

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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In the Matter of the Petition of: :

GUILLERMO M. RAMIREZ AND JULIO C. :
VENTURA AND MEMO APPAREL, INC. (T/A :
HART KNITWEAR, INC.), :

Petitioners, :

DOCKET NO. PR 09-354

To Review Under Section 101 of the Labor Law: :
An Order to Comply with Article 19 of the Labor Law :
and an Order Under Articles 6 and 19 of the Labor :
Law, both dated October 7, 2009, :

RESOLUTION OF DECISION

- against - :

THE COMMISSIONER OF LABOR, :

Respondent. :
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APPEARANCES

Simon, Eisenberg & Baum, Sheldon Karasik, Esq. of Counsel, for the petitioners.

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

WITNESSES

Guillermo M. Ramirez, Libia Castillo, Margarita Gomez, Maria Merino, Maria Ramirez, Elidia Pena, Raul Padilla and Lorenza Segunda for the petitioners; Labor Standards Investigator Erika Castillo, Supervising Labor Standards Investigator Maritza Lamboy, Miriam Flores, Patricia Hernandez, and Elia Ruiz for the respondent.

WHEREAS:

The petition in this matter was filed with the Industrial Board of Appeals (Board) on December 3, 2009, and seeks review of two orders that the Commissioner of Labor (Commissioner or respondent) issued on October 7, 2009, against the petitioners Guillermo M. Ramirez, Julio C. Ventura and Memo Apparel, Inc. (T/A Hart Knitwear, Inc.)

(collectively, petitioners). Upon notice to the parties a hearing was held on November 17, December 3 and December 30, 2010 in New York, New York, before Devin A. Rice, Associate Counsel to 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 file post-hearing briefs.

The first order is to comply with Article 19 of the Labor Law (wage order). It finds that the petitioners failed to pay minimum wages in the amount of \$37,043.77 to 12 named employees from October 18, 2003 to October 27, 2007. The wage order further finds interest due at the rate of 16% calculated to the date of the order, in the amount of \$14,137.15, and assesses a 200% civil penalty in the amount of \$74,087.54, for a total amount due of \$125,258.46.

The second order is under Articles 6 and 19 of the Labor Law (penalty order). It finds that the petitioners failed to pay weekly wages to manual workers not later than seven calendar days after the end of the week in which the wages were earned, failed to keep and/or furnish true and accurate payroll records for each employee, and failed to provide each employee with a statement with every payment of wages, listing gross wages, deductions, and net wages. The penalty order assesses a \$1,000.00 civil penalty for each of the three counts, for a total civil penalty of \$3,000.00. The petitioners do not challenge the penalty order which is therefore affirmed.

SUMMARY OF EVIDENCE

On September 24, 2007, Miriam Flores filed a claim at the Department of Labor's (DOL) offices at 75 Varick St, New York, NY. Labor Standards Investigator (LSI) Erika Castillo assisted Flores to file her claim by translating the claim form for her from English to Spanish and then writing Flores' responses in the appropriate boxes on the form. Flores' claim alleges that she worked for Memo Apparel, Inc. under the supervision of petitioner Guillermo Ramirez from May 9, 2004 to September 19, 2007. The claim alleges that Flores' hours of work were Monday to Thursday from 7:00 a.m. to 5:30 p.m., Friday from 7:00 a.m. to 4:00 p.m., and Saturday from 7:00 a.m. to 3:00 p.m. and that she was paid piece rate. A notation on the claim form states that the employer asks the employees to punch in from 8:00 a.m. to 4:30 p.m. but most employees start work around 6:30 or 7:00 a.m. and work until 5:30 or 6:00 p.m. Ms. Flores attached to her claim form a list of pieces she alleged the petitioners had not paid her for from the weeks of September 9, 16, and 23, 2007, totaling \$979.53.

DOL assigned LSI Pilar Castillo, who at the time of hearing was no longer employed by DOL, to investigate Flores' claim, under the supervision of then Senior LSI Maritza Lamboy. LSIs Pilar Castillo and Rashid Hart interviewed employees at the petitioners' garment factory in Brooklyn, NY on October 22, 2007. DOL's records of the investigation indicate that four of the petitioners' employees – Maria Del Rosario, Maria Ramirez, Elidia

Pena, and Margarita Gomez – were interviewed on October 22, 2007. Of those employees, only one, Elidia Pena stated that she worked more than 40 hours a week.

