

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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 In the Matter of the Petition of: :
 :
 YUNG JIN HAN T/A HAN'S FOOD DELI, :
 :
 Petitioner, :
 :
 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 February 27, 2009, :
 :
 - against - :
 :
 THE COMMISSIONER OF LABOR, :
 :
 Respondent. :
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DOCKET NO. PR 09-095

RESOLUTION OF DECISION

APPEARANCES

Law Office of Samuel S. H. Ahne, Samuel S. H. Ahne of Counsel, for Petitioner.

Maria L. Colavito, Counsel, New York State Department of Labor, Benjamin A. Shaw of Counsel, for Respondent.

WITNESSES

Pilsang Han for the Petitioner; Labor Standards Investigator Dawn Hughes and Ruben Hernandez for the Respondent.

WHEREAS:

The Petition for review in the above-captioned case was filed with the Industrial Board of Appeals (Board) on April 24, 2009 and was amended on May 11, 2009. Upon notice to the parties a hearing was held on June 11, 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, and to make statements relevant to the issues. Additionally, the parties were allowed an opportunity to submit post-hearing briefs concerning the respondent's position with respect to paid and unpaid break and meal times.

The order to comply with Article 19 (wage order) under review was issued by the respondent Commissioner of Labor (Commissioner) on February 27, 2009 against petitioner Yung Jin Han T/A Han's Food Deli. The order directs compliance with Article 19 and payment to the Commissioner for minimum wages due and owing to claimant Ruben Hernandez in the amount of \$11,029.48 for the time period from November 5, 2001 through November 2, 2007, with interest continuing thereon at the rate of 16% calculated to the date of the order, in the amount of \$2,335.23, and assesses a 50% civil penalty in the amount of \$5,515.00, for a total amount due of \$18,879.71. The order under Article 19 (penalty order) assesses a \$750.00 civil penalty against the petitioner for failure to keep and/or furnish true and accurate payroll records¹.

SUMMARY OF EVIDENCE

Testimony of Pilsang Han

Pilsang Han was the manager of Han's Food Deli, a deli and greengrocery located in New York, New York. Pilsang Han is the son of Yung Jin Han who was the owner of Han's Food Deli during the time period covered by the orders. Han's Food Deli closed in December 2007.

Han testified that the claimant, Ruben Hernandez, worked for Han's Food Deli from 6:30 a.m. to 3:30 p.m. six days a week during the time period covered by the orders. Han further testified that Hernandez took a 30 minute breakfast break and a 30 minute lunch break during each shift. Han's Food Deli allowed Hernandez to eat any food from the deli he wanted during his breaks free of charge. Han stated that during the relevant time period the business hours of the deli were 6:30 a.m. to 7:00 p.m.

Han produced "payroll" documents at the hearing for the claimant that contained a weekly breakdown of the claimant's regular hours worked, regular pay rate, regular wages, overtime hours worked, overtime pay rate, overtime wages paid, net wages paid, and comments. In the comments sections were notations such as "Thanksgiving" or "1 day off" which Han testified indicated days that the claimant had not worked. The records do not indicate the number of daily hours worked by the claimant. Han testified that the "payroll" documents were print outs of information that he had entered into his computer after paying the claimant his "weekly salary" and receiving the claimant's signature. Han lost the original signed papers when he closed his store. Han further testified that customers occasionally gave gratuities to the claimant.

Han testified on cross-examination that the claimant was paid an hourly salary "plus some bonus." The bonus was not recorded in the "payroll" documents. The only deductions taken from the claimant's wages were for time that he did not work. No records were kept of the meals provided by the petitioner to the claimant or of the gratuities he received. Likewise, Han maintained no records of the break time taken by the claimant, but testified he did not pay the claimant for that time.

¹ The petition does not object to the penalty order.

Han also explained on cross-examination that the claimant worked from 6:30 a.m. to 3:30 p.m. each day with one hour deducted for breaks, for a total of 8 hours per day or 48 hours per week, and that this was the claimant's regular schedule. However, Han conceded when reviewing the "payroll" records that the claimant seldom worked exactly 48 hours per week.

Testimony of Labor Standards Investigator Dawn Hughes

Labor Standards Investigator (LSI) Dawn Hughes testified that on December 14, 2007 she made a field visit to Han's Food Deli to investigate a claim for unpaid wages filed by claimant Ruben Hernandez. When LSI Hughes visited the premises, she found that the business was closed and learned from the store's neighbors that the deli had gone out of business a month or so before.

