signed it and replied "Yes, on the same day I thought it was right." Petitioner testified that he learned that Abreu had worked for Tu from her "When I had the business from Annie, she told me he was working for her -- when I complained about and explained for her the problems, she told me he was working with me." Petitioner said he learned at some time after the investigators visited that Abreu was the person in the neighborhood known as Alex "After the Department of Labor came and told us that Octavio Abreu claimed against me, I was asking and I know it was the same person, Alex."

Testimony of Annie Tu

Tu testified that she purchased "Humboldt Live Poultry Market" from JV Poultry in November 2004, and sold the business to Petitioner on April 29, 2005. The person she dealt with at JV Poultry was "Steve." For approximately three weeks prior to the sale, Thabet worked in the store to be trained. Tu said she was in the store every day.

Tu testified that Abreu was working at the store when she purchased the business and that she fired him "between the end of January to February" of 2005 because he was making lots of mistakes, slow, and business was down. When she sold the business to Thabet at the end of April, 2005, Abreu had "already left" and she had "already fired him." Tu testified that after she sold the store she went back once or twice a month to buy chicken and on those occasions she did not see him. She could not recall the dates of her visits and said they continued up to January, 2010.

On cross examination, Tu testified that when Thabet came into the business at the beginning of April, 2005 there were only two employees, her husband and another person called Kiki. Tu said she did not bring any payroll records, quarterly tax filings, or any other documentation showing who was working for her at the time.

Testimony of Enrique Mercado

Mercado testified on direct examination that he has worked at the poultry store continuously for 27 to 30 years, was previously employed by Annie Tu, and is currently employed by Petitioner. Mercado testified that Abreu also worked for Tu but was not employed by Petitioner. Mercado was asked "How did Alex's relationship with Annie end?" and replied "Before the new owner came, Alex was not there anymore, about two months." On cross examination, Mercado could not recall the date Petitioner took over the business but said "The same day that the Chinese lady left, I was there working with him." Mercado testified that just prior to Petitioner taking over there was one other employee working with him, Abreu, and that both "clean[ed] the chickens, kill[ed] the chickens, and clean[ed] up the place." When asked "What did you do?" Mercado replied "With Alex, the same thing. In that job it's the same thing every day." Mercado said he never took orders in the store. When asked who else, besides himself, was working in the store after Petitioner took over, Mercado replied "It was me, because Alex was fired by the Chinese woman."

Mercado testified on direct examination that he signed an employment agreement with Petitioner before the store changed hands. He said he understood from the agreement that he was going to work six hours a day, he could start at 8:00, 12:00, or 2:00 and work to 5:30, and that his hours would be flexible. Mercado testified that his hours of work vary but he does not work more than six hours a day and is paid \$500 for six days. When asked how he gets paid, Mercado replied "He gives me a check, I sign it and he gives me cash."

On cross examination, Mercado testified that Petitioner's cousin "Wally" was working with him on the day the investigator visited the store and it is possible Roman was also there. Mercado could not recall who was working on any day from 2005 to 2007 and said he has no records of who worked on any particular day. Mercado testified that in 2007 he was paid a salary of \$500 per week no matter how many hours he worked. Mercado acknowledged he was not always paid that salary, however, as he started with Petitioner at \$325 and was given raises to \$425 and \$500 per week after Petitioner saw how well he was working. He could not recall the dates that the raises went into effect. Mercado acknowledged he told the investigator his salary history and provided him with the address and cell number listed in his interview report. Mercado said he told the investigator he was paid on Saturday, took lunch from 12:00 to 12:30, was not charged for a uniform, and received \$8 to \$10 a day in tips. The tips average to about \$50 a week for six days of work. Mercado testified that from 2005 to 2007 the store opened at 7:30 AM, closed at 5:30 PM, and he told the investigator the closing time. Mercado testified he would open the store in the morning and close it at night, depending on whether he came in early or late that particular day. Mercado acknowledged he had no record of the actual days or hours that he worked from 2005 to 2007. Finally, Mercado testified he was paid by check the entire time and was never provided a wage statement listing the days and hours he worked.

GOVERNING LAW

A. Standard of Review and Burden of Proof

The Labor Law provides that "any person ...may petition the board for a review of the validity or reasonableness of any ... order made by the [C]ommissioner under the provisions of this chapter" (Labor Law 101 §[1]). It also provides that an order of the Commissioner shall be presumed "valid" (Labor Law §103 [1]).