DOL issued a notice of revisit to the petitioners indicating the investigators would return on November 6, 2007 to review payroll records. On November 6, 2007, LSIs Pilar Castillo and Michella Angel returned to the petitioners' garment factory and were provided time cards and payment sheets. LSIs Pilar Castillo and Feng [first name not in evidence] visited the petitioners' garment factory again on November 14, 2007 at approximately 7:10 a.m. where they found employees already working and no time cards punched. An interview form indicates that at that time, LSI Pilar Castillo interviewed Camillo Ponce who stated that he started work at 7:00 a.m. on Monday through Friday, and at 8:00 a.m. on Saturday. He further stated that he punched his time card at 8:00 a.m. each day. The notes of Ponce's interview indicate that he was paid \$7.15 an hour, was not paid overtime, did not receive a wage statement, and took a half hour each day for lunch.

Senior LSI Lamboy testified that the wages found due were calculated by using:

“a sample of Ms. Flores' statement because apparently they were not getting paid on an hourly basis, but however, it seems that based on the piece rate they were getting at least the state minimum wage. So we used the number of hours they worked and then we just assumed that for the employer's benefit that they were getting the state minimum wage and then we computed overtime . . . because we determined that the records were not accurate and there was – when we did the surveillance there – we saw employees working. We assumed that they worked a number set of hours [sic] from, if I remember correctly. Some worked 56 hours and some worked maybe less or more.”

Senior LSI Lamboy further explained that DOL used a 56 ½ hour workweek for every named employee for every week and that the wages due and owing were the “half time for any hours worked after 40.” Lamboy believed that DOL used 56 ½ hours based on information from the interviews DOL conducted of those employees; however, there are no records that any employees other than the claimant ever stated that they worked 56 ½ hours a week, and only Elidia Pena informed DOL she worked more than 40 hours a week, and even her interview sheet indicates she told DOL that she worked only 50, not 56 ½, hours a week.

Senior LSI Lamboy testified that there are no records of an interview with Raul Padilla, but he was listed in the wage order as working 56 ½ hours per week because “the 56 and a half hours is an average, it's an average because we don't have accurate records.” She further explained that based on a single visit to the factory, DOL “decided on 56 and a half hours based on Ms. Flores' statement and the fact that people were working additional hours that were not noted on the time cards.¹”

¹ In fact, Flores listed her hours as Monday to Friday 7:00 a.m. to 6:00 p.m. and Saturday 7:00 a.m. to 4:00 p.m., with a ½ hour per day for lunch, which totals 60 hours worked per week.

Petitioner Guillermo Ramirez testified he was the owner and manager of Hart Knitwear from 2003-2005, and of Memo Apparel from August 2006 to present. He testified that he was "in charge of the whole thing." According to Ramirez, his garment factory, which manufactured sweaters, operated only from June to December and was closed the rest of the year. He acknowledged that Patricia Hernandez, Libia Castillo, and Miriam Flores had worked for both Hart and Memo, and that Margarita Gomez, Raul Padilla, Maria Merino, and Gloria Zhiazia had worked for Memo, although he stated that Padilla had not worked for the entire time period listed in the wage order. Ramirez produced time cards and payment records for those employees, but they were not complete because of Ramirez's "own negligence and also because [he didn't] have anyone to help [him] organize."

Ramirez testified that the petitioners' employees' wage rate "is always minimum salary, minimum wage" and that the employees did not make the same every week, but their hourly salary was always the same. Employees punched a time clock that recorded the hours they worked and automatically deducted half an hour for lunch.² He testified that he paid the employees in cash based on the number of hours they worked and that "it was very few days [sic] that someone may have worked a little more than 40 [hours], an extra hour or so."

Ramirez acknowledged that on November 14, 2007, his employees were already working at around 7:00 a.m. when DOL investigators arrived at Memo Apparel, and that those employees had not yet punched in on the time clock. He explained that "I told the workers I would pay them that separately, whatever it was, which was normally half an hour that I would pay them separately. I was going to give them an extra bonus." He further explained "that was only one day. I don't usually do that. That day had an emergency [sic] and that was the reason, but I never do that." However, Ramirez further testified that this had happened on other days – "I don't remember, but possibly one, two days, but what I tell you is I don't make them work more than eight hours."

