

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

-----X
 In the Matter of the Petition of: :
 :
 KWANGPYO KIM AND ROYAL CLEANERS :
 LLC, :
 :
 Petitioners, :
 :
 To Review Under Section 101of the Labor Law: An :
 Order to Comply with Article 19 and an Order under :
 Articles 5 and 19 of the Labor Law, both dated March :
 15, 2010, :
 :
 - against - :
 :
 THE COMMISSIONER OF LABOR, :
 :
 Respondent. :
 -----X

DOCKET NO. PR 10-134

RESOLUTION OF DECISION

APPEARANCES

Kwangpyo Kim, *pro se* petitioner and for petitioner Royal Cleaners, LLC.

Pico Ben-Amotz, Acting Counsel, NYS Department of Labor (Benjamin T. Garry of counsel), for the respondent.

WITNESSES

Kwangyo Kim and Jeone Min You for the Petitioners; Janae Crittenden, Elsa Martinez, Nathan Lazelle and Eduarda Cazares for the Respondent.

WHEREAS:

The Petition for review in the above-mentioned case was filed with the Industrial Board of Appeals (Board) on May 5, 2010. Upon notice to the parties, a hearing was held on August 16, 2010, in Rochester, New York, before LaMarr J. Jackson, Esq., member of the Board and the designated Hearing Officer in this proceeding. Each party was afforded a full opportunity to present documentary evidence, to examine and cross-examine witnesses, to make statements relevant to the issues and to file post-hearing briefs.

The Petitioners filed a timely post-hearing statement by a letter dated August 24, 2012; Commissioner of Labor (Commissioner) did not file a post-hearing brief and the record was closed.

The Order to Comply with Article 19 (Wage Order) and the Order to Comply under Articles 5 and 19 (Penalty Order) under review were issued by the Respondent Commissioner on March 15, 2010, against Petitioners Kwangpyo Kim and Royal Cleaners, LLC. The Wage Order directs compliance with Article 19 and payment to the Commissioner for wages due and owing to six named claimants in the amount of \$3,562.12, with interest continuing thereon at the rate of 16% calculated in the amount of \$693.62, and assesses a civil penalty in the amount of \$7,124.24, for a total amount due of \$11,379.98. The Penalty Order finds the Petitioners violated Labor Law Article 19 § 661 and 12 NYCRR 142-2.6 by failing to keep and/or furnish true and accurate payroll records and Section 162 of Article 5 of New York State Labor Law for failure to give a thirty (30) minute meal time, and directs payment of a civil penalty in the amount of \$2,000.00.

SUMMARY OF EVIDENCE

Petitioner's Testimony:

Petitioner Kwangpyo Kim testified that he is employed as manager of Royal Cleaners, LLC, a company that operated as a dry cleaning business. Mr. Kim was the manager throughout the period of the Department of Labor's investigation that began in February 2009. He testified that all the employees named in the order worked at least four to five hours every day, some of them seven hours a day, five days a week and that each one was paid partly in cash and partly by check. In addition, he testified that the employee, Orlandito Rodriquez, who was employed as a presser, had money deducted from his pay because he had borrowed \$200 from Mr. Kim. Petitioner stated that he had no record of when the money was borrowed or how often or how much he took from each check of Mr. Rodriquez.

Petitioner stated that Mr. Rodriquez had a wage rate of \$10.00 per hour. If he worked four hours, he would get \$40.00. However, he would round up or down to the nearest hour. If it was three hours and five minutes, he would make it three hours. If it was two hours and fifty minutes, he would make it three hours. So, the total amounts that were paid, were not accurate according to what was on the time record.

The petitioner testified that Eduarda Cazares worked at Royal Cleaners as a presser. She worked for six hours a day, five days a week. He testified that her hours were 7:30 A.M. to 1:00 P.M. He would pay her for twenty hours by check and the rest of her time was paid for in cash. But he would always write down twenty hours, even if she had worked twenty-one hours or thirty-one hours.

The petitioner testified that Janae Crittenden pressed shirts and her hours were 7:30 A.M. to 11:30 A.M. and that she was paid by check. Erma Lewis was a shirt presser, her hours were the same as Janae Crittenden and she was also paid by check. When the

petitioner was questioned as to whether or not time cards were brought to the hearing, he stated no. He did state that he had them in his possession but he did not bring them.

