

STATE OF NEW YORK  
INDUSTRIAL BOARD OF APPEALS

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In the Matter of the Petition of:	:	
	:	
YICK WING CHAN AND WING HUANG	:	
RESTAURANT CORP.,	:	
	:	
Petitioners,	:	DOCKET NO. PR 08-174
	:	
To Review Under Section 101 of the Labor Law:	:	
An Order to Comply with Article 19 of the Labor	:	<u>RESOLUTION OF DECISION</u>
Law, and an Order Under Articles 6 and 19 of the	:	
Labor Law, both dated October 9, 2008,	:	
	:	
- against -	:	
	:	
THE COMMISSIONER OF LABOR,	:	
	:	
Respondent.	:	
	:	
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**APPEARANCES**

Stella Azie, P.C. (Stella Azie of counsel), for petitioners.

Pico Ben-Amotz, Acting Counsel, NYS Department of Labor (Jeffrey G. Shapiro of counsel), for the respondent.

**WITNESSES**

For the petitioners: Yick Wing Chan; Mui Li Chan; Lai Ying Wong; and Ning Sheng Chen.

For the respondent: Lock Yik Sim; Run Huan Ni; Zhi Jian Li; Lee Ping Chai; and Senior Labor Standards Investigator Wei Sha.

**WHEREAS:**

The petition in this matter was filed with the Industrial Board of Appeals (Board) on December 3, 2008, and seeks review of two orders issued by the Commissioner of Labor (Commissioner or respondent) against petitioners Yick Wing Chan and Wing Huang Restaurant Corp. on October 9, 2008. Upon notice to the parties a hearing was scheduled for July 28 and 29, 2011, which was adjourned at the request of the petitioners' former

counsel. Upon notice to the parties, the adjourned hearing was held on February 27, 29, and April 10, 2012, in New York, New York, before Devin A. Rice, the Board's Associate Counsel, 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, make statements relevant to the issues, and file post-hearing briefs.

The petition alleges, *inter alia*, that the petitioners were not employers prior to April 1, 2006, the date on which petitioner Wing Huang Restaurant Corp. commenced business and petitioner Yick Wing Chan began to supervise the restaurant owned by Wing Huang Restaurant Corp.; and that the maximum hours per day an employee could work was 8 ½ hours, that all employees worked six days per week, and that all employees were paid an overtime rate of time and one-half their regular rates of pay for hours worked in excess of 40 per week.

### Parties

Petitioner Yick Wing Chan was a partner and/or owner of petitioner Wing Huang Restaurant Corp. and did business as Wing Huang, a restaurant located at 111 Lafayette St, New York, New York. Respondent Commissioner of Labor is the head of the Department of Labor (DOL) (Labor Law § 10), and is authorized to enforce the Labor Law and issue orders (Labor Law § 21).

### **EVIDENCE**

#### Wage Order

The order to comply with Article 19 (wage order) under review was issued by the respondent Commissioner of Labor against the petitioners on October 9, 2008. The wage order directs compliance with Article 19 and payment to the Commissioner for minimum wages due and owing in the amount of \$233,903.95 to eight named claimants for the time period from April 1, 2002 to November 21, 2007, with interest continuing thereon at the rate of 16% calculated to the date of the order, in the amount of \$40,751.37, and assesses a civil penalty in the amount of \$116,952.00, for a total amount due of \$391,606.22. At hearing, the respondent stipulated that claimant Heung Ping Chan was a manager and therefore not subject to the overtime requirements of Article 19, and that the wage order should therefore be reduced by the \$21,211.12 found due and owing to Heung Ping Chan and the interest and civil penalties reduced accordingly. The respondent further stipulated at hearing that the wages found due and owing to Zhi Jian Li must be reduced based on Li's own testimony that he did not work for the petitioners from February 2005 to February 2006.