Several employees and former employees of the petitioners testified on their behalf. Libia Castillo, Margarita Gomez, and Maria Merino all testified that during the time they worked for the petitioners, they worked 40 hours a week or less, 8 hours per day, started work at 8:00 a.m. and finished at 4:30 p.m., had a half an hour lunch break each day, were paid every Friday, and believed the petitioners had paid them for all the hours they had worked. One employee, Margarita Gomez, could not remember which days of the week she worked. Elidia Pena, who was interviewed by DOL as part of its investigation, gave similar testimony. When asked to explain why her testimony differed from her statement to DOL, specifically that she testified she worked 8:00 a.m. to 4:30 p.m. but told the DOL investigator she worked 7:00 a.m. to 5:30 p.m., she said "that day the [LSI] supervisor [sic] arrived to ask us questions and asked me some questions. She got me very nervous and she like forced me to say this, and because of my nerves, I said 7, but the times we worked are from 8 to 4:30, no more . . . she kept asking me do I come in at 7. She was making me do it. So many questions she got me very nervous so I just told her yes." Pena further testified that all of the other information on the interview sheet – her name, address, phone number, salary, pay day, the name of her manager at Memo Apparel – was correct. Pena,

² The time clock also appears to have rounded to the nearest 15 minute time increment.

additionally testified, when asked whether the investigator she spoke to was a man or a woman, testified that the investigator was a man.

Raul Padilla also testified on behalf of the petitioners. He worked for the petitioners from 2005 to December 2007. He generally worked from 8:00 a.m. to noon or 1:00 p.m. or sometimes one or two hours later while he cleaned his work station. He worked Monday to Friday approximately four hours a day, 20 hours a week, and was paid on Fridays. He testified that he was paid a piece rate and that his wages were calculated "by the dozen," meaning the petitioners paid him \$1.50 for every dozen sweaters he pressed. He estimated that he pressed an average of 20 dozen sweaters a day. The petitioners have paid him for all the dozens he pressed for them. He testified that the petitioners' wage records did not indicate the number of pieces he pressed. With respect to the record of his hours noted on the wage records he stated "I would like to say that [on the wage records] he placed the hours, but I did not work for hours, but for piece rates. These hours don't have any importance for me."

The claimant, Miriam Flores, testified for the respondent. She made sweaters for the petitioners at both Hart Knitwear and Memo Apparel. Her supervisor was petitioner Guillermo Ramirez. She testified that she was paid piece rate by the dozens of pieces that she sewed, and explained that the rate per dozen depended on the style of the sweaters – "my payment was done on the basis of the dozens that I did. Not on the basis of the time that appeared on my timecard." She testified that she worked from 7:00 a.m. to 6:00 p.m. six days a week, sometimes seven. She clarified that her normal schedule was Monday to Friday 7:00 a.m. to 6:00 p.m., although some weeks she worked only until 5:00 or 5:30 p.m., and that on Saturdays she worked 7:00 a.m. to 4:00 p.m. She testified on cross-examination that on Fridays she worked only until 4:00 p.m. or 4:30 p.m. She put 5:30 p.m. down on her claim form as the time she stopped work each day, because it was the average between 5:00 and 6:00 p.m.

Flores testified that she did not punch her time card when she arrived at work, stating that "I would sign in from 8 in the morning to 4:30 . . . because Mr. Ramirez would tell us that we should only sign in for 40 hours." She explained that Ramirez directed her to punch in at 8:00 a.m. and out at 4:30 p.m., and that she continued to work each day after she had punched out. Flores testified that other employees worked the same number of hours as she did and that "most of them would arrive at 7 in the morning. But there were some that would arrive at 6:30 or even 6 in the morning." She further testified that "most of them remain until 6." She testified that she knew Libia Castillo and Lorenza Segunda started work at 6:00 a.m., although she could not say whether they arrived at 6 everyday. Others also started work at 6, but she could not remember their names.

Flores stopped working for the petitioners in September 2007. She filed a complaint with DOL because she had not been paid for all her pieces for three weeks in September. She explained that Ramirez fired her because she refused to work until 7:00 p.m.

When the petitioners' attorney showed Flores payment records that she had purportedly signed, she denied having signed those specific documents, but admitted that

she had sometimes signed similar documents. She stated that “the payroll documents that Mr. Guillermo Ramirez gave me on some occasions to sign were not like this . . . they were different . . . I don’t really recall how they were. But they were not like the ones you are showing me.”