In addition, the petitioner testified that he paid the employees every Wednesday. He would call Paychex on Monday with the hours from the previous week and then the checks would be issued on Wednesday for the previous week worked. The check amount was based on the time cards that he provided to them. He believed that the information he was providing to them was accurate.

He indicated that sometimes he would make notes on the time cards. If somebody borrowed money, he would put down the amount or if someone wanted pay for the day he would just cross out the day: "That is my way for the record every day. On Monday, I review the time cards and calculate the total and put that in the report sheet and I would read that to my payroll company. Then I would deduct everything they owe me and I would put the rest of the hours on the sheet." The petitioner further testified that once the hours were put down on the sheet and he gave them to the payroll company, he would dispose of the papers. Other than the time cards themselves, there are no other records that the petitioner kept relevant to showing the hours worked for each employee.

Mr. Kim testified that he only paid two employees in cash, Ms. Cazares and Mr. Rodriquez: Ms. Cazares, because she asked for part of her pay in cash; and Mr. Rodriquez, part in cash and part in check, because he had borrowed some money. Ms. Cazares was always paid for twenty hours by check and the rest of her time was paid in cash.

Testimony of Jeong Min You:

Mr. Jeong Min You testified on behalf of the petitioner. Mr. You testified that he had a lunch break and a coffee break. The coffee break was at 10:00 A.M. and a lunch break at 12:00 P.M. He did not punch in or out for the breaks and he did not have any paycheck issues. He stated that other employees did take a lunch hour and that he didn't know what time they started or ended their work schedule. He was employed in 2008 but he couldn't remember if he left in 2009 or 2010. He usually did wrapping and if someone was behind in their work he would help. He stated that his hours were from 9:00 A.M. to closing time at either 5:00 P.M. or 6:00 P.M. He stated that when he would arrive, Ms. Martinez, Mr. Rodriquez and Ms. Cazares would already be there.

Mr. You testified that when he came in the morning he would pick up a time card from the slot, punch in, put it back and then go to work. He stated that he did not punch out until he was ready to leave. He said that his lunch break was for thirty minutes depending on the work load, but sometimes longer. He did not recall meeting with Mr. Ryan, an investigator from the Department of Labor, and he had no knowledge of making any statement to the investigator nor did he recall making any statement to Mr. Kim.

When questioned further, and given a copy of the statement on Royal Cleaners and Dryers letterhead dated April 8, 2009, supposedly signed by him, that was included with the petition, Mr. You stated that he was paid partly in cash and partly by check. He said he was paid in cash because he asked Mr. Kim to pay him in cash if he was short on his rent and he didn't want them to take the taxes out because it was too much. Mr. You believed that he

only asked Kim to do this maybe once or twice every month or two. He said his hours would change from day to day depending on how much stuff they had to do.

If he worked five days a week, \$20.00 was deducted from his pay for that week for lunch. He was told by Mr. Kim that the money was taken out for the lunch break. Mr. You testified that even though he did not punch in or out for lunch, Mr. Kim took \$4.00 out of his pay every day for lunch and that thirty minutes for lunch equaled the \$4.00 based on his hourly rate.

Mr. You also testified that the April 8, 2009 letter was in his handwriting and that he wrote it because Mr. Kim had called and explained the situation regarding someone calling the Department of Labor about discrepancies in the paychecks with the time cards. Mr. Kim wanted him to come over and write a statement that there was no trouble with getting his paycheck. The letter was written on letterhead and there was a portion that was not in Mr. You's handwriting, but Mr. You could not identify whose handwriting it was.

Respondent testimony:

Testimony of Janae Crittenden:

Ms. Janae Crittenden testified that in September, 2008, she was interviewed by Mr. Kim and Mr. Jeong Min You to be a presser and that she was hired right away. She was told her hours would be 7:00 A.M to 3:00 P.M., five days a week, Monday through Friday. She testified that on a typical day she would arrive at 7:00 A.M. and that Mr. Orlandito Rodriguez was standing outside and waited with her for Mr. Kim to arrive to unlock the building. Ms. Crittenden further testified that she and Mr. Rodriguez on many days had to wait until 7:30 A.M. for the Petitioner to get there to let them in. Upon entering the building, they would take a time card near the door and punch in, write their name on the time card and would use that card for the week.

She stated that during the day they had a five minute break at 10:00 A.M. which was the only break they had. When it was time for lunch, it was usually eaten at their work station. She said that this would last perhaps fifteen minutes. There were no other breaks during the day. Her ending time would vary. Some days, she would leave at 3:00 P.M. and some days she would leave at 2:30 P.M. Her rate of pay was \$10.00 per hour.

