

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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In the Matter of the Petition of:	:	
	:	
OFER KEYNAN AND A&O ASSOCIATES (T/A	:	
ASHKARA VEGETARIAN CAFÉ),	:	
	:	
Petitioners,	:	DOCKET NO. PR 10-335
	:	
To Review Under Section 101 of the Labor Law:	:	
An Order to Comply with Article 6, an Order to	:	<u>RESOLUTION OF DECISION</u>
Comply with Article 19, and an Order under Articles	:	
5 and 19 of the Labor Law, issued August 31, 2010,	:	
	:	
- against -	:	
	:	
THE COMMISSIONER OF LABOR,	:	
	:	
Respondent.	:	
	:	
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APPEARANCES

John Scola, Esq., for petitioners.

Pico Ben-Amotz, Esq., Acting Counsel, NYS Department of Labor (Jeffrey Shapiro of counsel), for respondent.

WITNESSES

Ofer Keynan, for petitioners.

Daniel Melchor Gutian, Salvador Nico Garcia, Manuel DeJesus Santiago, Luis Arrevalo and Labor Standards Investigator Julio Rodriguez, for respondent.

WHEREAS:

On October 25, 2010, petitioners filed a petition to review three orders that the Commissioner of Labor (Commissioner) issued against them on August 31, 2010. An amended petition was filed on December 28, 2010. The respondent filed its answer to the amended petition on February 14, 2011.

The first order is an Order to Comply with Article 19 of the New York Labor Law (Minimum Wage Order) and directs petitioners to pay \$24,014.32 in unpaid wages owed to six employees, \$2,508.44 in interest, and \$24,014.32 in civil penalties for a total due of \$50,573.08.

The six employees named are: Luis Arrevalo, Salvador Nico Garcia, Daniel M. Gutian, Fraulio G. Marcelino, Manuel De Jesus Santiago, and Deigo Zhumi.

The second order is an Order to Comply with Article 6 of the New York Labor Law (Wage Order) and directs petitioners to pay \$6,321.00 in unpaid wages to the same six employees, plus \$630.00 in interest, and \$6,321.00 in civil penalties for a total due of \$13,272.00.

The third order was issued under Articles 5 and 19 (Penalty Order) and directs petitioners to pay \$4,000.00 in civil penalties based on: (1) the failure to keep and/or furnish the requisite payroll records for the period of January 10, 2010 through January 23, 2010 (\$2,000); (2) the failure to provide wage statements to employees with every payment of wages for the same period (\$1,000); and (3) the failure to provide employees with a 30 minute break for a noon day meal (\$1,000).

The initial petition alleges that petitioners' employees were paid weekly, were given more than minimum wage, and were provided meal periods. The petition states that 2 to 5 days of wages are still owed some of the employees but that two of the names on the order, Marcelino and Gutian, are unknown to petitioners. The amended petition alleges that petitioners kept adequate records but that the records were stolen; that the audit failed to take into account that certain employees received tips, that they were provided meals in addition to meal breaks; and that the employees did not work over 40 hours in any week.

In his answer, the Commissioner alleges that petitioners failed to keep accurate time and payroll records and therefore, the orders and the audit of wages due petitioners' employees were based on the claims filed by the six former employees which indicated that the employees were not paid a premium for overtime, not provided a meal break, and were not paid at all for the last period of their employment.

Upon notice to the parties, a hearing was held on February 12, 2013 in New York City before Anne P. Stevason, Chairperson 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 make closing arguments.

I. SUMMARY OF EVIDENCE

A. Petitioner's Case

Testimony of Ofer Keynan

Petitioners operated a vegetarian restaurant in New York City from 2007 until its closing in January 2010. Petitioner Keynan testified that employed at any one time were a kitchen worker, a counterman and two delivery workers. The restaurant was open 7 days per week from 11:30 a.m. to 11:30 p.m. The counterman made \$10 per hour. The kitchen worker was paid \$7.50 per hour, and the delivery workers each made \$6.00 per hour plus tips. There were approximately 30 deliveries made each day resulting in approximately \$30 to \$50 per day in tips

for the delivery workers. Employees worked approximately seven to eight hours per day, five days per week. A weekly time sheet was kept on the door to the kitchen where the employees would sign in and out. They were paid weekly, in cash, were given meal breaks and provided meals. A photograph of the kitchen door showing a time sheet was identified and entered into evidence.

In December 2009, petitioners' restaurant was visited by Fire Department inspectors who instructed Keynan that the oven needed certain repairs and that the repairs had to be made by January 16, 2010. Keynan testified that he closed the restaurant on January 17 and 18, 2010 to make the repairs. He arrived at the restaurant on January 17 to find that the restaurant had been vandalized, and around \$200-300 in cash, a computer, and records had been stolen. Since there had been no evidence of a break-in, in his opinion, he thought that the employees could have been responsible since they had keys. No police report was filed. The Department of Labor (DOL) investigator report indicated that the employees admitted to taking some paperwork from the restaurant. The employment records were kept in a file cabinet in the office. There was some paperwork on the floor after the break-in but they were not employment records.