Flores testified that each week, she told Ramirez how many dozens of pieces she had completed and he gave her a ticket. On Mondays, she gave the ticket from the previous week back to Ramirez so he could make the payroll. Flores testified that when Ramirez paid her, he gave her an envelope that contained her cash wages. Her name, gross wages, the amount deducted from her wages, and her net wages, were indicated on the envelope’s flap. The date, number of pieces done, and pay rate were not written on the envelope. Flores testified that Ramirez told her the deduction made from her gross wages was for taxes, although she received no document at the end of each year showing how much tax petitioners had paid on her behalf. Flores produced two of these undated envelopes at the hearing which had the following handwritten on the flaps:

Miriam Flores	Miriam Flores
295	210
<u>- 25</u>	<u>- 10</u>
270	200

Flores testified that there were weeks the petitioners did not pay her, and weeks she was only partially paid. She stated that “during the last year that I worked with him in 2007, in reality, one did not know the day that was going to be the pay date . . . normally he paid on Fridays. But sometimes he paid two weeks’ salary; and other time he paid on Tuesday, Wednesday. So we could not know what day.” The petitioners did, however, eventually pay Flores for all the pieces she had done, except for the last three weeks. She noted that although the petitioners’ payment records show she was paid \$150.00 for the week of September 9, 2007, she never received that money.

Patricia Hernandez also testified for the respondent. She sewed sweaters for the petitioners from 2004 to 2007, and Ramirez was her supervisor. She testified she “was never paid by the hour, always by the produce [sic].” Specifically, the petitioners paid her a set amount for every dozen pieces she produced with the amount varying according to the style of the sweaters being sewn. Hernandez’s hours were from 7:00 a.m. to 7:00 p.m. Monday to Friday, and 7:00 a.m. to 4:00 p.m. on Saturday. She had a thirty minute lunch break each day. Payday was supposed to be Friday, but it varied.

Hernandez testified that Ramirez asked her to punch in at 8:00 a.m., even though she started work at 7:00 a.m. She further testified that she punched out at 4:30 p.m., but did not stop working then. When she arrived at work at 7:00 a.m., there were already a few people working, including Libia Castillo, Lorenza Segunda, and Elia Ruiz. She typically left work at 7:00 p.m. with “Monica”, Libia Castillo, and sometimes Lorenza Segunda. With respect to her timecards, she said none of them “reflect the time I came in or left work with Mr. Ramirez.” When shown copies of payment records with her name and signature on them,

she identified her signature but denied that the information shown in the records was accurate.

Hernandez was present at the petitioners' garment factory when DOL investigators came, and she recalled that she spoke to a male investigator "who asked us how many hours had we worked. But since [Ramirez] had already told us that we had to answer 8 hours, we all had to answer the same thing . . . all the persons that were there knew what we had to say because [Ramirez] said it that way." Hernandez remembered that Libia Castillo, Lorenza Segunda, Monica [no last name in record], Camillo Ponce, and Elia Ruiz were there the day the investigator interviewed her. She never signed a statement for DOL and does not believe that the investigator took notes of the interview.

Elia Ruiz also testified for the respondent. She worked for the petitioners from 2006 to June 2010, and was paid \$.50 for each dozen labels she sewed onto sweaters. She estimated that she could sew 50 dozens of labels a day. She testified that she worked Monday to Saturday from 7:00 a.m. to 6:00 or 7:00 p.m.

Ruiz testified that Ramirez had the workers punch in at 8:00 a.m. each day and punch out at 4:30 p.m. She explained that Ramirez "told us that he paid a lot of taxes and he didn't want to pay more. And that's why we worked from 7 to 6 or 7 to 7, but we only signed in for an 8 hour period." Ruiz further testified that "when I arrived at 7 o'clock in the morning, everybody would be there, they would already be working. But when I arrived at 6 or 6:30, Libia, Lorena, Maria [Marino] and Patricia would be there . . . usually I would go at 6, very seldom would I remain to 7. When I would leave, I would usually see Patricia, Libia, Lorenza, and Monica still there."

Ruiz testified that she was interviewed at work by an investigator from DOL, who took notes. Ruiz told the investigator she was paid by the hour, because Ramirez "came ahead of time and told us that the Department of Labor was going to come around and that when they came around we should tell the person who came around what he wanted us to tell them."

The petitioner produced one current employee, Lorenza Segunda, as a rebuttal witness. Segunda testified that she worked for the petitioner for five to six months in 2005, does not remember whether she worked there in 2006, did not work there in 2007 or 2009, and worked a couple of months for the petitioners in 2008. She testified that she always worked 40 hours a week for the petitioners, starting at 8:00 a.m. and finishing at 4:30 p.m., with a 30 minute break each day. She never worked Saturday or Sunday, or worked more than 40 hours a week. She did not remember whether other employees came into work before her, although on days when she worked 7:00 a.m. to 3:30 p.m., she was the only one working that early. She further testified that she was paid on an hourly basis, and never counted the pieces that she did. The number of hours she worked was written on the envelope she received her wages in.

