

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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In the Matter of the Petition of:

JOSEPH SHAUBI AND YOSSIS GRILL, INC.
AND EMEJ, INC. (T/A YOSSIS GRILL),

Petitioners,

To Review Under Section 101 of the Labor Law:
An Order to Comply with Article 19 of the New York
State Labor Law, and an Order under Articles 6 and 19
of the New York State Labor Law, both dated April 3,
2009,

- against -

THE COMMISSIONER OF LABOR,

Respondent.
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DOCKET NO. PR 09-123

RESOLUTION OF DECISION

APPEARANCES

Joseph Shaubi, *pro se* for Petitioners.

Maria L. Colavito, Counsel, NYS Department of Labor, Benjamin T. Garry of Counsel, for Respondent.

WITNESSES

Joseph Shaubi, Angel Montiel and Esther Danon, for Petitioners. Angelito M. Reyes, Claimant; Raheem Ausborn and Labor Standards Investigator Donna Griffith, for Respondent.

WHEREAS:

The petition for review in the above-captioned case was filed by Petitioners Joseph Shaubi, Yossi's Grill, Inc. and EMEJ, Inc trading as Yossi's Grill (Petitioners) pursuant to Labor Law § 101 and Part 66 of the Board's Rules of Procedure and Practice (Board Rules) (12 NYCRR Part 66) seeking review of two Orders to Comply that the Commissioner of Labor (Commissioner or Respondent) issued against them on April 3, 2009. The Order under Article 6 (Wage Order) finds that the Petitioners failed to pay wages to Angelito M. Reyes (Claimant), for the period August 15, 2005 through January 6, 2008, in the amount

of \$17,374.33; interest at the rate of 16% in the amount of \$3,450.11; and a civil penalty of \$4,344.00, for a total amount due under the Wage Order of \$25,168.44. The Order under Article 19 (Penalty Order) assessed civil penalties in the total amount of \$1,200.00 against the Petitioners: \$200.00 for violating Labor Law §198-d by failing to post regulations on prohibited deductions from wages and appropriation of tips; \$500.00 for violating Labor Law §661 by failing to keep and furnish payroll records for each employee; and \$500.00 for violating Labor Law §661 by failing to give each employee a complete wage statement with every payment of wages. An Answer was filed by Respondents on November 20, 2009.

The Petition states that Claimant worked elsewhere in 2005 and 2006 and worked part-time in 2007, and “was paid every hour he worked,” and that Petitioners have “witnesses who will testify as to employment history.”

Upon notice to the parties, a hearing was held on October 7, 2010 in Garden City, New York before Jean Grumet, Esq., Member of the Board and the designated Hearing Officer in this proceeding. Each party was afforded a full opportunity to present documentary evidence, to examine and cross-examine witnesses, to make statements relevant to the issues, and to make closing arguments.

SUMMARY OF EVIDENCE

Testimony of Petitioner Joseph Shaubi

Petitioner Joseph Shaubi (Shaubi) testified that from 2002 to June 30, 2010, he owned Yossi's Grill (Yossi's), a kosher fast food restaurant located in Cedarhurst, New York, that employed four people. Yossi's generally operated from 11:00 a.m. to 11:30 p.m. or midnight, Sunday through Thursday. It was closed on Saturday for the Sabbath and open two to three hours plus cleaning time on Friday. Shaubi also testified that the hours varied. For example, Yossi's was not open as many hours in the summer because business was slow.

It also closed “about 35 days at least for holidays” including Passover, Rosh Hashanah, Yom Kippur, Succot, Simchat Torah, Shavuot, Christmas, Thanksgiving, five Jewish fast days, and nine days during the summer when observant Jews do not eat meat. For the year 2007, Shaubi provided a list of 36 dates that Yossi's was closed for religious holidays. He testified that besides his own observance of Jewish law, the Vaad, which certifies restaurants as kosher, “would close the place” for violations.

