STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of: LO HSEN KUO and FIVE-STAR CLASS DANCING STUDIO, INC., Petitioners, To Review Under Section 101 of the Labor Law: An Order to Comply with Article 19, and an Order Under Articles 6 and 19 of the Labor Law, both dated July 30, 2009, - against - THE COMMISSIONER OF LABOR, Respondent.	DOCKET NO. PR 09-246 RESOLUTION OF DECISION

APPEARANCES

Kenneth W. Jiang, Esq., for petitioners.

Pico Ben-Amotz, Acting Counsel, NYS Department of Labor, (Benjamin A. Shaw of counsel), for respondent.

WITNESSES

Lo Hsen Kuo, for petitioners; Jiang Hua, and Geovanna Giraldo, for respondent.

WHEREAS:

The petition for review in the above-captioned case was filed with the Industrial Board of Appeals (Board) on September 4, 2009. In response, the Commissioner of Labor (Commissioner, DOL [Department of Labor], or respondent) filed a motion to dismiss the petition which was denied by the Board by letter dated May 3, 2010, after briefing by the parties. An answer was thereafter filed on June 4, 2010. Upon notice to the parties, a hearing was held on May 17, 2011, in New York City before Anne P. Stevason, Esq., Chairperson of the Board and the designated hearing officer in this proceeding. Each party was afforded a full opportunity to present documentary evidence, to examine and cross-examine witnesses, to make statements relevant to the issues, and to make closing statements.

The Commissioner issued two orders against petitioners Lo Hsen Kuo and Five-Star Class Dancing Studio, Inc. (together, petitioner) on July 30, 2009. An Order to Comply with Article 19 (Wage Order) directs payment to the Commissioner for wages due and owing to claimant Jiang Hua (claimant or Hua) and Xu Hua Niu (Niu) in the amount of $38,025.25 with interest continuing thereon at the rate of 16% calculated to the date of the Wage Order, in the amount of $7,617.68, and assesses a civil penalty in the amount of $28,518.93, for a total amount due on the Wage Order of $74,161.86.

The Order under Articles 6 and 19 of the Labor Law (Penalty Order) assesses a civil penalty against the petitioner in the amount of $1,500.00: $750.00 for failing to provide requested payroll records for the period of June 4, 2002 through October 19, 2008; and $750 for failing to provide each employee with a wage statement with every payment of wages during the same time period.

The main allegations of the petition are that petitioner never employed claimant Hua and that although Niu worked for petitioner, he has been properly paid under the law. The Commissioner filed an answer basically denying the allegations of the petition and additionally, alleged that petitioner failed to keep or furnish required time and payroll records and therefore, the Commissioner relied on the employees' statements and that initially, petitioner alleged that it had no employees at all.

SUMMARY OF EVIDENCE

Petitioner Lo Hsen Kuo (Kuo) is the president and manager of Five-Star Class Dancing Studio, Inc. (Five-Star). Five-Star is a social club where customers dance, exercise, socialize and drink tea. It was incorporated in 2001.

In June 2008, Hua filed a claim with DOL against petitioner alleging that he worked at Five-Star as a helper/waiter from November 15, 2001 to April 20, 2008. From November 2001 to July 2006, claimant was paid $25.00 per day plus tips and worked 5 days per week. Thereafter claimant was paid $10.00 per day plus tips and worked 4 days per week. Claimant received $40 to $50 per day in tips. Claimant received extra money 3 to 4 times per month if there was a party. Claimant received no tips directly from the customers during the parties but only received cash from petitioner which he would share with other waiters. Hua testified that that he had to sign his name on a record each time that he was paid by petitioner. During the DOL investigation Hua submitted sworn statements from other waiters and customers of Five-Star that Hua was employed there.

Claimant worked from approximately 12:30 p.m. to 12:00 a.m. each day. He was given a meal plus a one hour meal period. Claimant testified that he was paid weekly. He stopped working for Five Star on approximately April 28, 2008.

Senior Labor Standards Investigator Geovanna Giraldo (SLSI Giraldo) testified that she oversaw the DOL investigation of Five Star. DOL visited petitioner on October 20, 2008, and interviewed Niu and petitioner Kuo. An Interview Sheet signed by Niu was admitted into evidence which stated that Niu worked 4 days per week from 12:30 p.m. to 10:30 p.m., was given a one hour break and was paid $13.00 per hour in cash once a week.

The sheet also indicates that Nui was one of 3 employees of petitioner. At the time Kuo admitted that she did not have any record of employee hours.

A Notice of Revisit was left with petitioner which indicated that DOL would return to inspect payroll and time records, etc. The revisit was rescheduled twice and on November 18, 2008, petitioner, along with her attorney, brought yearly payroll summaries for the years 2002 through 2008. The only two people listed in the summaries were petitioner Kuo and her daughter Cindy Kuo, except for 2004 when the names Hui Yu Kuo and Xi Hong Feng were also listed. At a later date, petitioner's attorney sent Five-Star's Quarterly Tax Reports, which also listed only petitioner and her daughter as the only employees from 2002 to 2008, with the exception of 2004. An affidavit signed by petitioner Kuo on December 8, 2008, was also included that stated that Kuo communicated with other employees of Five-Star and determined that Hua did not work for petitioner at any time for the past 6 years.

Petitioner Kuo testified that she and her daughter were the only employees at Five-Star but then stated that after 2006, she would hire "part-time workers" once or twice a week to help clean. At hearing, Kuo identified claimant but stated that she did not know that his name was Jiang Hua. Kuo testified that Hua started working in 2006 and worked about 3 to 4 hours a day, two days per week, 30 to 40 hours per month. Kuo testified that she paid him $8 to $10 per hour in cash and that she paid him daily. No records were kept of the part-timers' work. The quarterly tax records produced by petitioner did not include any record of the part-time workers. Five Star was open 7 days per week. It opened at 12:00 p.m. and was open every afternoon. However, it would not be open at night when there were few customers.

