STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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In the Matter of the Petition of:	:	
HEENAM BAE AND DAEKYUNG BAE AND FANCY LEXINGTON AVE. CLEANERS, INC. (T/A MME LUCILLE CLEANERS),	:	
Petitioners,	:	DOCKET NO. PR 09-298
To Review Under Section 101 of the Labor Law: An Order to Comply with Article 19 of the Labor Law and an Order Under Article 19 of the Labor Law, both dated August 27, 2009,	:	<u>RESOLUTION OF DECISION ON APPLICATION FOR RECONSIDERATION</u>
- against -	:	
THE COMMISSIONER OF LABOR,	:	
Respondent.	:	

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APPEARANCES

Klein, Zelman, Rothermel, LLP (Jesse Grasty of counsel), for the petitioners.

Pico Ben-Amotz, Acting Counsel, NYS Department of Labor (Larissa C. Bates of counsel), for respondent.

WHEREAS:

On October 26, 2009, the petitioners filed a petition with the Industrial Board of Appeals (Board) seeking review of two orders issued by the respondent Commissioner of Labor (respondent or Commissioner) on August 27, 2009. A hearing was held on October 21 and December 2, 2010, and the Board issued a resolution of decision on July 26, 2011 affirming the orders except to the extent that the amount of wages and civil penalties due was modified based on the evidence at hearing. The Board issued a corrected and reissued resolution of decision on September 9, 2011, correcting a mathematical mistake in the July 26 decision.

The petitioners filed a motion pursuant to Board Rules of Practice and Procedure 65.41 (12 NYCRR 65.41) to reconsider the Board's September 9 decision on the grounds that the Board applied an improper burden of proof on the petitioners, that the petitioners

provided an accurate estimate of the hours worked by the claimant, the Board failed to address the inadequacy of the investigation, the claimant is not credible, and the Board failed to address that the orders were based on inaccurate calculations. For the reasons set forth below, we deny the petitioners' motion to reconsider.

The petitioners argue that their burden of proof in this proceeding was to prove by an accurate estimate that the claimant worked less than 40 hours a week. We disagree. In our recent decision in *Matter of Ram Hotels, Inc.*, PR 08-078 (October 11, 2011), we explained that in the absence of required records of hours worked and wages paid, the burden of proof before the Board is to "show that the order is not reasonable by a preponderance of the evidence of the specific hours that employees worked and that employees received payment for the time that they worked or other accurate evidence that shows the Commissioner's findings to be unreasonable." This is consistent with our prior decisions explaining that where an employer fails to maintain required wage and hour records, its burden is to "submit sufficient proof so as to provide an accurate estimate of the hours worked" by the employees (*see Matter of Mohammed Aldeen et al.*, PR 07-093 [May 20, 2009] *confirmed*, 92 AD3d 1220 [2d Dept 2011]). Accordingly, the petitioners' burden of proof in this proceeding was to establish an accurate estimate of the hours the claimant worked each week, which is not the same as showing, even if we found it credible, that the claimant worked on average less than 40 hours a week over the claim period. As we explained in our decision of September 9, 2011, and as further explained below, the petitioners did not meet this burden proof.

The petitioners argue on this motion that they established an accurate estimate of the hours the claimant worked. As we stated in our September 9 decision, the petitioners' method of using averages to estimate the hours the claimant worked each week during the more than five year claim period did not establish a sufficiently accurate or credible estimate of the hours the claimant worked. The petitioners' estimate is based on assumptions that the Board did not credit. The petitioners' estimate was based on dry cleaning revenue figures absent the underlying sales receipts[1], an estimated average press rate for the claimant, and an average price per piece. For example, in August 2001, the petitioners estimate that the claimant worked 35 hours a week based on $26,554.00 in total dry cleaning revenue for the two stores the claimant pressed for, which, according to the petitioners meant that the claimant pressed 5,311 pieces because an average piece costs $5.00, and that he could not have worked more than 35 hours a week that month based on an industry average press rate of 35 pieces an hour (5,311 pieces ÷ average press rate of 35 = 152 hours worked for the month ÷ 4.3 weeks in a month = 35 hours worked per week).