FINDINGS

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

At the outset, we note that the burden of proof in a proceeding before the Board is with the petitioners to show that the order is invalid or unreasonable (Labor Law § 101, 103; 12 NYCRR 65.30). Here, the petitioners, as discussed below, did not produce credible evidence sufficient to meet their burden of proof, and the orders are affirmed subject to recalculation by DOL based on our findings.

We find that petitioner Guillermo Ramirez's testimony was not credible. Ramirez testified that the petitioners' employees were paid an hourly wage rate, which was always the minimum wage, and that they very seldom worked more than 40 hours a week. All but one of the employees who testified on his behalf corroborated this, although Elidia Pena, when interviewed by DOL, stated that she worked 50 hours a week. However, one witness proffered by the petitioners, Raul Padilla, contradicted Ramirez's testimony and said that he was not paid an hourly rate, but was paid by the piece, which corroborates the claim filed by Miriam Flores and the testimony of the respondent's witnesses. Padilla's testimony was not contradicted by the petitioners' other witnesses, none of whom testified about their rate of pay. Furthermore, Guillermo Ramirez admitted that the petitioners' employees sometimes worked off the clock. In light of Flores' claim, the statement Pena originally made to DOL, DOL's surveillance of the petitioners' factory during which employees were observed working off the clock, and the testimony of Flores, Hernandez, and Ruiz that they regularly worked significantly more hours than indicated on their time cards, we do not credit Ramirez's testimony that his employees did not start work before 8:00 a.m. Likewise, we do not credit his testimony that the petitioners' employees were paid an hourly wage rate and rarely worked overtime. His own witness, Padilla, testified that he was paid piece rate, which corroborates Flores' testimony and claim, as well as the testimony of Hernandez and Ruiz. The petitioners' other witnesses did not testify about their pay rates. Furthermore, Ramirez admitted he was negligent in maintaining records and could not provide exact testimony concerning the number of days employees worked off the clock.

We also find that Elidia Pena, Margarita Gomez, and Maria Merino's testimony was not credible. Pena, Gomez, and Merino's testimony was too general and appeared rehearsed – they were asked the same general questions and provided almost identical answers. Furthermore, Gomez could not remember what days of the week she worked. It is not credible that she could be so certain she worked the same 40 hour a week schedule for the entire duration of her employment, but not know which days of the week she worked. Pena did not adequately explain why her testimony contradicted the statement she provided to DOL during its investigation, wherein she said she worked 50 hours a week. She testified that the investigator, who she consistently and repeatedly referred to as *she*, pressured her to say she worked from 7:00 a.m. to 5:00 p.m., but this is not believable because other information she provided the investigator was correct, and when later asked whether the investigator was a man or a woman, she said he was a man despite previously referring to the investigator using the third person feminine pronoun. Indeed, in light of the evidence

produced by the respondent in this case, we find Pena's statement to the DOL investigator was a more accurate statement of her working conditions than her testimony at hearing.

The workers who testified for the respondent, on the other hand, provided credible and specific information about their employment with the petitioners. Flores, Hernandez, and Ruiz each testified that they started work before they clocked in at 8:00 a.m. and continued to work after they clocked out at 4:30 p.m. They explained that petitioner Guillermo Ramirez instructed them to do this. They each testified that they were paid piece rate "by the dozens" and not by the hour, which is consistent with Padilla's testimony. They also each testified that the petitioners' other employees also worked off the clock. This testimony was consistent with the claim Flores filed with DOL, the interview Pena provided to a DOL investigator, and the DOL investigators' observation that on November 14, 2007, the petitioners' employees were working off the clock. Furthermore, Hernandez and Ruiz both offered credible testimony that Ramirez knew he was under investigation by DOL and instructed his employees to lie to DOL investigators.