#### **Petitioners' evidence**

Petitioner Yick Wing Chan testified that in 2002 he, along with several partners "took over" a restaurant at 111 Lafayette Street in New York, New York, known as Wing Huang, where he described himself as "the head," although he did not actually run the restaurant, but, in fact worked at another restaurant, Hung Won, located at 244 Canal Street. Yick Wing Chan testified that at the time he took over Wing Huang, there was no payroll and the workers had not been paid on time. Yick Wing Chan created the system for paying

the workers subsequent to 2002, and instructed the managers how to keep track of the employees' hours.

Yick Wing Chan testified that from 2002 to April 1, 2006, Heung Ping Chan ran the day to day operations of Wing Huang. Heung Ping Chan hired, fired and disciplined the staff, assigned job duties to employees, collected money from the restaurant to submit to the accountants, and ordered supplies and food for the restaurant. Furthermore, Heung Ping Chan handled all matters related to the New York City Department of Health. Additionally, Heung Ping Chan was "fully responsible" for paying the employees' wages and recording such payments.

Yick Wing Chan testified that he "kept an eye on" Heung Ping Chan, because he was not a reliable manager, and eventually "took over" the business himself on April 1, 2006, although he still worked at Hung Won and was not present at Wing Huang on a daily basis. After Heung Ping Chan left, Yick Wing Chan hired Hui Fen to manage the restaurant.

Yick Wing Chan testified that Wing Huang's employees worked from 8:00 a.m. to 6:00 p.m. six days a week, although he did not know the actual hours they worked. Employees earned a monthly salary and were paid twice a month on the 15<sup>th</sup> and 30<sup>th</sup> or 31<sup>st</sup>. Yick Wing Chan testified that he did not handle the wages and that the business' accountants paid the workers. Yick Wing Chan did not know whether employees received pay stubs with their wages.

Yick Wing Chan's wife, Mui Li Chan, testified that she worked as a cashier at Wing Huang from April 1, 2006 to April 30, 2008, although she also testified that she went to Wing Huang only to collect money, but did not work there. She further testified that she withdrew money from the bank and "transferred" it to Heung Ping Chan to use for the payroll at Wing Huang.

Lai Ying Wong testified that she worked at Wing Huang from February 2005 to February 2008 as a waitress. She was hired by Ms. Chan and worked 60 hours a week for a monthly salary of \$500.00. Ning Sheng Chen testified that he worked for Wing Huang from April 1, 2002 to 2007. He cooked, cleaned, and washed dishes. He did not supervise other employees. He testified that he worked 60 hours a week for a monthly salary of \$1,650.00.

### **Respondent's evidence**

Lock Yik Sim testified that she worked at Wing Huang from July 2003 to January 2008. She was supervised by Yick Wing Chan. Her job duties included taking customers to their tables, serving them tea, and taking their orders. She was also responsible for take-out and the cash register. She testified that she received a monthly salary of \$500.00 and received approximately \$60.00 to \$70.00 a day in tips. She worked 11 hours a day, six days a week, with two thirty minute meal periods each day. She was paid \$250.00 twice a month. She further testified that Yick Wing Chan gave instructions to Heung Ping Chan and that sometimes when there were not enough employees working at Wing Huang, employees would be sent from Hung Won.

Run Huan Ni testified that Yick Wing Chan hired him in 2001 to work at Hung Won where he prepared porridges and noodles. On April 1, 2002, Yick Wing Chan transferred him to work in the kitchen at Wing Huang, where he worked until he was fired by Ms. Chan on September 30, 2007. Run Huan Ni testified that his salary was originally \$1,700.00 a month, which was increased to \$1,800.00 a month sometime after he was transferred to Wing Huang. He testified that his salary was increased after he asked Yick Wing Chan for a raise. He further testified that Yick Wing Chan told him what hours to work and changed his schedule two or three times. Run Huan Ni clarified that Yick Wing Chan did not work at Wing Huang, and at the time of the transfer simply told him to go to Wing Huang and cook noodles.