A petition filed with the Board that challenges the validity or reasonableness of an Order issued by the Commissioner must state "in what respects [the order on review] is claimed to be invalid or unreasonable" (Labor Law § 101[2]). It is a petitioner's burden at hearing to prove the allegations that are the basis for the claim that the order under review is invalid or unreasonable (Board's Rules of Procedure and Practice § 65.30 at 12 NYCRR § 65.30 ["The burden of proof of every allegation in a proceeding shall be upon the person asserting it"]; *Angello v Natl. Fin. Corp.*, 1 AD 3d 850, 854 [3d Dept 2003]).

It is therefore Petitioners' burden to prove the allegations in the Petition by a preponderance of evidence.

B. Recordkeeping Requirements

Article 19 of the Labor Law, known as the “Minimum Wage Act,” defines “[e]mployee,” with certain exceptions not relevant to this appeal, as including “any individual employed or permitted to work in any occupation (Labor Law § 651 [5]).” Labor Law § 661 requires employers to maintain payroll records for employees covered by the Act and to make such records available to the Commissioner:

“Every employer shall keep true and accurate records of hours worked by each employee covered by an hourly minimum wage rate, the wages paid to all employees, and such other information as the commissioner deems material and necessary, and shall, on demand, furnish to the commissioner or [her] duly authorized representative a sworn statement of the same. Every employer shall keep such records open to inspection by the commissioner or [her] duly authorized representative at any reasonable time. . . .”

The Commissioner’s regulations implementing Article 19 provide at 12 NYCRR § 142-2.6:

- “(a) Every employer shall establish, maintain and preserve for not less than six years weekly payroll records which shall show for each employee:
- (1) name and address;
 - (2) social security number;
 - (3) wage rate;
 - (4) the number of hours worked daily and weekly, including the time of arrival and departure for each employee working a split shift or spread of hours exceeding 10;
 - (5) when a piece-rate method of payment is used, the number of units produced daily and weekly;
 - (6) the amount of gross wages;
 - (7) deductions from gross wages;
 - (8) allowances, if any, claimed as part of the minimum wage.”

C. DOL’s Calculation of Wages in the Absence of Adequate Employer Records.

An employer’s failure to keep adequate records does not bar employees from filing wage complaints. Where employee complaints demonstrate a violation of the Labor Law, DOL must credit the complaint’s assertions and relevant employee statements and calculate wages due based on the information the employee has provided. The employer then bears the burden of proving that the disputed wages were paid. Labor Law § 196-a provides that employers who keep inadequate records “shall bear the burden of proving that the complaining employee was paid wages, benefits, and wage supplements” (*See, Angello v Natl. Fin. Corp.*, 1 AD3d 850 [3d Dept 2003]). As the Appellate Division stated in *Matter of*

Mid-Hudson Pam Corp. v Hartnett, 156 AD2d 818, 821 [3d Dept 1989], “[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.”

In *Anderson v Mt. Clements Pottery Co.*, 328 U.S. 680, 687-688 [1949], superseded on other grounds by statute, the U.S. Supreme Court long ago discussed the fairness of relying on employee statements where the employer failed to keep adequate records:

“[W]here the employer’s records are inaccurate or inadequate....[t]he solution...is not to penalize the employee by denying him any recovery on the ground that he is unable to prove the precise extent of uncompensated work. Such a result would place a premium on an employer’s failure to keep proper records in conformity with his statutory duty; it would allow the employer to keep the benefits of an employee’s labors without paying due compensation as contemplated by the Fair Labor Standards Act.”

Citing to *Anderson v Mt. Clemens*, the Appellate Division in *Mid-Hudson Pam Corp. v Hartnett*, *supra*, agreed:

“The public policy of providing protection to workers is embodied in the statute which is remedial and militates against creating an impossible hurdle for the employee.... Were we to hold otherwise, we would in effect award petitioners a premium for their failure to keep proper records and comply with the statute. That result should not pertain here.”

FINDINGS

Petitioners Violated Articles 6 and 19 of the Labor Law by Failing to Pay Wages and Wage Supplements Due the Claimants

With the modifications that follow, we affirm the Wage and Wage Supplements Orders directing payment to the Commissioner of wages owed Abreu and Mercado and find Petitioners’ evidence submitted at hearing insufficient to meet their burden of proof.