We criticized this method of estimating the claimant's hours worked, because the only proof that an average piece costs $5.00 is the self-serving testimony of Damon Bae that to get from the revenue figures to the number of pieces pressed:

[1] During the first day of hearing, the hearing officer cautioned the petitioners that the revenue figures on the spreadsheets produced by the petitioners were not probative without the underlying sales receipts. Indeed, the hearing officer agreed to adjourn the hearing so that the petitioners could provide those documents; however, no such records were produced on the second day of hearing.

"You just divide by five, that's the average price per piece in a given store. So some pieces, you know, some items, you know, cost \$5.00. Most items cost roughly around \$5, give or take, and then, you know, you have some dresses that cost more, jackets cost more, sweaters cost less, skirts cost less. So you average out the five. And it's actually very accurate, believe it or not. If you take the total number of revenues and you figure out how many pieces it is, it really is very accurate. It really averages about to five because you're dealing with so many pieces."

We simply cannot accept this assumption absent some supporting documentation of the actual cost of each piece pressed by the claimant, or at least a representative sample.

We further criticized this method of estimating the hours worked by the claimant, because the number of pieces pressed may have been arbitrarily assigned. Bae testified, for example, that in determining how many pieces to assign to a particular garment:

". . . there's so much variation with clothes, so it's more of a judgment call . . . you know, if you have a pleated skirt and there [are] a ton of little pleats that's going to take forever to press, so. You have to sit there line it up and hand iron everything with a steam iron. That's going to take forever. So then we give about five, six, seven or even eight pieces or four garments for that one."

He further testified that during the period where records were kept of the pieces pressed by the claimant that:

"The pressers had the same pay schedule, and then, you know, if it was something a little bit out of the ordinary like let's say you're pressing a fancy ball gown or something like that, then he would say, oh, I think I should get ten rings[2] for this. The guy who checked the clothes would say, okay, well, you know, I don't know about ten rings, I can give eight for this."

Such testimony indicates that the nature of determining how many pieces to assign a particular item was subject to debate, and certainly not as scientific as the petitioners would like us to believe. Furthermore, the parties agree that different items take different amounts of time to press, with more complicated items taking longer.

Finally, we criticized the petitioners' reliance on an industry wide average press rate of 35 to accurately estimate the hours worked each week by the claimant. For the limited time period during which records were kept of the pieces pressed by the claimant and the hours he worked, we found that there was no meaningful correlation between the hours the claimant worked and the number of pieces he pressed that would justify using an average press rate to accurately estimate the number of hours he worked in any given week during

[2] One ring is one piece, two pieces is a garment.

the preceding five year period. Even during that very small sample of ten weeks where records were kept, the number of hours worked by the claimant varied from 33 ½ the week of January 31, 2005 to 56 ½ the week of April 4, 2005. The records show that in the same number of hours, the claimant pressed significantly differing numbers of pieces. For example, the week of March 7, 2005, the claimant pressed 1,515 pieces in 45 ½ hours, whereas the following week, he pressed 1,823, or 308 more pieces, in approximately the same number of hours (45 1/3). These records also indicate, that while during the ten weeks for which records do exist, the claimant pressed an average of 35 pieces per hour, his rate actually varied from 26.2 pieces per hour the week of January 31, 2005 to 41.9 pieces per hour the week of March 28, 2005. The petitioners argue that we should essentially throw these two weeks out as outliers because they were extremes; however, we do not accept this argument. Instead, we find that the average number of pieces pressed per hour does not accurately predict the hours the claimant worked since it is dependent on the total number and type of pieces, and is based on an insignificant sample size (ten weeks out of a more than five year claim period).

We also did not credit Bae's nonspecific testimony of the hours the claimant worked. He testified that the claimant started work each day between 8:00 a.m. and 8:30 a.m., and that on slow days he finished his work at 1:00 p.m., on busy days he finished between 3:00 p.m. and 3:30 p.m., and on busier days he finished at 4:00 p.m. to 4:30 p.m. He further testified that the claimant's hours varied:

> "Well, depends on the day, you know. Every day it varies. Busy days, you know, busy days it would be around like 4:00, 5:00 on Monday, Tuesday. Maybe Wednesday was a little slower, Thursday, Friday was even slower than that. Some days he would work until 3:00, some days he would work until 2:00, some days he'd work until 3:30, 2:30. It really varies. One, 1:30. It really varied."