Run Huan Ni stated that he complained to the Department of Labor (DOL) by telephone that Wing Huang did not pay overtime. He recalled speaking to Investigator Wei Sha, and testified that after speaking to Sha, Yick Wing Chan asked him to sign 42 documents. Run Huan Ni refused to sign the documents because the documents were incorrect and he was afraid that Yick Wing Chan was fabricating false evidence.

Zhi Jian Li testified that he started working as a waiter "for Yick Wing Chan" at Wing Huang on April 1, 2002. He was already working at the restaurant before Yick Wing Chan became the owner, and was not fired after the change of ownership. Zhi Jian Li worked at Wing Huang until February 2005 when he went to China to attend to a family emergency. Zhi Jian Li testified that he returned to New York in February 2006 and was rehired by Ms. Chan to work at Hung Won. He was transferred to Wing Huang in 2007 and was working there when investigators from DOL came to the restaurant.

Zhi Jian Li testified that the restaurant was managed by Heung Ping Chan, who gave him his work schedule. Zhi Jian Li was paid a monthly salary of \$500.00, worked 60 hours a week, and was paid \$250.00 every two weeks. In addition, he received \$20.00 to \$80.00 per day in tips, and received a share of the tips even on days he did not work. Zhi Jian Li testified that normally his wages were paid to him by Ms. Chan.

Lee Ping Chai testified that she worked as a waitress at Wing Huang from October 2003 until 2008. She was hired by Heung Ping Chang who told her what hours to work and gave her instructions on how to do her job. She further testified that she saw Yick Wing Chan come to the restaurant to collect money.

Lee Ping Chai also testified that after a DOL investigator visited the restaurant, Yick Wing Chan and Ms. Chan asked her to sign a document about the hours she worked at Wing Huang. The document stated that she worked eight hours a day, which was incorrect since she, in fact, worked ten hours a day. The Chans explained to her that the document related to "working conditions." Lee Ping Chai signed the document, but returned later to demand that Ms. Chan return it to her, which she did after an argument. Lee Ping Chai destroyed the document after it was returned.

Lee Ping Chai testified that she worked six days a week, ten hours per day (11 hours less one hour for meals), for a salary of \$500.00 a month. She received \$40.00 a day in tips, including days she did not work.

Senior DOL Labor Standards Investigator Wei Sha testified that in the summer of 2007, DOL received an anonymous complaint that Wing Huang's employees were not paid overtime. Sha visited the restaurant on June 7, 2007, and interviewed six employees who all informed him that they worked 11 hours a day with one hour for meal breaks, six days a week, for a fixed salary. The employees informed Sha that nobody at the restaurant received overtime pay. Sha also received written complaints from employees.

Sha requested payroll records from the petitioners for the time period from January 2002 through June 7, 2007, and received some records from the petitioners' accountant; however, Sha did not credit the records he received because several employees had reported to him that the petitioners had fabricated payroll records after the investigation had commenced, and because the records themselves were clearly flawed.

Sha determined the underpayments due to the claimants as follows:

“. . . because all the employees . . . received a monthly salary, I multiplied the monthly salary by 12 months, so divided by 52 weeks to reach their weekly wages, then divided the hours. I think it was 60 hours, because all the employees told me they worked 60 hours. So for the waiter, waitress, for service workers, I used the state minimum wage, the employer tip credit.”

Sha further explained that he credited the petitioners with a tip credit because all of the service employees stated they had received tips, and that he included an extra hour each day at minimum wage (“spread shift”), because the employees were at the restaurant from starting to quitting time for more than ten hours.

Sha also testified that Yick Wing Chan was named as an employer by the orders, because all documents in DOL's possession such as subpoenaed bank records indicated that Yick Wing Chan owned the restaurant during the entire time period.

Finally, Sha testified that a 50% civil penalty was included in the order, instead of the normal 100% to 200% civil penalty, because Wing Huang is a small restaurant. Sha testified, however, that a penalty was warranted in this case because the petitioners fabricated payroll records.