Wages and Wage Supplements Owed Octavio Abreu

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 (*Matter of Mid-Hudson Pam Corp. v Hartnett*, *supra* at 821). 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

negative the reasonableness of the inference to be drawn from the employee's evidence" (*Anderson v Mt. Clemens Pottery, supra* at 688; *Matter of Mid-Hudson Pam Corp. v Hartnett, supra* at 821 [employer burden to negate reasonableness of Commissioner's determination]).

Petitioners first argue that the Order is unreasonable because Abreu's claims did not reference "Omar Thabet" or "La Gallina, Inc." and therefore did not sufficiently establish that he was "employed" by Petitioners. However, the record discloses that Abreu filed wage and wage supplement claims with DOL in September, 2007 stating that he worked at the "live poultry" business on Humboldt Street, Brooklyn, New York from September, 2002 to April 14, 2007. The claims stated that Abreu worked 6 days per week from 9/1/02 to 4/14/06 and five days per week from 4/14/06 to 4/14/07. Claimant stated he worked from 7:00 AM to 6:00 PM with 15 minutes for lunch and was paid \$300 per week in cash with no wage statements. The claims listed the responsible person of the firm as "Wally-owner" and asserted that Claimant had demanded and been denied \$600 vacation pay by "Wally." DOL's investigators interviewed Walid Sereti -- identified by Mercado as "Wally" -- at the site on September 13, 2007. Sereti identified himself to the investigators as a supervisor. Petitioner also testified that Sereti was a supervisor at the time. Following Petitioners' denial of the claims, investigator Allen interviewed Abreu to respond to Petitioners' contention that Claimant had not been employed. Abreu verified that the "current owner" took over the business in April, 2005. Abreu stated he "began working for the owner" at that time and was "sure that he worked for the employer in the years 2005, 2006, and 2007." Petitioners did not submit any payroll records to DOL during the course of its investigation establishing who was employed from April, 2005 to April, 2007 and the hours and wages paid those employees. In addition, Petitioner testified that he could not remember who was working in April, 2005. In the absence of adequate records, the Commissioner relied on the "best available evidence" and drew the reasonable inference from Claimant's statements that he was "employed" by Petitioners and not paid wages and wage supplements during the period of the claims.

Petitioners submitted the testimony of four witnesses -- Omar Thabet, Annie Tu, Enrique Mercado, and Jimmie Ramos -- to support their contention that Abreu had been previously employed by Tu but was *not* employed by Thabet after he purchased the poultry business on April 29, 2005. The testimony was inconsistent and incredible, and, therefore, insufficient to meet their burden of proof in light of Petitioners' failure to comply with their recordkeeping obligations under the law.

The testimony of Petitioner Thabet concerning Abreu was evasive, inconsistent, and not credible. Petitioner testified that he had never employed Abreu. He conceded that he never kept payroll records for his employees and has no records of who worked for him from 2005 to 2007. To support his assertion concerning Abreu, Petitioner had submitted a sworn affidavit to DOL on October 31, 2007 stating that when he purchased the business on April 29, 2005 the previous owner had three employees. Petitioner stated he hired only one of the employees, Enrique Mercado, and did not hire the other two, "one of which was Octavio Abreu." Petitioner made the affidavit knowing that DOL would rely on it and stated that it was true in all respects.

Petitioner initially testified there were three people employed by Tu when he took over the business in April, 2005. When asked who the employees were, however, Petitioner replied "I don't remember exactly." When later presented with his affidavit stating that Abreu was one of those employees, Petitioner claimed the information concerning Abreu "was wrong". When asked whether he read over the affidavit to make sure its contents were accurate before signing and swearing to it, Petitioner said he read the affidavit fast, didn't pay attention to it, was now paying attention, and saw that it was wrong. Petitioner testified that when he fired the two employees he didn't know whether Abreu was one of them or not. When confronted with his statement from the affidavit, Petitioner repeated his assertion that he didn't know if Abreu was one of the employees he fired. Petitioner finally stated he could not remember something that happened two years before "but I know that he was not there." Petitioner added on redirect examination that he learned from Tu that she had employed Abreu and that "he was working with me" and later learned that Abreu was Alex. We find Petitioner's inconsistent testimony and effort to retract his prior statement on a key fact telling.