She stated that she usually got paid on Thursdays and that on some occasions, she did not get paid until the following Monday. There were occasions when she and the Petitioner had a disagreement over her check because she says that the hours that she worked were not consistent with the pay she received.

Ms. Crittenden further testified that punching in and punching out for lunch was something that they never did. She stated that she accurately punched her time card but that it didn't match the check. She testified that there were never any breaks over twenty minutes and that she only had the one five minute break for a smoke and ate lunch at her work station.

Ms. Crittenden stated that she quit the job because the money was not right and she was tired of waiting outside in the cold for Mr. Kim to come and open up every morning. She said that she was not fired by Mr. Kim as he had stated, but that she quit.

Testimony of Elsa Martinez:

Testimony of Elsa Martinez was translated by an interpreter who participated via telephone. Ms. Martinez testified that she saw a sign on the door of Royal Cleaners and Dryers that said that they needed a worker so she applied. She was interviewed by Mr. Wang Kim who told her that she would be working from 7:00 A.M. or 8:00 A.M. and it would depend upon when the work was finished as to when she would be done for the day. She recalled that it was before 2008 and it was a different owner; not Mr. Kwang Kim.

She testified that she believed that Mr. Kwang Kim took over Royal Cleaners in 2008. He did not change her hours. He increased her hourly wage from \$13.00 per hour to \$14.00 per hour. She stated that when Mr. Kim took over she would always start work between 8:00 A.M. and 8:30 A.M. until she completed her work which would typically be 2:30 P.M. or 3:00 P.M. at the latest. She said that on many days she would work only until 2:00 P.M. She further testified that she punched a card in a clock near the door when she came in and when she finished for the day. She stated that she did not recall any hand written times on her card. She said that Mr. Kim was the only one that would write on the time cards. She stated that Mr. Kim would write on the time card if she forgot to punch the card in the morning and she would tell him what time she came in. She stated that she got paid weekly by check only and that her checks were from a payroll service and were always accurate in representing the hours that she had worked.

She said that she brought her lunch to work and that she had a half an hour for lunch. She also stated that she took a break of ten to fifteen minutes in the morning. She said lunch was always at 12:00 P.M.

Ms. Martinez was handed respondent's Exhibit B which was a letter that reportedly had her signature on it. When asked by Mr. Garry if the letter looked like her hand writing, she said no. When asked about the signature on the exhibit, the witness testified, "I am not sure. I think so." When asked if she read English, she said poorly. She was then asked to repeat what was on the page. She was able to read it.

Testimony of Eduarda Cazares:

Ms. Cazares testified that she does not write in English. During her testimony she stated that she was paid for twenty hours of work by check and the rest was in cash. She stated that usually it was four or five hours that was paid in cash, but not always. She stated that Mr. Kim always paid her correctly and that sometimes she took an hour for lunch. Her work hours were from 8:00 A.M. or sometimes 9:00 A.M. until before 3:00 P.M. in the afternoon.

During her testimony, Ms. Cazares was handed a letter dated April 7, 2009, and she stated that she only recognized her signature on the paper and that she did not remember Mr. Kim coming to her to have her sign the paper. She further stated that he would tell her that

he could only pay her in cash for two or three hours and that the rest had to be in a check. When asked if there were any records of the cash payments kept by Mr. Kim, Ms. Cazares stated no.

Testimony of Nathan Lazelle:

Labor Standards Investigator (LSI) Nathan Lazelle testified regarding records that Mr. Joseph Ryan, who is no longer with the Labor Standards division, had accumulated during the investigation of this matter. Mr. Ryan left the DOL prior to when the Orders to Comply were issued and Mr. Lazelle finished the investigation. Mr. Lazelle testified that the original claim came about on February 11, 2009, when the DOL did an inspection of Mr. Kim's premises. There was no formal complainant or claim that initiated the inspection. It was an example of the routine investigations that are conducted by the DOL regarding various industries. A notice of revisit was scheduled for February 26, 2009, at which time the investigator went back to review certain payroll records for the year 2008. During the revisit, records were reviewed that established:

1. The petitioner was not keeping track of all hours worked.
2. There was nothing signed by employees when they received cash.
3. There were no records of when the petitioner paid cash to employees.
4. The petitioner would round out employee's hours to the nearest hour or half hour on the time cards as a way of determining payment. As a result the time cards did not match the payroll register.
5. The petitioner was not providing employees with a full half hour lunch period.