#### Penalty Order

The order under Articles 6 and 19 of the Labor Law (penalty order) was issued on October 9, 2008, and imposes a \$1,000.00 civil penalty against the petitioners for violating Labor Law § 661 and 12 NYCRR 137-2.1 by failing to keep and/or furnish true and accurate payroll records for each employee from on or about April 1, 2002 through November 21, 2007, imposes a \$1,000.00 civil penalty against the petitioners for violating Labor Law §

661 and 12 NYCRR 137-2.2 by failing to give each employee a complete wage statement with every payment of wages from on or about April 1, 2007 through November 21, 2007, and imposes a \$1,000.00 civil penalty against the petitioners for violating Labor Law § 191 (a) by failing to pay wages weekly to manual workers not later than seven calendar days after the end of the week in which wages were earned, for a total penalty due in the amount of \$3,000.00.

The petitioners presented no evidence that they maintained true and accurate payroll records or provided complete wages statements to each employee with every payment of wages. Yick Wing Chan admitted that employees of Wing Huang were paid semi-monthly.

### ANALYSIS

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

#### Burden of Proof

The petitioners' burden of proof in this matter was to establish by a preponderance of the evidence that the orders issued by the Commissioner are invalid or unreasonable (State Administrative Procedure Act § 306 [1]; Labor Law §§ 101, 103; 12 NYCRR 65.30).

#### Wage Order

At the outset, we must determine whether petitioner Yick Wing Chan was the claimants' employer. If he is not an employer, then he is not liable under the Labor Law for the wages found due and owing. For the reasons set forth below, we find that petitioner Chan is an employer under the Labor Law.

"Employer" as used in Articles 6 and 19 of the Labor Law means "any individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons acting as an employer" (Labor Law § 651 [6]; *see also* Labor Law § 190 [3]). "Employed" means "suffered or permitted to work" (Labor Law § 2 [7]).

The federal Fair Labor Standards Act, like the New York Labor Law defines "employ" to include "suffer or permit to work" (29 USC § 203 [g]), and "the test for determining whether an entity or person is an 'employer' under the New York Labor Law is the same test . . . for analyzing employer status under the Fair Labor Standards Act" (*Chu Chung v The New Silver Palace Rest., Inc.*, 272 F Supp 2d 314, 319 n6 [SDNY 2003]).

In *Herman v RSR Sec. Servs. Ltd.*, 172 F3d 132, 139 (2d Cir 1999), the Second Circuit Court of Appeals stated that the test used for determining employer status by explaining that:

"Because the statute defines employer in such broad terms, it offers little guidance on whether a given individual is or is not an employer. In answering that question, the overarching concern is

whether the alleged employer possessed the power to control the workers in question with an eye to the ‘economic reality’ presented by the facts of each case. Under the ‘economic reality’ test, the relevant factors include whether the alleged employer (1) had the power to hire and fire employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records” (internal quotations and citations omitted). When applying this test, “no one of the four factors standing alone is dispositive. Instead the ‘economic reality’ test encompasses the totality of the circumstances, no one of which is exclusive.” (*Id.* [internal citations omitted]).

We find that petitioner Yick Wing Chan exercised sufficient control over the claimants to be liable as an employer under Articles 6 and 19 of the Labor Law for the entire time period covered by the orders.

Yick Wing Chan had the authority to hire employees at Wing Huang. Run Huan Ni credibly testified that Yick Wing Chan hired him in 2001 to work at Hung Won and then sent him in 2002 to work at Wing Huang. Zhi Jian Li also credibly testified that in 2006 he was transferred from Hung Won to Wing Huang. Similarly, Lock Yik Sim credibly testified that Yick Wing Chan sent employees from Hung Won to Wing Huang when Wing Huang needed workers. This testimony was not rebutted. Finally, Yick Wing Chan testified that he hired Hui Fen to manage Wing Huang after Heung Ping Chan retired. We find that Yick Wing Chan had the authority to hire employees at Wing Huang, even if he rarely exercised it as most claimants were hired by Heung Ping Chan, and the authority to transfer employees from Hung Won to Wing Huang, which is analogous to hiring employees at Wing Huang.

