STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of:	:	
DERVISH KRAKI AND BESIM KRAKI AND TURNPIKE DELI BAGELS AND BAKERY, INC.,	:	
Petitioners,	:	DOCKET NO. PR 10-232
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 May 17, 2010,	:	RESOLUTION OF DECISION
- against -	:	
THE COMMISSIONER OF LABOR,	:	
Respondent.	:	

APPEARANCES

Helfer & Helfer, LLP (Michael Helfer of counsel), for petitioners.

Pico Ben-Amotz, Acting Counsel, NYS Department of Labor (Michael Paglialonga of counsel), for the respondent.

WHEREAS:

On July 16, 2010, the petitioners filed a petition with the New York State Industrial Board of Appeals (Board) pursuant to Labor Law § 101 and Part 66 of the Board's Rules of Procedure and Practice (Board Rules [12 NYCRR part 66]), amended on August 25, 2010, seeking review of two Orders that the Commissioner of Labor (Commissioner or Respondent) issued on May 17, 2010. The first Order is an Order to Comply With Article 19 of the Labor Law (Wage Order), which finds that Petitioners failed to pay wages to Rumualdo Flores and Carlos A. Reyes (Claimants) and demands payment of $11,327.91 in wages due and owing, interest at the rate of 16% calculated to the date of the order in the amount of $4,255.77 and a civil penalty in the amount of $8,495.93 for a total amount of $24,079.61. The second Order is an Order Under Article 19 (Penalty Order) finding that Petitioners failed to keep and/or furnish accurate payroll records; failed to provide complete wages statements to all employees; and, failed to post a Minimum Wage Poster, all for the period from March 15, 2003 through May 29, 2009 in violation of Article 19 of the Labor Law, and demands payment of $500.00 for each violation for a total of $1,500.

The petition challenges the Wage Order as unreasonable or invalid on the grounds that Petitioners were not Flores' employer as Flores was an independent contractor, and that Petitioners did not employ Carlos Reyes during the claim period. The petition does not challenge the Penalty Order, nor does it challenge the naming of Besim Kraki as an employer. However, Petitioners argued at hearing that the record evidence supports a finding that Besim Kraki was an employee and not an employer. The Commissioner responds that the Wage Order is reasonable and valid in all respects; that Petitioners waived any challenge to the Penalty Order by not contesting it in the petition; and, that Besim Kraki acted as Claimants' employer.

SUMMARY OF THE EVIDENCE

Testimony of Dervish Kraki

Dervish Kraki is president of Turnpike Deli Bagels and Bakery (Deli). He testified that Rumualdo Flores was working at the Deli when he took over in 2003, and that he reached an understanding with Flores that he was to cook breakfast, six days a week, from 6:00 a.m. to noon, for $350 cash a week. Dervish Kraki contended that from noon to 1 p.m., Flores used his kitchen for his own catering business. Flores did not work Sundays, nor holidays, and according to Dervish Kraki, any work that he did after noon was for his own catering business.

Dervish Kraki testified that he did not keep payroll records for Flores because he believed he was not his employee. He also testified that he never employed Carlos Reyes.

Testimony of Besim Kraki

Besim Kraki has worked at the Deli since 2001. Besim Kraki testified that Flores worked from 6:00 a.m. to 1:00 p.m. at the deli. He had no direct knowledge that Flores had his own business, but he stated that from noon to 1:00 p.m. Flores cooked Latin American food, which was not served at the Deli. Besim Kraki also testified that he did not know Reyes.

Testimony of Rumualdo Flores

Flores testified that he worked at the Deli as a cook from 2001 through October 2007, and that his hours were from 6:00 a.m. to 2:00 p.m. every day, Monday to Sunday. He stated that he was initially paid $700 a week, but his salary increased to $800 a week around 2005. He maintained that he did not own a catering business and any additional cooking that he did was for himself, or his family, for special occasions. Flores also testified that he had "no idea who is Carlos Reyes."

Flores asserted that Dervish Kraki was an owner who also worked at the Deli, and assigned him his job responsibilities. Flores further testified that Besim Kraki worked like a "boss," and that they both were supposed to supervise him but they never gave him orders. However, Flores also testified that Besim Kraki had the authority to direct the Deli's employees.