Shaubi testified that he paid his workers' wages in full and on time, and paid Claimant extra for overtime but “didn't keep a record of the salary.” Although other workers were paid by check, Claimant was paid in cash. Shaubi further testified that Yossi's had a time clock during Claimant's employment, but did not provide time cards to the DOL or produce any at the hearing. Shaubi hired Claimant in 2007. Claimant's work consisted of cleaning and performing “multiple tasks,” including grilling. According to Shaubi, Claimant's hours were flexible.

In 2007, Claimant worked intermittently at Yossi's. Shaubi testified that Claimant quit three times in 2007 because of fights with other employees, but that he hired him back after each incident because he was satisfied with his work.

In November 2007 Claimant asked Shaubi to write a letter stating that he was employed at Yossi's and earned \$500.00 per week. Since Claimant was earning that amount, Shaubi complied. After working until "the end of December, January," Reyes again quit, and filed a claim at the DOL alleging that he had not been properly paid by the Petitioners.

Shaubi testified that when the Claimant was first hired, the Petitioners paid him \$7.25 an hour which was eventually raised to \$7.50 an hour. Shaubi further testified that the Claimant's wage rate was raised to \$8.00 an hour approximately two months before he stopped working for the Petitioners.¹ Shaubi explained that "I pay [Claimant] per hour Every week is a different number, based on hours."

Testimony of Claimant Angelito M. Reyes

Claimant first worked at Yossi's from May 2004 to January 2005, when he left because of a hernia that made it difficult to do work such as lifting garbage bags. Claimant then took a job at another restaurant and worked there for almost six months. That job ended when Shaubi invited him back to work at Yossi's, offering to give him a lighter job at the lunch counter, taking orders and doing deliveries. Six weeks later, however, Claimant was sent to the kitchen to cook and wash dishes, clean the basement and lift heavy garbage bags. Claimant testified that he did not have fights with other employees.

Claimant initially testified that when he returned to Yossi's in 2005, Shaubi agreed to pay him \$5.50 per hour; but later testified that his pay was raised to \$5.50, from \$4.50, six weeks after his return when his job changed. He testified that the \$5.50 rate remained constant throughout his employment, and that he did not take home the same wage every week, but earned between \$350.00 and \$500.00 per week. He was always paid in cash, without a pay stub. Claimant worked long hours, sometimes from "9:00 in the morning to prepare the stuff" until "almost like 3:00 in the morning the next day." He worked Sunday through Friday, with a shorter day on Friday. He was told to eat "when it's not busy," had no lunch break and was not paid overtime. Shaubi sometimes instructed him to clock out at midnight but to continue cleaning for up to an additional two hours. Even when Yossi's was closed on weekends or Jewish holidays – except for Passover when it closed "for straight up nine days," when he did not work – Reyes and another employee worked in the back of the restaurant cleaning up, with the doors locked and the lights turned off in the front, so no one knew they were there.

Around December 15, 2007, Claimant asked for a lighter job because his hernia had recurred, but Shaubi refused. Reyes called in sick on December 31, and when he returned

¹ According to Shaubi, the \$8.00 per hour rate was confirmed by a time card provided by the Claimant for his last work week which recorded 40.33 hours and on which Shaubi had written the numbers 323, 200 and 523 which he said show that claimant was paid \$323 for 40.33 hours, "plus \$200 that I didn't pay... the week before" or that was an "extra bonus." Shaubi did not explain why he would have owed pay for the week before or paid a bonus.

on January 1, 2008, Shaubi fired him.² At that time, Claimant asked to be paid for the two weeks in December for which he had not been paid, but Shaubi only paid him for December 30 through January 1.