As a result of this, Labor Law violations were issued against the petitioner for violations of Article 5 § 162 (no meal period); Article 6 § 191.1a (failure to pay wages within seven days) and Article 19 § 661 (failure to maintain accurate payroll records).

Following that visit, there were continuing efforts on the part of the investigator to settle the matter and to collect the wages due for the various employees. The petitioner did not comply and as a result, two orders to comply were issued.

Mr. Lazelle further testified that in reviewing the file, there were notations of interviews conducted by LSI Ryan. In one of the interviews, Ms. Martinez stated: "I do not get a thirty minute meal period. I get a five minute break, and a ten and fifteen minutes break at 12 and do not get paid for the breaks." Mr. Lazelle also noted that there were missing time cards from July 2007 through April 2008, and that no time cards whatsoever were ever maintained for a Ms. Kang. This indicated a records violation as employers are required by law to maintain daily and weekly payroll records for all employees and such records must be true and accurate and kept for six years.

LSI Lazelle testified that as to Mr. Orlandito Rodriguez, there were two time cards that contained hand written statements on them saying "no lunch." There was a third one with a hand written note stating that "balance is \$54.23." Mr. Kim, the petitioner, stated during the investigation that he made notes on the time cards when he was determining the amounts that he was going to deduct from the employees' checks. There was testimony that the investigator believed the balance of \$54.23 was the amount left on Mr. Rodriguez's loan.

LSI Lazelle testified that record violations were found when the petitioner gave cash and a check to Mr. Rodriguez deducting the cash advance and there was nothing in writing to substantiate the debt. Payroll records are missing for the week ending June 28, 2008. Time cards for Elsa Martinez were missing for the week ending July 5, 2008. There were no time cards for four employees and no payroll register for the week ending January 31, 2009. There were no time cards for Eduarda Cazares for the time period of March 1, 2008 through May 27, 2008. All of those are records violations of Section 661 of the Labor Law.

GOVERNING LAW

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 commissioner under the provisions of this chapter" (Labor Law § 101 [1]). It also provides that a Commissioner's order shall be presumed "valid" unless declared invalid in a proceeding brought under the provisions of this chapter. (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 the hearing to prove that the allegations that are the basis for the claim under the order to comply are invalid or unreasonable (Board Rules of Procedure and Practice § 65.30 (12 NYCRR § 65.30). It is therefore the petitioner's burden to prove, by a preponderance of the evidence, that the claimants' wages and miscellaneous expenses are not due and owing, and that the Civil Penalty is invalid or unreasonable (State Administrative Procedure Act § 306; Labor Law §101 and §103).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Board makes the following findings of fact and conclusions of law pursuant to the provisions of Board Rule 65.39 (12 NYCRR § 65.39).

Penalty Order

The DOL seeks civil penalties of \$1000 for failure to keep and furnish true and accurate payroll records for each employee (Count 1) and \$1000 for failure to provide a meal period of at least 30 minutes for employees working a shift of more than six hours (Count 2).

The petitioner did not maintain or produce legally sufficient payroll records. 12 NYCRR §142-2.6, provides that every employer is required to maintain weekly payroll records for each employee that include: inter alia, the wage rate, number of hours worked daily and weekly, the amount of gross wages, deductions from gross wages, allowances, if any, claimed from the minimum wage, net wage paid, and student classification. There is no dispute that the petitioner failed to keep proper records of the hours worked by the

employees. The payroll records that were produced were weekly records provided by the petitioner for the payroll company Paychex. As such, these records do not comply with Article 19, because they do not show required information to be furnished to each employee in 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 (12 NYCRR 142-2.7 [2009]). We do not find the wage statements credible. No records were kept by the petitioner of the exact hours worked because the petitioner used rounding up or down to arrive at the hours worked. We find that it was reasonable for LSI Lazelle to conclude that the employer's records were not credible and to give them little, if any, weight in his investigation.

Labor Law § 162 requires employers to provide a meal period of at least thirty minutes to each employee scheduled to work for six or more hours. LSI Lazelle testified that the investigation determined that the records were unclear as to whom and when a thirty minute meal period was provided when employees worked more than six hours. The petitioner did not provide any evidence concerning meal breaks, and conceded during testimony that he did not provide all employees with a shift of six hours or more a designated uninterrupted thirty minute meal break.