LSI Hughes then contacted the petitioner at his home address notifying him of the claim and requesting a response. Because the petitioner failed to reply to LSI Hughes' letter, she sent a second letter along with a detailed recapitulation sheet of the wages she had determined the petitioner owed the claimant. The recapitulation sheet was based on the hours the claimant alleged that he had worked and the weekly salaries that he listed in his claim form. The petitioner by his attorney then requested a district meeting to discuss the matter.

The petitioner submitted his "payroll" records to LSI Hughes at the district meeting, but she refused to credit them because they did not show the daily hours worked by the claimant and were not supported by original records such as time cards. Additionally, LSI Hughes did not consider the "payroll records" true and accurate or contemporaneous to the time period the claimant worked for the petitioner. Furthermore, LSI Hughes was unable to speak to the claimant's coworkers because the business was closed, and the petitioner did not provide her with contact information for other employees or any other way to verify the information contained in the "payroll" records.

LSI Hughes testified that the wage order was ultimately issued based on the information contained in the claimant's claim form.

Testimony of Ruben Hernandez

Claimant Ruben Hernandez testified that he worked at Han Food Deli from July 1990 until the deli closed in 2007, and that his work schedule from November 5, 2001 to November 2, 2007 was 6:00 a.m. to 3:30 p.m. six days a week with a 20 minute breakfast break and a 30 minute lunch break each day. Hernandez testified that during the time period covered by the orders, he took one week off and did not work on Christmas Day and Thanksgiving.

Hernandez testified that from November 5, 2001 to July 30, 2004, the petitioner paid him \$330.00 per week. Hernandez further testified that the petitioner increased his salary to

\$400.00 per week “at the end, right when they were getting set to close, close down.” He received another raise to \$450.00 per week “just when they were getting ready to shut the door.”

Hernandez testified that he was paid a weekly salary that was always the same regardless of the number of hours he actually worked, and that he regularly worked more than 40 hours a week for which he was never paid time and one-half for the overtime hours.

On cross-examination, Hernandez conceded that where he indicated in his claim form that he had been paid \$360.00 per week from November 5, 2001 to June 30, 2004, he had actually been paid \$330.00 per week. He explained that he stated on his claim form that his wage rate was \$360.00 per week because the petitioner had written a letter for him to a potential landlord during that time period stating that his salary was \$360.00 per week because that was the salary required to rent an apartment.

Hernandez testified that Pilsang and Yung Jin Han opened the deli each day at 6:00 a.m. and that he was there when they opened the store.

Rebuttal Testimony of Pilsang Han

Han testified that during the time period relevant to the orders, he woke up each day around 5:00 a.m., left home between 5:30 and 5:40 a.m. and arrived at the deli around 6:10 or 6:15 a.m. to open the doors. No employees were present at that time. Han testified that the employees did not arrive until 6:30 a.m. The employees ate breakfast from 9:30 to 10:00 a.m. and took their lunch break from 2:00 p.m. to 2:30 p.m. Han did not have records of the hours that he, himself, worked each day or corroboration of the time he arrived at the deli each day.

FINDINGS AND CONCLUSIONS OF LAW

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

The petitioner has the burden to show that the orders are invalid or unreasonable (Labor Law § 101, 103; 12 NYCRR 65.30).

Article 19 requires every employer in the restaurant industry to pay each of its covered employees the minimum wage in effect at the time payment is due (*see* Labor Law § 652). The applicable minimum wage in effect in New York for non-tipped restaurant workers during the time period covered by the wage order was \$5.15 an hour in 2001, 2002, 2003, and 2004; \$6.00 an hour in 2005; \$6.75 an hour in 2006; and \$7.15 an hour in 2007 (12 NYCRR 137-1.2). An employer must also pay every covered employee overtime at a wage rate of 1 1/2 times the employee’s regular rate of pay for all hours worked in excess of 40 in a given work week (12 NYCRR 137-1.3). When an employee is paid on a basis other

than an hourly rate, “the regular hourly rate shall be determined by dividing the total hours worked during the week into the employee’s total earnings” (12 NYCRR 137-3.5).

Article 19 additionally requires employers to maintain payroll records and to keep those records available for inspection by the Commissioner at any reasonable time (Labor Law § 661). DOL regulations 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; occupational classification and wage rate; number of hours worked daily and weekly; amount of gross wages; deductions from gross wages; allowances if any claimed as part of minimum wages; and net wages paid for each employee.

The petitioner’s payroll records for the relevant time period are inadequate because they do not show the claimant’s daily hours worked. Furthermore, the records produced by the petitioner are inconsistent with his own testimony concerning the number of hours the claimant worked. Han testified that the claimant’s regular schedule was 48 hours per week during the claim period, but was unable to explain why the records reflected the claimant working a schedule that varied considerably from week to week. Additionally, the payroll records indicate that the petitioner paid the claimant an hourly rate and overtime, but there is no corroborating evidence such as paystubs, cancelled checks or signed cash payment receipts to substantiate that the wages indicated were paid.