Yick Wing Chan also supervised and controlled employee work schedules and conditions of employment in some instances. Lock Yik Sim gave unrebutted testimony that she was supervised by Yick Wing Chan, and that Yick Wing Chan gave instructions to Heung Ping Chan for running the restaurant. Furthermore, Yick Wing Chan, himself, testified that he oversaw or “kept an eye” on Heung Ping Chan’s management of Wing Huang because he did not believe Heung Ping Chan was reliable, created the payroll system, and instructed the managers how to track the employees’ hours of work. Additionally, Run Huan Ni credibly testified that Yick Wing Chan set his schedule and changed it two or three times after he was transferred to Wing Huang. Run Huan Ni’s testimony was not rebutted by the petitioners.

Yick Wing Chan admitted that he determined the rates and method of payment for employees of Wing Huang. He testified that he created the system used for paying the employees subsequent to April 1, 2002, because prior to that, the employees were not paid on time. He also admitted that he instructed the managers how to track the employees’ hours of work. Furthermore, based on Run Huan Ni’s credible testimony, which was not rebutted, Yick Wing Chan had the authority to approve employees’ requests for wage increases.

Chan controlled the claimants and was an employer under the Labor Law for the entire claim period, and we note that the fact he was not present at the restaurant on a daily basis supervising the claimants does not relieve him of his status as an employer (*See Herman v RSR Security Services Ltd.*, 172 F3d at 139 [quoting *Donovan v Janitorial Services, Inc.*, 672 F2d 528, 531 [5<sup>th</sup> Cir 1982] [“Control may be restricted, or exercised only occasionally, without removing the employment relationship from the protections of the FLSA, since such limitations on control ‘do not diminish the significance of its existence’”]; *see also Carter v Dutchess Community College*, 735 F2d 8, 11-12 [2d Cir 1984] [fact that control may be “qualified” is insufficient to place employment relationship outside statute]; *Moon v Kwon*, 248 F Supp 2d 201, 237 [SDNY 2002] [fact that hotel manager may have “shared or delegated” control with other managers, or exercised control infrequently, is of no consequence]).

Having determined that petitioner Yick Wing Chan was the claimants’ employer (along with petitioner Wing Huang Restaurant Corp.) we next determine whether the petitioners owe the wages found due by the orders. Article 19 of the Labor Law, entitled “Minimum Wage Act” sets forth the minimum wage that every employer must pay each of its non-exempt employees for each hour of work (Labor Law § 652 [1]). The applicable minimum wage rates during the time period covered by the wage order were \$5.15 an hour from April 1, 2002 to December 31, 2004; \$6.00 an hour in 2005; \$6.75 an hour in 2006; and \$7.15 an hour in 2007 (Labor Law § 652 [1]; 12 NYCRR 137-1.2 [2007] [repealed effective January 1, 2011 and replaced by 12 NYCRR Part 146]). Additionally, Labor Law § 652 (4) provides that the applicable wage rates for food service workers receiving tips during the time period covered by the wage order were \$3.30 an hour from April 1, 2002 to December 31, 2004; \$3.85 an hour in 2005; \$4.35 an hour in 2006; and \$4.60 an hour in 2007, provided that the tips of such employees, when added to the cash wage, were equal to or in excess of the minimum wage (*see also* 12 NYCRR 137-1.5 [2007]). The Labor Law also requires that employers pay any non-exempt employee working more than 40 hours in a work week an overtime premium of one and one-half of their regular hourly wage rate for those hours worked in excess of 40 (12 NYCRR 137-1.3 [2009]), and one hour’s pay at the basic minimum hourly wage rate before allowances on each day in which the spread of hours an employee is scheduled to work exceeds ten (12 NYCRR 137-1 [2007]).