Accordingly, the petitioner failed to meet his burden of proving that the penalty order is invalid or unreasonable, and we affirm it.

Wage Order

In the absence of sufficient records, the petitioner bears the burden of proving that the disputed wages were paid (Labor Law § 196-a; *Angello v National Finance Corp.*, 1 AD3d 850 (3rd Dept 2003)) As the Appellate Division stated in *Matter of Mid-Hudson Pam Corp v. Hartnett*, 156 AD2d 818, 821 (3d Dept 1989): “[w]hen an employer fails to keep accurate records as required by statute, the Commissioner is permitted to calculate back wages due to employees by using the best available evidence and to shift the burden of negating the reasonableness of the Commissioner's calculation to the employer.” Therefore, the petitioner has the burden of showing that the Commissioner's order is invalid or unreasonable by a preponderance of the evidence of the specific hours that the claimants worked and that they were paid for those hours, or other evidence that shows the Commissioner's findings to be invalid or unreasonable. *In the Matter of Ram Hotels, Inc.* Board Docket No. PR 08-078 (October 11, 2011), appeal pending.

The petitioner failed to prove that the Commissioner's determination of the amount of wages owed to all six employees was either invalid or unreasonable. In the absence of reliable payroll records, the Commissioner used the best available evidence, which were the interviews and testimony of the employees, to calculate the amount of wages due. Where incomplete or unreliable wage and hour records are available, DOL is "entitled[d] to make just and reasonable inferences and use other evidence to establish the amount of underpayments, even though the results may be approximate" *Matter of Hy-Tech Coatings v. New York State Dept. of Labor*, 226 AD2d 378, 379 (1st Dept 1996) (citing *Mid-Hudson Pam Corp.*).

In a post-hearing written statement, the petitioner argued that there was no translator used when the first interviews were done and that three of the four witnesses testified they

did have thirty minute lunch breaks. Further, the petitioner states the order is unreasonable because three witnesses testified they were paid in full by checks and cash. LSI Lazelle testified at length regarding the investigation that was conducted by former investigator Joseph Ryan. Lazelle introduced into evidence an investigative file that included Ryan's interview notes, computation sheets for the wage claims, Interim Report, Final Narrative, Issuance of Order to Comply Cover Sheet, and other documents.

The petitioner did not challenge any of these documents and did not ask even one question of LSI Lazelle at the hearing. The petitioner presented no evidence that Ryan had any problem communicating with the employees that he interviewed. Evidence was inconsistent regarding lunch breaks, with on the one hand the petitioner preparing a statement for Elsa Martinez to sign stating that she had a thirty minute lunch period every day, while as noted above her signed interview statement for Ryan stated that she did not get a thirty minute meal period.

The petitioner also had the opportunity to examine and challenge the computation sheets for the wage claim in detail at the hearing but again chose not to challenge any of the evidence that the DOL offered in support of the Wage Order. While choosing to not challenge the basis for the Wage Order at the hearing, the petitioner's unsupported post-hearing statements are unpersuasive in finding the Wage Order to be either unreasonable or invalid.

Civil Penalty

The Wage Order assesses a 200% civil penalty. The petitioner failed to keep proper employment records for all employees as required by law and many of the records that were kept were not accurate records of the hours worked by employees. The lack of credible records made the investigation more difficult. While there were no prior violations on record for the business, the records violation was serious and reflected a willful disregard of the law for an extended period of time. This is coupled with the failure to consistently provide employees with their proper meal breaks when they were working for extended periods of time. The Board finds that the considerations required to be made by the Commissioner in connection with the imposition of a 200% civil penalty were proper and reasonable in all respects.

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."

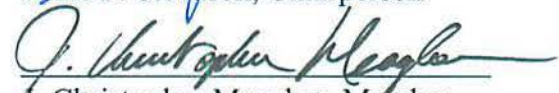
The Board finds that the considerations and computations required to be made by the Commissioner in connection with the interest set forth in the Wage Order are valid and reasonable in all respects.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The Order to Comply with Articles 5 and 19 of the Labor Law, dated March 15, 2010, is affirmed; and
2. The Petition be and the same hereby is, denied.



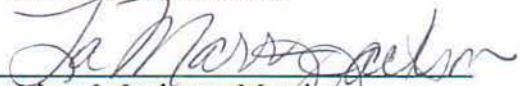
Anne P. Stevason, Chairperson




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 New York, New York on
March 20, 2013.