We find that Lorenza Segunda, who testified on rebuttal, was not credible. Segunda testified in general terms that she worked only 40 hours a week during the few months of the claim period she was employed by the petitioners. She testified inconsistently about her schedule, first stating she always worked from 8:00 a.m. to 4:30 p.m. and later stating there were days she worked from 7:00 a.m. to 3:30 p.m. This testimony was also inconsistent with petitioner Ramirez's testimony that the petitioners' employees started work at 8:00 a.m. She could not remember specific facts such as whether other employees were already working when she arrived at 8:00 a.m., but incredibly she did recall that on days she started work at 7:00 a.m., she was the only one working that early. She testified she was paid an hourly rate, which we do not believe in light of the credible and specific evidence from other witnesses, including the testimony of the petitioners' own witness, Padilla, that the petitioners paid their employees piece rate. She also testified that the number of hours she worked was written on the envelope she received her wages in. This is contradicted by actual pay envelopes in evidence that do not have the number of hours worked written on them.

We find that the time cards and other payroll records produced by the petitioners are not accurate. The record is replete with credible evidence corroborated by surveillance done by DOL that the petitioners' employees worked off the clock. In the absence of accurate time records, DOL may calculate unpaid wages based on the best available evidence (Labor Law § 196-a; *Matter of Mid-Hudson Pam Corp. v Hartnett*, 156 AD2d 818, 821 [3d Dept. 1989]). In this case, DOL found that the best available evidence indicated the petitioners' known employees worked 56 ½ hours and were paid piece rates estimated to equal minimum wage with no overtime premium³. Although then Senior LSI Lamboy was unclear about why this assumption was made, we find that 11 of the 12 named employees

³ For example, the minimum wage in 2007 was \$7.15 an hour. DOL assumed the petitioners paid each employee \$403.98 per week. However, under Article 19, the petitioners were required to pay each employee \$463.97 for 56 ½ hours of work, because they worked 16 ½ hours of overtime which should have been paid at time and one half (See 12 NYCRR 142-2.1 and 2.2). Therefore, DOL assumed each employee was underpaid \$58.99 a week in 2007.

worked more than 40 hours a week and were not paid the overtime premium required under Article 19 of the Labor Law (*See* 12 NYCRR 142-2.2 [“[a]n employer shall pay an employee for overtime at a wage rate of 1 ½ times the employee’s regular rate . . . for working time over 40 in a workweek”). The petitioners owe the employees overtime wages as follows based on the best available evidence.

Wages owed to Miriam Flores

We find based on Miriam Flores’ testimony that she worked from 7:00 a.m. to 6:00 p.m. Monday to Thursday, and 7:00 a.m. to 4:00 p.m. Fridays and Saturdays, with a 30 minute lunch break each day for a total of 59 hours a week. An employer must pay an employee the required minimum wage and overtime for each week of work regardless of whether the wage is on a piece rate basis (12 NYCRR 142-2.9 [“[t]he minimum and overtime wage . . . shall be required for each week of work, regardless of . . . whether the wage is on . . . piece rate”). The petitioners paid Flores piece rate, and the piece rate as evidenced by the two wage envelopes produced by Flores, was less than minimum wage for a 59 hour work week⁴. Nevertheless, DOL determined that the petitioners’ paid their employees minimum wage for all hours worked with no overtime premium and we do not disturb that assumption. Accordingly, we find that the petitioners owe Flores half-time at minimum wage for 19 hours a week for the time period covered by the wage order.

Wages owed to Patricia Hernandez

We find based on Patricia Hernandez’s testimony that she worked from 7:00 a.m. to 7:00 p.m. Monday to Friday, and 7:00 a.m. to 4:00 p.m. on Saturdays, with a 30 minute lunch break each day for a total of 66 hours a week for the time period listed for her in the wage order. As discussed above, DOL determined that the petitioners paid their employees minimum wage for all hours worked with no overtime premium. Accordingly, we find that the petitioners owe Hernandez half-time at minimum wage for 26 hours a week for the time period covered by the wage order.

Wages owed to Libia Castillo

Libia Castillo testified about her hours of work. However, as discussed above, we did not credit her testimony. Flores, Hernandez, and Ruiz each testified that Libia Castillo started work each day before 7:00 a.m., although neither of them could say with certainty what time she actually started work. Ruiz testified that Libia Castillo left work after 6:00 p.m., and Hernandez testified that Libia Castillo left work at 7:00 p.m. We have no evidence she worked weekends. Therefore, we find based on the best available evidence, the testimony of Flores, Hernandez, and Ruiz, that Libia Castillo worked from 7:00 a.m. to 7:00 p.m. Monday to Friday with a 30 minute lunch break each day for a total of 57 ½ hours

⁴ The first pay envelope indicates that Miriam Flores was paid gross wages of \$295.00 for a work week, which is an hourly wage rate of \$5.00 an hour (295/59), which is less than any of the minimum wage rates in effect during the time period covered by the wage order. The second envelope indicated Flores was paid gross wages of \$210.00, which is an hour wage rate of \$3.56 an hour (210/59), which is also less than any of the minimum wage rates in effect during the time period covered by the wage order. (*See* 12 NYCRR 142-2.16).

a week. As discussed above, DOL determined that the petitioners paid their employees minimum wage for all hours worked with no overtime premium. Accordingly, we find that the petitioners owe Castillo half-time at minimum wage for 17 1/2 hours a week for the time period covered by the wage order.