Thabet was evasive and inconsistent on other matters in the record that further reflect his lack of candor. Petitioner testified on direct examination, for instance, that the "Services Agreement" with Mercado was upheld by the parties and Mercado was paid a salary of \$500 per week for six days of services. Mercado testified, however, that he started at \$325 and was given raises to \$425 and \$500 per week after Petitioner saw how well he was working. In response to DOL's records demand, Petitioner submitted a letter claiming he was not required to maintain records because his was a family business and he did not have any "employee[s]." Petitioner said he meant "full-time employees" and attributed the letter to advice from a tax professional and a directive from the investigator.

Petitioner's admission concerning Abreu is inconsistent with the testimony of Tu and Mercado. The contradiction between Petitioner and his witnesses is material. Petitioner claims he made the business decision to let Abreu go when he took over on April 29, 2005, whereas Tu and Mercado claim that Tu made the decision two months before Petitioner had ever arrived.

Tu testified that there were only two people employed at the store at the beginning of April, 2005, her husband and Mercado, and she had fired Abreu "between the end of January to February" of 2005 because he was making lots of mistakes, slow, and business was down. When she sold the business to Petitioner at the end of April, 2005, Abreu had "already left" and she had "already fired him." Tu's testimony is flatly contradicted by Petitioner's sworn statement to DOL that there were three people employed by her when he purchased the business on April 29, 2005, "one of which was Octavio Abreu." It is also inconsistent with Petitioner's testimony that Tu told him that Abreu "was working with me." Tu did not bring any payroll records, quarterly tax filings, or other documentation showing who was working for her in April, 2005. We give no weight to her vague testimony that she did not see Abreu on her visits to the store to buy chicken after she sold the business. Tu could not recall the days of her visits and provided no physical details concerning time, place, or where she was in the premises on those occasions. This evidence is insufficient to establish he was not employed.

Mercado testified that Abreu had been fired by Tu before Petitioner took over. When asked how Abreu's relationship with Annie ended, Mercado said "Before the new owner came, Alex was not there anymore, about two months." Mercado had no records of who worked at the poultry store from 2005 to 2007. He was employed by Petitioner at the time of his testimony and dependent on him for his livelihood. As discussed below, he provided less than candid testimony to support Petitioners' contention that he was paid minimum wage. We do not credit his inconsistent testimony concerning Abreu's employment.

Petitioners submitted no payroll records to DOL during its investigation and no records at hearing to support their assertion that Claimant was never employed. Such records would be relevant circumstantial evidence of who was employed during the claim period and who was not. The records demanded by DOL included bank statements that would evidence withdrawals made to pay Petitioners' employees. Despite Mercado's testimony that he was always paid by check, Petitioners failed to submit any banking records. At the hearing, Petitioners' witnesses acknowledged they had no records of who was employed at the store during the period of the claim. Thabet testified he had no records of anyone that ever worked for him and Mercado and Ramos testified they had no records of who worked in the store on any day from 2005 to 2007. Tu did not produce any payroll or tax records showing who she employed in April, 2005. The testimony of Petitioners' witnesses was evasive, inconsistent, and incredible. In the absence of adequate records demonstrating who was employed by Petitioners during the period of the claim, we find Petitioners' proof simply too unreliable to "negative the reasonableness of the inference" supporting the Commissioner's determination.

In closing, Petitioners argued that the "presumption" favoring the Commissioner's calculation afforded by Labor Law § 196-a does not apply to the wages found owing Abreu because he was never employed. Petitioners argue he was therefore not an "employee" protected by the statute. We reject this argument as the claims filed by Abreu asserted that he *was* employed and was not paid wages and supplements from April, 2005 to April 14, 2007. Petitioners were required by law to maintain payroll records identifying the names of their employees and the hours and wages paid them. In the absence of such records, the same burden shifting applies to establishing who was an employee as it does in establishing the hours of work and wages due them. Petitioners' argument would permit them to deny employees the protection of the statute by violating the law by failing to maintain records. As the court held in *Mid-Hudson Pam Corp. v Hartnett, supra*, the public policy of protecting workers is embodied in the Labor Law, is remedial, and should not be applied to "award Petitioners a premium for their failure to keep records and comply with the statute" (*Id.* at 821).