Testimony of Frank King

Frank King is a Department of Labor (DOL) senior investigator and is responsible for overseeing, and conducting investigations. He testified that he was familiar with this matter as he got feedback from the investigator, Cecilia Maloney, who conducted the investigation, and because he met with the employer and Claimants. Maloney no longer works for DOL and did not testify at hearing.

King testified that Maloney requested payroll records from Petitioners for the period from May 2003 through 2009, including time records and timesheets. In response, Petitioners submitted a payroll journal for various employees for November 14, 2008, and for May 2009. Claimants are not included in those journals.

King also explained the wage computations DOL made that formed the basis of the Orders. The total amount of wages that were paid to a claimant were divided by the total amount of hours that the claimant worked which resulted in an hourly and overtime rate. The hourly rate was multiplied by 40, and the overtime rate by the amount of overtime hours worked. When added, the actual earnings earned were generated. The underpayment was derived by subtracting wages paid from actual earnings.

FINDINGS

A. Standard of Review and Burden of Proof

The Labor Law provides that "any person . . . may petition the board for a review of the validity or reasonableness of any . . . order made by the commissioner under the provisions of this chapter" (Labor Law § 101 [a]). It also provides that an order of the Commissioner shall be presumed "valid" (Labor Law § 103 [1]).

A petition filed with the Board that challenges the validity or reasonableness of an Order issued by the Commissioner must state "in what respects [the order on review] is claimed to be invalid or unreasonable" (Labor Law § 101[2]). It is the petitioner's burden at hearing to prove the allegations that are the basis for the claim that the order under review is invalid or unreasonable (Board's Rules of Procedure and Practice § 65.30 at 12 NYCRR § 65.30 [The burden of proof of every allegation in a proceeding shall be upon the person asserting it"]; *Angello v Natl. Fin. Corp.*, 1 AD 3d 850, 854 [3d Dept 2003]).

1. The Petitioners employed Rumualdo Flores

Under Article 6 of the Labor Law, "employer" is defined as "any person, corporation or association employing any individual in any occupation, trade, business or service" (Labor Law § 190 [3]). "Employed" is defined as "permitted or suffered to work" (Labor Law § 2 [7]). The federal Fair Labor Standards Act (FLSA) also defines "employ" to include "suffer or permit to work" (29 USC § 203 [g]). Because the statutory language is identical, the New York Labor Law and the FLSA follow the same test to determine the existence of an employment relationship (*see e.g. Ansoumana v Gristede's Operating Corp.*, 226 F Supp 2d 184, 189 [SDNY 2003]).

In determining whether an individual is an employee covered by the Labor Law or an independent contractor without wage and hour protections, "[t]he ultimate concern is whether, as a matter of economic reality, the workers depend upon someone else's business for the opportunity to render service or are in business for themselves" (*Brock v Superior Care, Inc.*, 840 F 2d 1054, 1059 [2d Cir 1988]). The factors to be considered in assessing such economic reality include (1) the degree of control exercised by the Petitioners over the Claimant, (2) the Claimant's opportunity for profit or loss, (3) the degree of skill and independent initiative required to perform the work, (4) the permanence or duration of the working relationship, and (5) the extent to which the work is an integral part of the Petitioners' business (*Brock* at 1058-1059). No one factor is dispositive (*Brock* at 1059).

We find that Petitioners did not meet their burden of proof in establishing that Flores was not their employee and was an independent contractor. Dervish Kraki agreed that Flores worked for him from 6:00 a.m. to noon, but contended that from noon to 1:00 p.m., he ran his own catering business out of Petitioners' kitchen. However, Petitioners offered no evidence supporting their contention that at noon, on each workday, Flores became an independent contractor. Petitioners were unable to establish any of the criteria of independent contractor status.

Moreover, we credit Flores' testimony that he did not have his own business, and only occasionally used Petitioners' kitchen to cook meals for his family. While Besim Kraki testified that Flores cooked food at the Deli from noon to 1:00 p.m. that was not the type of food served there, he also testified that he had no knowledge that Flores had his own business.