In the absence of adequate payroll records, the Commissioner, as she must, determined the amount of underpayments based on the claimant’s statement (Labor Law § 196-a). We have repeatedly held that where an employer fails to maintain required records, DOL may use the best available evidence to calculate back wages due to an employer’s employees, which in this case was the estimate made by DOL based on the claimant’s statement (*see e.g. Matter of Abdul Wahid et al.*, PR 08-005 [November 17, 2009]; *Matter of Ricardo J. Ahrens*, PR 07-062 [August 27, 2009]; *Matter of 238 Food Corp.*, PR 05-068 [April 25, 2008]; *see also* Labor Law § 196-a).

The petitioner, having failed to produce credible payroll records, had the burden to prove that DOL’s calculation of wages owed to the claimant, which was based on the claimant’s claim form, was unreasonable (Labor Law § 196-a). We find that Han’s testimony that the claimant started work at 6:30 a.m., not 6:00 a.m. as alleged by the claimant, that the breakfast break was 30 minutes, and that the claimant was paid an unspecified hourly wage rate as opposed to a weekly salary, was not sufficient absent corroborating evidence to meet the petitioner’s burden of proof where the claimant credibly testified concerning the hours that he worked and the weekly salary that he was paid. Accordingly, we find the wage order reasonable except that it must be modified to reflect the claimant’s testimony that he was paid \$330.00 per week from November 5, 2001 to June 30, 2004 and not \$360.00 as stated in the claim form and included in the wage order, and include two daily meal allowances in accordance with 12 NYCRR 137-1.9, since the evidence at hearing showed that although the petitioner did not keep records of the meals provided, there was no dispute that the petitioner gave the claimant breakfast and lunch each day he worked at no charge to the claimant.

Additionally, we find the Commissioner's determination that the 20 minute breakfast break the claimant claimed in his claim form, which he credibly testified he took, was compensable time is reasonable. The Commissioner explained in her post-hearing briefs that break times of less than 30 minutes must be compensated because, although New York law is silent on the issue, federal law provides that such breaks are counted as working time (29 CFR 785.19). The Commissioner argues that she must follow the federal regulations on break time because New York's Minimum Wage Act must be interpreted to be at least as protective as federal law (*see* Labor Law § 652 [1] and [4] and 12 NYCRR 137-1.2 [d] [providing that state minimum wage may not be lower than federal minimum wage]). We find that the Commissioner's position is reasonable because overtime and the determination of an employee's overtime rate are contained in the minimum wage orders and therefore allowing for breaks of less than 30 minutes to be uncompensated under the Labor Law would provide less protection in determining hours worked, and therefore hours that must be compensated, than under federal law (*see* 12 NYCRR 137-1.3 and 137-3.5)².

We note that the petitioner introduced evidence at the hearing regarding tip credits but since that issue was not raised by the petition, it was waived (Labor Law § 101 [2]), and that in any event, although there was some evidence that the claimant received an unspecified amount of tips, the petitioner in the absence of credible payroll records did not meet his burden of proof with respect to this issue.

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² We disagree, however, with the Commissioner's argument that state law does not recognize breaks of less than 30 minutes and that therefore the record keeping regulations do not require employers to record breaks of less than 30 minutes. Although not necessarily applicable in this case, the Labor Law explicitly recognizes an additional meal period of 20 minutes at Labor Law § 162 (3) for persons employed for a period or shift that starts before 11:00 a.m. and continues later than 7:00 p.m. Furthermore, the recordkeeping requirements set forth in the Minimum Wage Order for the Restaurant Industry state that the employer's records must contain the daily hours worked by each employee but does not require that breaks must be separately recorded (*see* 12 NYCRR 137-2.1).

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The wage order is remanded to DOL to recalculate the wages due and owing using \$330.00 per week from November 5, 2001 to June 30, 2004, and providing for two meal allowances per day worked in the manner described at 12 NYCRR 137-1.9; and
2. DOL will issue an amended wage order consistent with this resolution of decision to the petitioner within 28 days of service of this resolution of decision; and
3. The penalty order is affirmed in all respects; and
4. The petition of Yung Jin Han T/A Han Food Deli be, and the same hereby is, denied.



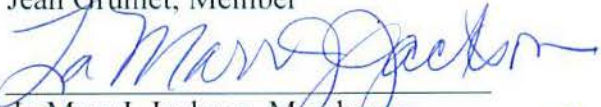
Anne P. Stevason, Chairman



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 Albany, New York, on
December 15, 2010.