The wage order finds that five waiters (one of whom, Heung Ping Chan, has been removed from the order by stipulation), one dishwasher, and two cooks were paid below the minimum wage rates required by Article 19 of the Labor Law from April 1, 2002 to November 21, 2007. All of the waiters who testified at hearing stated that they worked 60 hours a week, received tips, and were paid a monthly salary of \$500.00<sup>1</sup>. Run Huan Ni, a cook, testified that he worked 60 hours a week for a monthly salary of \$1,700.00 eventually raised to \$1,800.00. Ning Sheng Chen, a dishwasher, testified that he worked 60 hours a week for a monthly salary of \$1,650.00. This testimony was not inconsistent with the claimants’ statements to DOL. The petitioners did not rebut this testimony or produce any records to show the claimants were paid different amounts or worked less hours a week.

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<sup>1</sup> The regular hourly rate the petitioners paid to the waiters was \$1.92 (12 x \$500 monthly salary ÷ 52 weeks ÷ 60 hours worked per week). DOL used the same formula to determine the regular hourly rate paid to the cooks and dishwashers.



The petitioners did not maintain or produce legally sufficient and credible payroll records. 12 NYCRR 137-2.1 (a), which was in effect during the relevant time period, provided that every employer was required to maintain weekly payroll records for each employee that included, *inter alia*, the wage rate, number of hours worked daily and weekly, the amount of gross wages, deductions from gross wages, allowances, if any, claimed from the minimum wage, and money paid in cash. The records produced by the petitioners to DOL during the investigation, which were entered into evidence at hearing by the respondent, were clearly fabricated. Investigator Sha received reports from the petitioners' employees that after the investigation had commenced, the petitioners had requested that they retroactively sign payroll information. Those reports were confirmed by the credible testimony of several of the claimants who stated that Yick Wing Chan and Ms. Chan asked them to sign incorrect records after Investigator Sha had been to the restaurant. Furthermore, the records themselves do not make sense as, for example, the overtime rate was reported as less than the regular rate, check amounts were listed although employees were paid by cash, and union rates and bonus rates are listed but were never explained or even mentioned at hearing. We simply cannot accept the petitioners' purported payroll records as shedding any light on the hours the claimants worked or the wages they were paid, and find that the respondent was reasonable to not give such records any weight in its investigation.

In the absence of sufficient records, petitioners then bear the burden of proving that the disputed wages were paid (Labor Law § 196-a; *Angello v Natl. Fin. Corp.*, 1 AD3d 818, 821 [3d Dept 1989]; *Heady v Garcia*, 46 AD3d 1088 [3d Dept 2007]). 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 calculation to the employer." Therefore, the petitioners have the burden of showing that the Commissioner's order is invalid or unreasonable by a preponderance of the evidence of the specific hours that the claimants worked and that they were paid for those hours, or other evidence that shows the Commissioner's findings to be invalid or unreasonable (*In the Matter of Ram Hotels, Inc.* Board Docket No. PR 08-078 [October 11, 2011]). Where incomplete or unreliable wage and hour records are available, DOL is "entitled[d] to make just and reasonable inferences and use other evidence to establish the amount of underpayments, even though the results may be approximate" (*Hy-Tech Coatings v New York State Dept. of Labor*, 226 AD2d 378, [(1<sup>st</sup> Dept 1996), citing *Mid-Hudson Pam Corp.*). In this case, the Commissioner used the best available evidence, which was the statements of the employees, and the petitioners failed to prove that the wages found due and owing by the Commissioner were unreasonable. Indeed, Investigator Sha explained in detail his method of determining the claimants' regular hourly and overtime rates from their monthly salary, that he included an extra hour each work day at minimum wage for "spread shift" pay because the claimants starting and quitting time exceeded ten hours, and that he provided a tip credit to the petitioners for the waiters, although we note that this was not legally required since the petitioners did not maintain records of the tips received by their employees (12 NYCRR 137-3.4 [c] [2007]; *See also Bakerman, Inc. v Roberts*, 98 AD2d 965 [4<sup>th</sup> Dept 1983]; *Padilla v Manlapaz*, 643 F Supp 2d 302, 310 [EDNY 2009]). To the