2. Petitioners did not employ Carlos Reyes

We find that Petitioners did not employ Carlos Reyes during the claim period. Dervish Kraki testified that Reyes did not work at Petitioner's business, a claim supported by both Besim Kraki and Flores. Neither Reyes, nor investigator Maloney, testified at hearing - testimony that may have established Reyes' employment status. In evidence is a computation sheet of Reyes' wages that Maloney signed, but was not signed by Reyes. Also in evidence is a Division of Labor Standards Interview Sheet, which shows Maloney's and Reyes' (printed) signatures. However, in the absence of testimony by either Maloney or Reyes, and in light of the Krakis' and Flores' testimony, we do not credit these documents as proof that Petitioners were Reyes' employer. Therefore, we find that Reyes is not due $1,184.20 in wages from Petitioners.

3. The Petition Does Not Challenge the Penalty Order and Does Not Challenge Besim Kraki as an Employer.

The Penalty Order asserts that Petitioners failed to keep and or provide true and accurate payroll records (Count 1), failed to proved complete wage statements to all its employees (Count 2), and failed to post the Labor Department's Minimum Wage Poster (Count 3). Neither the petition nor the amended petition challenges the Penalty Order, and Petitioners made no effort to request an amendment of their petition at hearing.

Labor Law §§ 195(4) and 661 require employers to maintain payroll records. Labor Law §661 requires employers to make such records available to the Commissioner:

> "Every employer shall keep true an accurate records of hours worked by each employee covered by an hourly minimum wage rate, the wages paid to all employees, and such other information as the commissioner deems material and necessary, and shall, on demand, furnish to the commissioner or [her] duly authorized representative a sworn statement of the same. Every employer shall keep such records open to inspection by the commissioner or [her] duly authorized representative at any reasonable time . . . ."

Labor Law § 195(3) and 12 NYCRR § 137-2.2 also require employers to provide wage statements to employees with every payment of wages. Labor Law § 195(3) requires employers to:

> "furnish each employee with a statement with every payment of wages, listing gross wages, deductions, and net wages, and upon the request of an employee furnish an explanation of how such wages were computed."

Labor Law § 661 and 12 NYCRR § 137-2.3 requires:

> "Every employer of an employer shall keep a digest and summary of this article or applicable wage order, which shall be prepared by the commissioner, posted in a conspicuous place in his establishment and shall also keep posted such additional copies of such digest and summary as the commissioner prescribes."

Pursuant to Labor Law § 101(2), a

> "petition shall be filed with the board in accordance with such rules as the board shall prescribe, and shall state the rule, regulation, or order proposed to be reviewed and in what respects it is claimed to be invalid or unreasonable. Any objections to the rule, regulation or order no raised in such appeal shall be deemed waived."

We find that Petitioners waived their right to object to the Penalty Order because it failed to raise such objection in the petition, amended petition, or at hearing. Even if we were to consider the Penalty Order, we would dismiss any claim that it is unreasonable or invalid. Dervish Kraki conceded that Petitioners did not keep payroll records for Flores as he believed that Flores was not an employee. Further, Petitioners produced no evidence that it conformed with the posting requirements contained in Labor Law § 195(3) or the requirement to furnish each employee with a wage statement (Labor Law § 661).

We also find that Petitioners waived their right to object to Besim Kraki being named as an employer. Petitioners did not move to amend their petition prior to, or at hearing, to exclude Besim Kraki as an employer. Petitioners argued at hearing that he was an employee and not an employer, but offered no evidence supporting their contention. Moreover, even if we were to consider Besim Kraki's status, we would dismiss any claim that he was not an employer. Flores testified that Besim Kraki had to grant him permission to use the Deli's van; that he acted like a "boss;" that he had authority over Deli employees; and, that he directed their work.