On January 16, 2008, Claimant filed a Claim for Unpaid Wages with the DOL, claiming wages for the period December 24, 2007 to January 2, 2008 at an agreed rate of \$500.00 per week. He also filed a Minimum Wage/Overtime Complaint, stating that he worked at Yossi's from August 2005 through January 2, 2008; that his pay rate was \$500.00 per week after February 15, 2007, previously \$400.00 per week; that his only absences from work, including vacations and holidays, were one-week periods for Passover in April 2006 and April 2007; and that he worked the following hours, with no time off for meals:

	Time Started	Time Stopped	Hours
Sunday	10:00 am	12:00 midnight	14
Monday	11:00 am	12:00 midnight	13
Tuesday	10:30 am	12:00 midnight	13.5
Wednesday	11:00 am	12:00 midnight	13
Thursday	11:00 am	12:00 midnight	13
Friday	10:00 am	4:00 pm	6
Saturday	Off		
Weekly			72.50

With his claims, Claimant also submitted Shaubi's November 14, 2007 letter stating that Claimant earned \$500 per week, and nine pages of time cards. Claimant testified that he had requested the November 14th letter when Shaubi "started giving me trouble" about the hernia, and that it was Shaubi's idea, not Claimant's, to put in the letter that Reyes earned \$500.00 per week.

Concerning the time cards, Claimant stated that after Shaubi paid employees, he left cards under the cash register to put in the garbage, so Claimant just took his own time cards. Claimant testified that he did not have all his time cards, but produced all that he had. The cards, headed "Angel" or "Angelito," record hours for 16 weeks between January 21, 2007 and the end of Claimant's employment. A typical week which summarizes cards for February 11-16, 2007 is reproduced in the following table. The last column shows the daily work hours as written on the cards:

Sunday	Feb 11 '07 11:12 am Feb 11 '07 11:46 pm	13.77
Monday	Feb 12 '07 11:14 am Feb 12 '07 11:48 pm	12.57
Tuesday	Feb 13 '07 11:28 am Feb 13 '07 10:05 pm	10.62
Wednesday	10:35 [written in] Feb 15 '07 12:24 am	13.82
Thursday	Feb 15 '07 11:02 am Feb 16 '07 1:12 am	14.17

² Time cards indicate that Claimant worked full days on December 30, December 31 and January 1, and from 10:58 a.m. to 3:52 p.m. on January 2.

Claimant worked a total of 64.95 hours during this week. Eight of the 16 time cards included Friday work.

Testimony of Labor Standards Investigator Donna Griffith

DOL Labor Standards Investigator Donna Griffith (Griffith) testified that after reviewing Reyes' claim she paid two visits to the restaurant. She spoke with Shaubi on May 2, 2008; requested records for the period January 1, 2005 to April 30, 2008; and left a notice to revisit on May 19, 2008 to inspect records. When Griffith revisited on May 19, Shaubi did not provide her with any time cards and only incomplete payroll records.

Griffith determined that Claimant was underpaid from August 21, 2005 through January 2, 2008. She estimated that Claimant worked 66 hours per week, using an average of the time cards provided by Claimant. The wage rate information was based on the complaint form. Dividing the weekly wage rates stated in that form – \$400 before, and \$500 after, February 2007 – by 66 hours, Griffith computed an hourly rate for each of the two periods: respectively, \$6.06 and \$7.58 per hour. For 13 months (all of 2006, and January 2007) of the approximately 28 months in her computation, these rates were below what Labor Law § 652 required (\$6.00 per hour effective Jan. 1, 2005; \$6.75 effective January 1, 2006; and \$7.15 effective January 1, 2007), and Griffith calculated underpayment based on the Labor Law § 652 minimum wages effective at relevant times.

Griffith also calculated the overtime premium (one-half the hourly rate in effect) for 26 weekly hours (the estimated hours he worked beyond 40), as well as the "spread of hours" premium (an additional hour's pay at the statutory minimum rate) which he should have been paid for days when he was required to be present at the restaurant for more than ten hours. Finally, Griffith determined the wages due from December 24, 2007 through January 2, 2008, using the actual hours shown by his last time cards (58.73 and 40.33 hours). The total amount she found due was \$17,374.33.

On March 11, 2009, Griffith sent Yossi's a Notice of Labor Law Violation and preliminary Recapitulation Sheet stating that wages in the gross amount of \$17,374.33 had been found due to Reyes, that Yossi's had also failed to follow the Labor Law's records requirements, that a civil penalty could be assessed, and that Yossi's could request a meeting to be heard on the findings. She also prepared a "Background Information – Imposition of Civil Penalty" form in which she recommended that taking into account the business's size and Shaubi's statements that he was not familiar with the law, Petitioners be assessed the "minimum" civil penalty of 25%. On April 3, 2009 the DOL issued the Wage Order and the Records Order.