Wages owed to Maria Merino

Maria Merino testified about the hours she worked for the petitioners, but, as discussed above, we did not credit her testimony. Ruiz testified that Maria Merino started work before 7:00 a.m., although she could not say with certainty what time she started work each day. She was not, according to the testimony of Hernandez and Ruiz, among the employees who worked later than 6:00 p.m. We have no evidence she worked weekends. Accordingly, we find that she worked from 7:00 a.m. to 6:00 p.m. with a 30 minute lunch break, five days a week, for a total of 52 ½ hours worked per week. As discussed above, DOL determined that the petitioners paid their employees minimum wage for all hours worked with no overtime premium. Accordingly, we find that the petitioners owe Merino half-time at minimum wage for 12 ½ hours a week for the time period covered by the wage order.

Wages owed to Margarita Gomez

Margarita Gomez testified at hearing, however, as discussed above, we did not credit her testimony. Flores, Hernandez, and Ruiz each testified that the petitioners' employees typically worked from 7:00 a.m. to 6:00 p.m. We have no evidence Gomez worked weekends. We find based on the best available evidence, that Gomez worked 7:00 a.m. to 6:00 p.m. five days a week with a 30 minute lunch break each day, for a total of 52 ½ hours a week. As discussed above, DOL determined that the petitioners paid their employees minimum wage for all hours worked with no overtime premium. Accordingly, we find that the petitioners owe Gomez half-time at minimum wage for 12 1/2 hours a week for the time period covered by the wage order.

Wages owed to Maria Ramirez

Maria Ramirez testified, but as discussed above, we did not credit her testimony. Flores, Hernandez, and Ruiz each testified that the petitioners' employees typically worked from 7:00 a.m. to 6:00 p.m. There is no evidence of the number of days Ramirez worked each week. We find based on the best available evidence, that Ramirez worked 7:00 a.m. to 6:00 p.m. five days a week with a 30 minute lunch break each day, for a total of 52 ½ hours a week. As discussed above, DOL determined that the petitioners paid their employees minimum wage for all hours worked with no overtime premium. Accordingly, we find that the petitioners owe Ramirez half-time at minimum wage for 12 1/2 hours a week for the time period covered by the wage order.

Wages owed to Elidia Pena

Elidia Pena, when interviewed by DOL on October 22, 2007, stated she worked 50 hours a week, and had worked for 1 ½ years for the petitioners. Although she testified at hearing that she only worked 40 hours a week, we find that her statement to DOL reflects a more accurate estimate of the hours she worked for the petitioners than her testimony. We find that the petitioners employed Pena from April 22, 2006 to October 22, 2007, and that she worked 50 hours a week. As discussed above, DOL determined that the petitioners paid their employees minimum wage for all hours worked with no overtime premium. Accordingly, we find that the petitioners owe Pena half-time at minimum wage for 10 hours a week from April 23, 2006 to October 22, 2007.

No wages owed to Raul Padilla

Raul Padilla provided credible testimony about his hours of work for the petitioners. He testified that he worked part-time for the petitioners from 2005 to December 2007, and that he generally worked 20 hours a week. Because, as discussed above, DOL only attempted to recover half-time for hours worked over 40 a week, we find that Raul Padilla is not owed any wages since he did not work overtime.

Wages owed to Maria Bautista

Although there is no evidence that a person named Maria Bautista ever worked for the petitioners, the petitioners did not deny that she worked for them or dispute DOL's finding as set forth in the wage order that the petitioners employed her from October 13, 2007 to October 27, 2007 and failed to pay her \$176.96. Because it was the petitioners' burden to prove that she is not owed the wages set forth in the wage order, which they failed to do, we affirm that portion of the wage order related to Maria Bautista.