4. Petitioners Failed to Meet Their Burden to Establish that the Wage Order is Invalid or Unreasonable.

An employer's failure to keep adequate records does not bar employees from filing wage claims (Labor Law § 196-a). Where employee claims demonstrate a violation of the Labor Law, DOL must credit the complaint's assertions and relevant employee statements and calculate wages due based on the information the employee has provided. The employer then bears the burden of proving that the disputed wages were paid (Labor Law § 196-a; *Angello v Natl. fin. Corp.*, 1 AD3d 818, 821 [3d Dept 1989]). 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."

In *Anderson v Mt. Clements Pottery Co.,* 328 U.S. 680, 687-688 [1949], *superseded on other grounds by statute*, the Supreme Court long ago discussed the fairness of relying on employee statements where the employer failed to keep adequate records:

> "[W]here the employer's records are inaccurate or inadequate . . . [t]he solution . . . is not to penalize the employee by denying him any recovery on the ground that he is unable to prove the precise extent of uncompensated work. Such a result would place a premium on an employer's failure to keep proper records in conformity with his statutory duty; it would allow the employer to keep the benefits of an employee's labors without paying due compensation by the Fair Labor Standards Act. In such a situation we hold that an employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. The burden then shifts to the employer to then come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence. If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result be only approximate."

Citing to *Anderson,* the Appellate Division in *Mid-Hudson Pam Corp.,* at 821 agreed:

> "The public policy of providing protection to workers is embodied in the statute which is remedial and militates against creating an impossible hurdle for the employee . . . Where we to hold otherwise, we would in effect award petitioners a premium for their failure to keep proper records and comply with the statute. That result should not pertain here."

Petitioners have 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 claimant worked and that he was paid for the 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]). Where a Petitioners' payroll records are inadequate, 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" (*Hy-Tech Coatings v New York State Dept. of Labor,* 226 AD2d 378, [(1st Dept 1996], *citing Mid-Hudson Pam Corp.*)

We find that in the absence of Petitioners' records it was reasonable for DOL to rely upon Flores' statement of the number of hours that he worked, and his rate of pay, during the claim period and we affirm the order with respect to the wages due to Flores in the amount of $10,143.71..

5. The Department of Labor's Calculation of a 75% Civil Penalty is Reasonable and is to be Adjusted Consistent with the Reduction in the Amount of Wages Found Due.

The petition does not challenge the 75% Civil Penalty contained in the Wage Order. Further, Petitioners offered no evidence that the penalty is invalid or unreasonable. We find that the Civil Penalty is valid and reasonable, but that the amount assessed must be modified based on the reduction in the amount of wages due.

6. The Commissioner's Interest Calculation is to be Adjusted Consistent with the Reduction in the Amount of Wages Found Due.

Labor Law § 219(1) provides that when the Commissioner determines that when 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 § 14-A sets the "maximum rate of interest" at "sixteen percent per centum per annum."

We find that the interest rate set forth in the Wage Order is valid and reasonable in all respects, but that the amount of interest assessed must be modified based on the reduction in the amount of wages found due.

NOW , THEREFORE IT IS HEREBY RESOLVED THAT:

1. The wages found due and owing by the Wage Order are reduced from $11,327.91 to $10,143.71, and the interest and Civil Penalty are to be recalculated on that amount.

2. The Penalty Order is affirmed in its entirety.

3. The petition for review by, and the same hereby is, otherwise denied.

Anne P. Stevason, Chairperson

J. Christopher Meagher, Member

Jean Grumet, Member

LaMarr J. Jackson, Member

Jeffrey R. Cassidy, Member

Date and signed in the Office of
the Industrial Board of Appeals
at New York, New York on
May 30, 2012.

NOW, THEREFORE IT IS HEREBY RESOLVED THAT:

1. The wages found due and owing by the Wage Order are reduced from $11,327.91 to $10,143.71, and the interest and Civil Penalty are to be recalculated on that amount.

2. The Penalty Order is affirmed in its entirety.

3. The petition for review by, and the same hereby is, otherwise denied.

Anne P. Stevason, Chairperson

J. Christopher Meagher, Member

Jean Grumet, Member

LaMarr J. Jackson, Member

Jeffrey R. Cassidy, Member

Dated and signed by a Member
of the Industrial Board of Appeals
at Rochester, New York, on
June 4, 2012.