Additional Testimony

Two additional witnesses called by Petitioners, Angel Montiel and Esther Danon, and one called by the DOL, Raheem Ausborn, provided no relevant testimony.

STANDARD OF REVIEW

In general, when a petition is filed, the Board reviews whether the Commissioner's order is valid and reasonable. The petition must specify the order "proposed to be reviewed and in what respects it is claimed to be invalid or unreasonable. Any objections . . . not raised in [the petition] shall be deemed waived" (Labor Law § 101). The Board is required to presume that an order of the Commissioner is valid (Labor Law § 103).

Pursuant to Rule 65.30 of the Board's Rules of Procedure and Practice (Rules) (12 NYCRR § 65.30): "The burden of proof of every allegation in a proceeding shall be upon the person asserting it." Therefore, the burden is on the Petitioners to prove that the Wage Order was not valid or reasonable.

FINDINGS AND CONCLUSIONS OF LAW

The Board makes the following findings of fact and law pursuant to the provisions of Board Rule 65.39 (12 NYCRR 65.39). For the following reasons, we affirm the Commissioner's Orders and find that the Petitioners, in the absence of required records, have failed to meet their burden of proof.

Article 19 of the Labor Law requires employers to maintain payroll records, to keep those records available for inspection at any reasonable time, and to furnish them to the Commissioner on demand (Labor Law § 661). The Commissioner's regulations implementing Article 19, at 12 NYCRR § 137-2.1, provide that weekly payroll records must be maintained and preserved for six years and shall show, *inter alia*, the name and address; social security number; wage rate; number of hours worked daily and weekly; amount of gross wages; deductions from gross wages; and net wages paid for each employee. In the present case, the only records available – whose authenticity and correctness Shaubi not only did not dispute, but specifically acknowledged – were Claimant's time cards for 16 weeks in 2007, relied on and submitted by Respondent. Accordingly, those time cards are the best available evidence of Claimant's hours.

When employer records are not available, it is proper for the DOL to credit employee statements and calculate wages due based on information provided (*See* Labor Law § 196-a; *Matter of Angello v. National Finance Corp.*, 1 AD3d 850, 853-854 [3d Dept. 2003]; *Matter of Aldeen v. Industrial Appeals Bd.*, 82 AD3d 1220, 1221 [2d Dept. 2011]). In *Anderson v. Mt. Clemens 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's records are inaccurate or inadequate," stating that the 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.”

The Appellate Division adopted *Mt. Clemens’* reasoning in *Matter of Mid-Hudson Pam Corp. v. Hartnett*, 156 A.D.2d 818, 820-821 [3d Dept. 1989], explaining that to hold otherwise “would in effect award Petitioners a premium for their failure to keep proper records and comply with the statute,” and holding in light of the remedial nature of the prevailing wage statute and “its public purpose of protecting workmen,” that

[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.

The Board follows the precedent set in *Mid-Hudson Pam Corp., id.* at 821, that where required employer records are unavailable, DOL may use “the best available evidence” to estimate back wages due and “shift the burden of negating the reasonableness of the Commissioner’s calculations to the employer,” with “the amount and extent of underpayment... a matter of just and reasonable inference” (*Matter of Abdul Wahid*, PR 08-005 [Nov. 17, 2009]; *Matter of Dueck Sun Kim Youn*, PR 08-172 [Mar. 24, 2010]; *Matter of Herman Bae*, PR 09-298 [July 26, 2011]; *Matter of Bai Buang*, PR 09-289 [Apr. 27, 2011]; *Matter of Dae Lee*, PR 09-009 [May 26, 2010]). In the present case, it was reasonable for DOL to credit the statements in the claim forms concerning Claimant’s wage rates, duration of employment and hours worked, and estimate back wages due accordingly based on Petitioner’s failure to have complete records and Claimant’s production of confirming time cards. We find that Petitioners did not meet their burden of negating the reasonableness of the Commissioner’s calculations, except that we find that it was not valid to assess underpayment for the eighteen days (over two years) when Claimant acknowledged he did not work because Yossi’s was closed for Passover.