Wages owed to Camillo Ponce

Camillo Ponce was interviewed by DOL on November 14, 2007 at approximately 7:10 a.m., and indicated during that interview that he worked Monday to Friday from 7:00 a.m. to 4:30 or 5:00 p.m., and worked Saturdays from 8:00 a.m. to noon, with a half hour lunch break each day. He further stated in his interview that he had worked for the petitioners for three years. Accordingly, we find that Camillo Ponce worked 46 hours a week from November 15, 2004 to November 14, 2007. As discussed above, DOL determined that the petitioners paid their employees minimum wage for all hours worked with no overtime premium. Therefore, we find that the petitioners owe Ponce half-time at minimum wage for 6 hours a week for the time period covered by the wage order.

Wages owed to Luz Rivera

Although there is no evidence that a person named Luz Rivera ever worked for the petitioners, the petitioners did not deny that she worked for them or dispute DOL's finding as set forth in the wage order that the petitioners employed her from October 13, 2007 to

October 27, 2007 and failed to pay her \$176.96. Because it was the petitioners' burden to prove that she is not owed the wages set forth in the wage order, which they failed to do, we affirm that portion of the wage order related to Luz Rivera.

Wages owed to Gloria Zhiahzia

Petitioner Ramirez acknowledged that he employed Gloria Zhiahzia and there are records indicating that she worked for the petitioners. DOL found that she worked for the petitioners from July 7, 2007 to October 27, 2007 and that the petitioners failed to pay her \$1,002.80. We affirm the portion of the wage order related to Gloria Zhiahzia because the petitioners did not provide any evidence to contest DOL's finding regarding the wages owed to her.

Civil Penalty

The Wage Order assesses a 200% civil penalty which the petitioners did not allege to be unreasonable. We, therefore, affirm the civil penalty.

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."

The petitioners' motion for a mistrial is denied

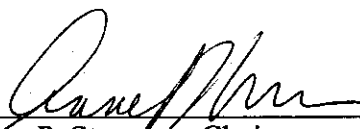
The petitioners moved at hearing and in their post-hearing submissions for a mistrial in this matter on the ground that DOL failed to provide information demanded in a bill of particulars or to identify the information that was withheld. The petitioners argue that a mistrial is warranted because they were prejudiced by DOL's failure to fully comply with their demand for a bill of particulars. We disagree.

The information that DOL failed to provide the petitioners consisted of three items – a contact list for the petitioners' employees, the petitioners' subpoenaed bank records, and a "crim" report. The contact list contained the names and phone numbers of some of the petitioners' employees. The bank records were the petitioners' own records that were subpoenaed by DOL during its investigation. The "crim" report was a financial report on the petitioners that could not be disclosed by DOL due to the terms of the subscriber agreement between DOL and the company that provided the report. While DOL should have provided the petitioners with a list identifying the existence of these records and explaining the reason for not producing them, DOL's failure to do so was harmless error and does not warrant a mistrial. The proper remedy when a party fails to comply with a demand

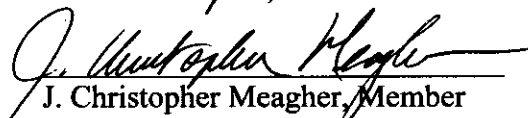
for a bill of particulars is generally preclusion (Board Rules 65.17 [d], 12 NYCRR 65.17 [d]). The petitioners had access to their own bank and financial records, and presumably had the contact information for their own employees. The petitioners were afforded an opportunity to adjourn the hearing so they could review the withheld information. They did not take advantage of such opportunity which would have afforded an adequate remedy for DOL's failure to fully comply with the demand for a bill of particulars. We do not find that the petitioners were prejudiced by DOL's misconduct and deny the motion.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The Commissioner shall recalculate the wages due and owing based on the findings herein not to exceed \$37,043.77, and issue an amended wage order consistent with this; and
2. The penalty order is affirmed; and
3. The petition for review be, and the same hereby is, denied.



Anne P. Stevason, Chairman



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
July 26, 2011.

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Anne P. Stevason, Chairman

J. Christopher Meagher, Member

Jean Grunet, Member


LaMarr J. Jackson, Member

Jeffrey R. Cassidy, Member

Dated and signed in the Office
of the Industrial Board of Appeals
at Rochester, New York, on
July 26, 2011.

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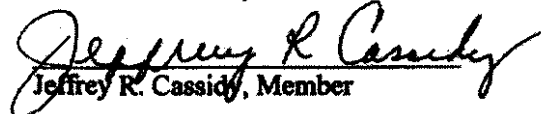
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Anne P. Stevason, Chairman

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
July 26, 2011.