DOL conducted an audit of wages that were due Hua and Niu based on Hua's claim and Niu's interview statement. DOL gave petitioner credit for a one hour meal period plus providing one meal per day as well as a tip allowance, which reduced the required minimum wage. It also gave Hua spread shift pay since his shift began and ended more than 10 hours apart. The audit determined that Hua was due $36,146.45 in unpaid wages and Niu was due $1,878.80. A request for payment was sent to petitioner which was not paid and then the Orders to Comply were issued.

DISCUSSION AND 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 petitioner's burden to prove the allegations in the petition by a preponderance of evidence.

B. Petitioner failed to keep required records.

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."

Section 142-2.7 further provides:

> "Every employer . . . shall furnish to each employee a statement with every payment of wages, listing hours worked, rates paid, gross wages, allowances, if any, claimed as part of the minimum wage, deductions and net wages."

Therefore, it is an employer's responsibility to keep accurate records of the hours worked by its employees and the amount of wages paid, and to provide its employees with a wage statement every time an employees is paid. This required recordkeeping provides proof to the employer, the employee and the Commissioner that the employee has been properly paid.

Petitioner did not maintain any time records. Quarterly tax reports and payroll summaries were provided for the years 2002 to 2008 (with the exception of 2004) which listed only petitioner Kuo and her daughter as employees. However, petitioner Kuo admitted that there were part-time workers during this time who helped with serving and cleaning up. Yet there were no records for them. Kuo also testified that the claimant never worked for her but then admitted that he did work for her after 2006 on a part-time basis under a different name. Yet there were no records for claimant, before or after 2006. Time and payroll records must be kept for all employees, including temporary, part-time workers.

Therefore, the Board finds that petitioner failed to keep the required records.

C. In the absence of adequate employer records DOL may utilize the best available evidence in determining the amount of unpaid wages.

Where an employee files a complaint for unpaid wages with DOL and the employer has failed in its statutory obligation to keep records, the employer bears the burden of proving that the employee was paid. Labor Law § 196-a provides, in relevant part:

> "Failure of an employer to keep adequate records, in addition to exposing such employer to penalties . . . shall not operate as a bar to filing of a complaint by an employee. In such a case the employer in violation shall bear the burden of proving that the complaining employee was paid wages, benefits and wage supplements."

In the case of *Angello v Natl. Fin. Corp.*, 1 AD3d 850 (3d Dept 2003), DOL issued an order to an employer to pay wages to a number of employees. The order was based on the employees' sworn claims filed with DOL, because the employer had failed to keep required employment records. The employer filed a petition with the Board claiming that the claims and therefore, the order, were overstated. In its decision on the petition, the Board reduced some of the claims. The court, on appeal, held that the Board erred in reducing the wages since the employer failed to submit proof contradicting the claims. Given the burden of proof in Labor Law § 196-a and the burden of proof which falls on the petitioner in a Board proceeding, 12 NYCRR 65.30, "the burden of disproving the amounts sought in the employee claims fell to [the employer], not the employees, and its failure in providing that information, regardless of the reason therefore, should not shift the burden to the employees" (*Id.* at 854).

Even in the absence of employee claims, the petitioner's burden of proof, in the absence of records of the actual hours worked and wages paid, is to submit sufficient proof as to provide an accurate estimate of the hours worked and wages paid (*Matter of Mohammed Aldeen*, PR 07-093 [March 28, 2008] *aff'd sub nom. Matter of Aldeen v Industrial Appeals Board*, 82 AD3d 1220 [2d Dept 2011]).

In *Anderson v Mt. Clements Pottery Co.*, 328 U.S. 680, 687-88 (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."

Anderson further opined that the court may award damages to an employee, "even though the result be only approximate. . . [and] [t]he employer cannot be heard to complain that the damages lack the exactness and precision of measurement that would be possible had he kept records in accordance with the [recordkeeping] requirements of . . .the Act (*Id.* at 688-89).

As the court stated in *Garcia v Heady*, 46 AD3d at 1090:

> "The record reveals that petitioner failed to maintain records of the hours claimants worked and/or provide them with wage stubs, thus compelling DOL to employ an alternate analysis to ascertain the number of hours that claimants worked and, in turn, imposing upon petitioner the burden of demonstrating the unreasonableness of DOL's calculations."

In the instant case, petitioner had no records of the hours worked or monies paid to either Hua or Niu, although Kuo admitted that both individuals worked for her. Therefore, the only information available to DOL to make its calculation of unpaid wages owed were the complaint of Hua and the interview of Niu. Since petitioner failed in its obligation to keep precise records, DOL had to rely on this information, even though it may only be an estimate, in making their calculations.

Petitioner requests that the Order be modified to reflect the amounts received by claimant when he worked parties a few times per month. However, there were no records of these amounts and Hua's testimony was inconclusive as to whether the monies paid were tips or regular wages. Therefore, petitioner failed to prove whether these were wages that should be credited or the amounts that should be credited. The Board will not credit any monies received for parties.

The Board affirms the finding that $38,025.25 is owed in unpaid wages.

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."

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 Orders. We therefore affirm the civil penalties as valid and reasonable in all respects.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The Order to Comply with Article 19 of the Labor Law (Wage Order) is hereby affirmed;

2. The Orders to Comply with Articles 6 and 19 or the Labor Law (Penalty Order) is hereby affirmed; 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 Albany, New York, on
December 14, 2011.