The Petition’s principal allegation was that Claimant did not work at Yossi’s in 2005 or 2006, a claim the Petition stated would be established by “witnesses who will testify as to employment history.” However, no witness other than Shaubi contradicted Claimant’s statement that he worked at another restaurant for six months in 2005 and was hired by Yossi’s in August of that year.

Since the Petitioners did not meet their burden of proof by providing records which they were required to maintain and preserve for six years, we accept the Claimant’s testimony as to his date of hire absent any evidence to corroborate Shaubi’s testimony. Also, in the absence of time records, we do not find Shaubi’s testimony concerning the various time periods Claimant allegedly did not work in 2007, specific enough to meet the Petitioners’ burden of proof.

With respect to the Passover holidays, however, the claim form which Claimant filed with the DOL itself stated that he was absent from work for one week each in April 2006 and 2007 for Passover. Claimant also testified that Yossi’s closed for “straight up nine days” for Passover and that no work was done during those nine days. It was not valid and reasonable for the DOL to assess underpayment for the Passover holidays when the claim

form itself indicated no work was performed, and the wage order must therefore be modified and its amount reduced to account for those days.

Claimant's testimony at the hearing confirmed that he was paid on an hourly rather than a weekly basis as his claim form had implied. The Commissioner issued the wage order based on the information then available, including Claimant's claim form stating that he was paid \$400 per week until February 2007 and \$500 per week thereafter, and Shaubi's November 2007 letter confirming that Claimant "earns \$500.00 per week." Since this is an appeal *de novo* and it is clear from testimony that Claimant was paid an hourly rate, not a weekly rate, with actual pay that varied from week to week we modify the Order to calculate the underpayment based on minimum wage since Claimant testified that he was paid between \$4.50 and \$5.50 per hour in 2005 and it remained unchanged. We, therefore, remand the Order to DOL to recalculate the wages due based on the minimum wage rate in affect at the different times.

CIVIL PENALTIES

The Wage Order additionally assessed a 25% civil penalty in the amount of \$4,344.00 and the Penalty Order assessed civil penalties in the total amount of \$1,200.00. The Board finds that the considerations and computations required to be made by the Commissioner in connection with the imposition of the civil penalty amounts set forth in the Orders were followed and that the penalties assessed were reasonable and valid in all respects.

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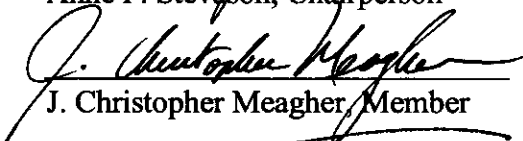
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THEREFORE, IT IS HEREBY RESOLVED THAT

1. The Wage Order is modified and remanded to the Department of Labor to recalculate the wages due based on the minimum wage rate in effect and to remove the wages due for the 18 days the Petitioner was closed and Claimant did not work during Passover 2006 and 2007;
2. The Penalty Order is affirmed.
3. The Petition is 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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THEREFORE, IT IS HEREBY RESOLVED THAT

1. The Wage Order is modified and remanded to the Department of Labor to recalculate the wages due based on the minimum wage rate in effect and to remove the wages due for the 18 days the Petitioner was closed and Claimant did not work during Passover 2006 and 2007;
2. The Penalty Order is affirmed.
3. The Petition is denied.

Anne P. Stevenson, Chairperson

J. Christopher Meagher, Member

Jean Grunet, Member


Lamar J. Jackson, Member

Jeffrey R. Cassidy, Member

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

THEREFORE, IT IS HEREBY RESOLVED THAT

1. The Wage Order is modified and remanded to the Department of Labor to recalculate the wages due based on the minimum wage rate in effect and to remove the wages due for the 18 days the Petitioner was closed and Claimant did not work during Passover 2006 and 2007;
2. The Penalty Order is affirmed.
3. The Petition is 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 Albany, New York, on
September 9, 2011.