Finally, Bae testified that the claimant sometimes worked past 5:00 p.m., and very rarely worked past 6:00 p.m. This testimony, as a whole, is simply too general to meet the petitioners' burden. Based on Bae's testimony, the claimant could have worked anywhere from 8:00 a.m. to 6:00 p.m. on any given day[3]. There is absolutely no credible evidence in the record as to which specific days during the more than five year claim period were busy, and which were busier, and which were slow.

We also found that the petitioners' estimate was not an accurate estimate, because it could not have accurately reflected the hours the claimant worked during the busy season, which Bae testified was April, May, June, August, September, October, and half of November, during which months an additional presser was hired to assist the claimant with the increase in work. Since the petitioners did not include the additional presser in their estimates, and assumed that the claimant pressed all the pieces during the busy months, they clearly overestimated his hours, which they argue supports their theory that he could not

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[3] The petitioners in their motion to reconsider correctly point out that in our decision of September 9, 2011, we mischaracterized Bae's testimony about busy days and slow days. We have clarified it here.

have worked more than 40 hours per week. We, however, find that this exposes yet another flaw in the estimate made by the petitioners. In August 2001, which was during what Bae testified was the busy season, the petitioners estimate that 1,782 pieces were pressed by the claimant and that he therefore worked an average of 35 hours per week. However, this is not accurate based on Bae's testimony that the claimant had help during busy months such as August. Accordingly, the claimant would actually have worked 17 ½ hours per week during that time period or an average of less than three hours per day. We simply do not find it credible that the petitioners paid the claimant $500.00 for a 17 ½ hour work week. Furthermore, the variation in total pieces between the slow months and the busy months as reflected in the petitioners' estimates does not appear so great as to justify help for the claimant. Bae testified that January was a slow month, but the records produced by the petitioners show that in January 2001, the piece count was 1,627, which was only 155 less pieces than in the busy month of August.

Finally, the petitioners argue that the testimony of their rebuttal witness, Donovan Allen, corroborates their estimate that the claimant could not have worked more than 40 hours a week. We disagree. As set forth in our September 9 decision, Allen's testimony was vague and imprecise. Allen, for example, testified that he worked the same hours as the claimant and that the hours varied. They were supposed to work from 8:00 a.m. to 3:00 p.m. or 4:00 p.m., but hardly ever worked those hours, instead working from 9:00 a.m. or 9:30 a.m. until "sometimes 1:00, 2:00 or something like that because there wasn't enough work there. He further testified that he (and the claimant) finished work at 1:00 p.m. four days a week in 2004. This testimony is too vague and inaccurate to meet the petitioners' burden of proof as there is no way to know from the testimony how many hours the claimant worked in any particular week, or even in an average week.

The petitioners having failed to produce an accurate estimate or negate the reasonableness of the respondent's estimate, we affirmed the orders based on the testimony of the claimant, which, as described in detail in our September 9 decision, we found credible.

Significantly, the petitioners have failed to address an issue the Board found compelling in this case – that the petitioners paid the claimant $500.00 per week in a combination of check and cash with the check portion reflecting 40 hours at minimum wage, and the cash portion representing what Bae termed "overtime, extra work, bonus, whatever you want to call it." We do not find the respondent's determination that the claimant worked overtime unreasonable in light of such evidence.

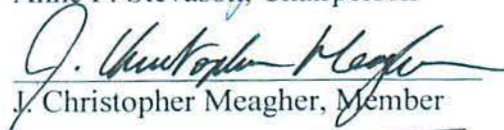
The petitioners' other arguments that we failed to consider the inadequacy of the investigation or address that the orders were based on inaccurate calculations are without merit. The Board conducted a *de novo* hearing in this matter and to the extent that the orders were based on inaccurate calculations, modified the orders based on the credible testimony and directed the respondent to recalculate the wages due and owing and pro-rate the civil penalty (*see* Labor Law 101 [3]).

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

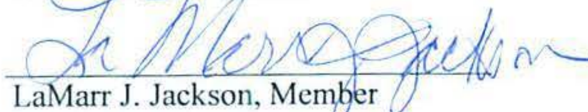
1. The Board's decision of September 9, 2011, is clarified by this decision, and otherwise confirmed; and

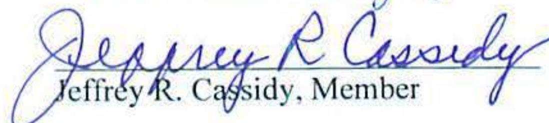
2. The motion for reconsideration be, and the same hereby is, denied.

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
December 14, 2011.