Petitioners also argue the Commissioner's determination is flawed because the Claimant did not testify at hearing. However, we have held that, in the absence of adequate employment records for a petitioner's employees, and where Petitioner has failed to meet his burden of proof, the Commissioner's determination of wages owed based solely on employee statements may be deemed valid and reasonable (*Matter of Mohammed Aldeen et al*, PR 07-093 [2008] *aff'd sub nom. Matter of Aldeen v Industrial Appeals Board*, 82 AD3d 1220 [2d Dept 2011]).

Subject to the modification below, we affirm the Commissioner's Orders directing payment of wages and wage supplements to the Claimant.

Wages Owed Enrique Mercado

The Court in *Anderson v Mt. Clemens Pottery, supra* defined the nature of evidence the employer must produce to establish the "precise" amount of work performed or to "negative the reasonableness" of the inference drawn from the employee's evidence. In finding that employees were entitled to compensation for preliminary activities after arriving at their places of work, the Court rejected the trial court's refusal to award such compensation -- not because it was not compensable work -- but because the amount of time spent doing these activities had not been proven by the employees with any degree of reliability or accuracy. The Court held that employees cannot be denied recovery on such basis. "Unless the employer can provide accurate estimates [of hours worked], it is the duty of the trier of facts to draw whatever reasonable inferences can be drawn from the employees' evidence as to the amount of time spent in these activities in excess of the productive working time" (*Id.* at 693; *Matter of Mohammed Aldeen et al, supra* [employer burden to provide "accurate estimate" of hours worked]).

Given the interrelatedness of wages and work, the burden shifting applicable when an employer fails to maintain records also applies to wages (*Doo Nam Yang v ACBL Corp.* 427 F. Supp.2d 327, 331 n. 2 [S.D.N.Y. 2005]). It was thus Petitioners' burden in this case to submit sufficient proof to establish an accurate estimate of the hours worked by Mercado and the wages he was paid for that work for the specific period of the Commissioner's audit. Unless the Petitioners do so, they have not negated the approximation of those hours and wages drawn by the Commissioner from the employee's statements.

Petitioner testified in general terms that Mercado worked between four and six hours a day, never worked longer than those hours, and was paid \$500 for each six days of services. Petitioner said the store was open five and later six days a week from 8:00 AM to 5:30 PM and that he, Sereti, or Mercado would open and close the store depending on who came early or stayed late that day. Petitioner could not recall when the change from five to six days was made, however, and acknowledged he had no records of who came early or stayed late on any particular day. Petitioner testified he did not give his employees a regular day off and said it was sometimes Saturday, Sunday, or Monday.

Likewise, Mercado testified in general terms on direct examination that his hours of work vary but he does not work more than six hours a day and is paid \$500 for six days. On cross examination, Mercado testified that the store opened at 7:30 AM and closed at 5:30 PM and he would open it in the morning and close it at night depending on whether he came in early or late that day. He said he has no records of the actual days or hours he worked from 2005 to 2007. Mercado acknowledged he was not always paid the \$500 salary he testified to on direct, and conceded that he started at \$325 and was given raises to \$425 and \$500 per week based on his performance. Mercado acknowledged he gave the investigator the data in the investigative report concerning salary history, address, phone number,

payday, lunch break, uniform, and tips. Mercado did not rebut or disavow having told the investigator the schedule of hours or the occupation stated in the report.

We find Petitioners failed to meet their burden of proof. The general and conclusory testimony of Petitioners' witnesses is insufficient to establish an "accurate estimate" of the hours Mercado worked during the period covered by the Commissioner's audit and the wages he was paid for those hours (*Matter of Mohammed Aldeen et al, supra* [general and conclusory testimony insufficient to establish accurate estimate of hours and wages]; *Matter of Michael Fischer*, PR 06-099 [testimony of general hours at worksite insufficient]). We find Mercado's testimony consistent with the information about salary and hours that the investigators utilized to calculate his underpayment. He did not rebut the schedule of hours or occupation stated in the report. In the absence of adequate records, the Commissioner's determination based on "the best available evidence", in this case DOL's approximation drawn from Mercado's prior investigative statement, is therefore deemed valid and reasonable (*Mid- Hudson Pam Corp. v Hartnett, supra*).

Subject to the modification below, we affirm the Commissioner's Wage Order directing payment of wages to the Claimant.