extent that it appears from the record that at least two meals per day were provided to claimants, it was nonetheless reasonable for the Commissioner not to provide a meal deduction because the petitioners failed to keep records of the meal allowances claimed and did not provide any evidence that the food provided constituted meals as defined by 12 NYCRR 137-3.8 (2007) (defining a meal as including at least one of the types of food from each of fruits and vegetables; cereals, bread or potatoes; eggs, meat, fish or poultry; and milk, tea or coffee, except that for breakfast eggs, meat, fish or poultry may be omitted if both cereal and bread are offered) (*see Padilla*, 643 F Supp 2d at 310).

For the above reasons, the wage order is affirmed except as stipulated at hearing that it be amended to remove Heung Ping Chan (\$21,211.12) and to reduce the wages due and owing to Zhi Jian Li to conform to the evidence at hearing that he was not in the country from February 2005 to February 2006.

Civil Penalty

The Wage Order assesses a 50% civil penalty. The Board finds that the considerations required to be made by the Commissioner in connection with the imposition of a 50% civil penalty were proper and reasonable in all respects.

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 per annum from the date of the underpayment to the date of payment. Banking Law section 14-A sets the “maximum rate of interest” at “sixteen percent per centum per annum.”

Penalty Order

The penalty order is affirmed. We find, as discussed above, that the petitioners violated 12 NYCRR 137-2.1 by failing to keep and/or furnish true and accurate payroll records for each employee and violated Labor Law § 661 and 12 NYCRR 137-2.2 by failing to give each employee a complete wage statement with every payment of wages. We also find that the petitioners violated Labor Law § 191 (a) where there is no dispute that the petitioners’ employees, who were manual workers, were paid semi-monthly and not weekly as required by the statute.

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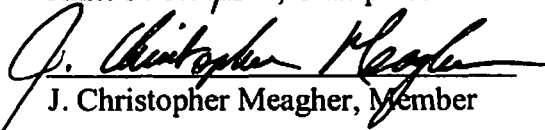
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**NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:**

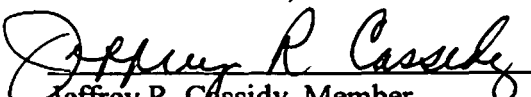
1. The Commissioner will recalculate the wages due and owing based on the findings of the Board herein, pro-rate the civil penalty accordingly, and issue an amended wage order consistent with this decision that removes Heung Ping Chan and finds no wages due and owing to Zhi Jian Li from February 1, 2005 to February 28, 2006; and
2. The penalty order is affirmed; and
3. The petition for review be, and the same hereby is, denied.

  
Anne P. Stevason, Chairperson

  
J. Christopher Meagher, Member

  
Jean Grumet, Member

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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  
October 17, 2012.

**NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:**

1. The Commissioner will recalculate the wages due and owing based on the findings of the Board herein, pro-rate the civil penalty accordingly, and issue an amended wage order consistent with this decision that removes Heung Ping Chan and finds no wages due and owing to Zhi Jian Li from February 1, 2005 to February 28, 2006; and
2. The penalty order is affirmed; and
3. The petition for review be, and the same hereby is, denied.

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Anne P. Stevason, Chairperson

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J. Christopher Meagher, Member

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Jean Grumet, Member

  
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LaMarr J. Jackson, Member

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Jeffrey R. Cassidy, Member

Dated and signed by a Member  
of the Industrial Board of Appeals  
at Rochester, New York, on  
October 17, 2012.