Modify Wages Owed the Claimants

We modify the Wage Order to delete the wages owed both Claimants for the period 4/11/05 to 4/29/05 and direct the Commissioner to amend the wages, interest, and civil penalties in the Order accordingly. We credit Petitioners' evidence, which was not rebutted, that he acquired ownership of the store and began his poultry business on April 29, 2005.

We also modify the Wage Order to delete 22 weeks wages calculated for Mercado for the periods 4/14/07 to 9/15/07 that were improperly included in the Order. Mercado's back wages listed in the Order are for the period 04/11/05 to 04/14/07 and are based on the "Recapitulation" served on Petitioners on October 2, 2007. However, the "Recapitulation" is based on the audit which calculated those same wages for the period 04/11/05 to 09/15/07, an extra 22 weeks. The Commissioner did not amend the Order to correct this discrepancy. We direct the Commissioner to amend the wages, interest, and civil penalties in the Order accordingly (*Matter of David Savaterra and NYC Photobooth, Inc.*, PR 10-297 [June 7, 2011] [once an order has been appealed pursuant to Labor Law § 101, the Commissioner must obtain Board approval to withdraw or amend the order by motion or stipulation of the parties]).

Interest

Labor Law § 219[1] provides that when the Commissioner determines that wages are due, then the order directing payment shall include "interest at the rate of interest then in effect as prescribed by the superintendent of banks pursuant to section fourteen-a of the Banking Law." Banking Law § 14-A sets the "maximum rate of interest" at "sixteen percent per centum per annum from the date of the underpayment to the date of the payment."

Petitioners did not challenge the assessment of interest made by the Wage and Wage Supplements Orders. Subject to the modifications above, the Board finds that the considerations required to be made by the Commissioner in connection with the interest set forth in the Orders are valid and reasonable in all respects.

Imposition of Civil Penalties

If the Commissioner determines that an employer has violated Article 19 of the Labor Law, she is required to issue a compliance order to the employer that includes a demand that the employer pay the total amount found to be due and owing and a civil penalty based on the amount owing (Labor Law § 218 [1]).

Petitioners did not submit evidence challenging the Commissioner's assessment of civil penalties in the Wage and Wage Supplements Orders. Subject to the modifications above, we therefore affirm the civil penalties as valid and reasonable in all respects.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. Subject to the modifications set forth in this decision, the Order to Comply with Article 6 of the Labor Law and the Order to Comply with Article 19 of the Labor Law, both dated April 18, 2008, are otherwise affirmed; and
2. The Commissioner is directed to amend the wages, interest, and civil penalties in the Order to Comply with Article 19 of the Labor Law and issue an amended Order consistent with this decision; and
3. The Petition for review be, and the same hereby is, otherwise denied.



Anne P. Stevason, Chairperson



J. Christopher Meagher, Member



Jean Grumet, Member

LaMarr J. Jackson, Member

Jeffrey R. Cassidy, Member

Dated and signed in the Office
of the Industrial Board of Appeals
at New York, New York, on
September 9, 2011.

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Petitioners did not challenge the assessment of interest made by the Wage and Wage Supplements Order. Subject to the modifications above, the Board finds that the considerations required to be made by the Commissioner in connection with the interest set forth in the Orders are valid and reasonable in all respects.

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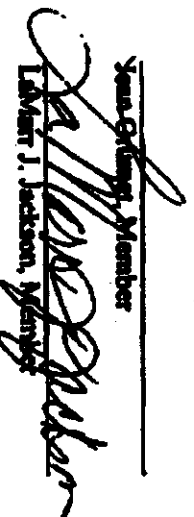
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2. The Commissioner is directed to amend the wages, interest, and civil penalties in the Order to Comply with Article 19 of the Labor Law and issue an amended Order consistent with this decision; and
3. The Petition for review be, and the same hereby is, otherwise denied.

Anne P. Severson, Chairperson

J. Christopher Moughar, Member

Sean O'Leary, Member


Edward J. Jackson, Member

Dated and signed by a Member
of the Industrial Board of Appeals
at Rochester, New York, on
September 9, 2011.

Jeffrey R. Cassidy, Member

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

Anne P. Stevason, Chairperson

J. Christopher Meagher, Member

Jean Grumet, Member

LaMarr J. Jackson, Member

Jeffrey R. Cassidy

Jeffrey R. Cassidy, Member

Dated and signed in the Office
of the Industrial Board of Appeals
at Albany, New York, on
September 9, 2011.