Keynan testified concerning each of the employees listed in the Orders. He stated that Manuel DeJesus Santiago was never an employee but worked part time doing painting and maintenance work. He also made a few deliveries but he was paid for them and given tips. Keynan admitted that he owed Santiago some money and could not remember how much but estimated that it was about \$100.

Keynan testified that he did not know Fraulio Gregorio Marcelino or anyone named Marcelino though he may have been someone who used another name. If he was a deliveryman he would have received an average of \$270 in tips per week.

Luis Arrevalo was hired by Keynan in June 2009 as a deliveryman. He worked 4 to 5 days per week and was paid \$6 per hour plus tips. Keynan testified that he still owed Mr. Arrevalo about \$240 for the last week that he worked from January 12 to 16, 2010 since he worked approximately 40 hours for that week. Arrevalo received his tips on a daily basis and he received all tips owed to him.

Salvador Nico Garcia was hired in April 2009 and worked 6 to 7 hours per day, 5 days per week. He was a kitchen worker preparing food and cutting salad. He was paid \$7.50 per hour plus tips when he did deliveries. He never worked 60 hours per week. Garcia is still owed for the last week of work which is approximately \$300.

Keynan testified that he did not recognize the name Daniel Gutian.

Diego Zhumi was a kitchen worker and was hired in May 2009. He was paid \$7.50 per hour and is owed for the last week's work minus \$100 which was paid to him on the last day. Mr. Zhumi worked from 36 to 40 hours per week. Mr. Zhumi is owed approximately \$200.

Keynan testified that he owed a total of approximately \$2,000 in unpaid wages, which was the usual weekly payroll.

The employees were paid in cash. Keynan told his employees that he would be closing the restaurant for a few days to make repairs to come into compliance with the fire rules.

B. Respondent's Case

Testimony of Daniel Melchor Guitan

Mr. Melchor testified that he began working for petitioner in 2009 and worked as a dishwasher, salad helper, and deliveryman. He also did some cleaning. He was paid \$6.00 per hour. He testified that the hours written out on his DOL claim form accurately represented the hours that he worked. The claim form specified that Melchior worked from 10:00 a.m. to 8:00 p.m. on Sunday and 6:00 p.m. to 3:00 a.m. on Monday, Tuesday and Wednesday.

Melchor's last day of work was Sunday, January 16 or 17, 2010. Keynan told the staff to leave early so that some repairs could be done but Keynan did not mention that the restaurant was closing. When Melchor went to the business the next day he found it empty, all machines gone, except for some papers strewn on the floor.

Testimony of Salvador Nico Garcia

Mr. Garcia testified that he started working for the petitioner preparing salads and dishwashing on April 27, 2010¹. He worked 6 days per week, from 10:00 a.m. to 8:00 p.m. His last day of work was January 16, 2010. Keynan never informed him that the business was closing and when he showed up for work on January 18 at 10:00 a.m. the restaurant was closed. Garcia did not go into the restaurant until 11:00 a.m. when the rest of the workers arrived. When they entered the restaurant they found trash all over the floor. One of the workers picked up less than 10 pieces of paper off the floor.

Garcia was paid \$6.00 per hour. He was not given meal breaks but was provided with salad to eat. A time record was kept on the kitchen door which was filled in by the workers but he was never told that time records were kept in a filing cabinet or that he could have access to them. He never made deliveries.

Testimony of Manuel DeJesus Santiago

Mr. Santiago testified that he was hired as a dishwasher for the restaurant but that he also did some maintenance work at Keynan's home and some painting at the restaurant. Santiago would record his hours on the kitchen door of the restaurant and also in his own notebook. A copy of his notebook containing his hours worked was introduced into evidence.

Santiago went to the restaurant for his usual schedule on Monday, January 18, 2010 at 8:00 a.m. and found the restaurant empty so he called his co-workers who arrived within the hour. Mr. Keynan was also called but there was no answer to their calls. There were papers on the floor and a trail of oil marks from where the machines were pulled out. The only papers taken by anyone was a paper which had Mr. Keynan's social security number as the workers

¹ Given the fact that the restaurant closed in January 2010, Garcia probably meant April of 2009.

were concerned about finding Mr. Keynan so that they would be paid. No timesheets were taken by anyone.

On occasion Santiago would make deliveries and when he did he usually received a tip but never more than \$10. He was given approximately 10 minutes each day to eat his meal. Santiago was not paid on a regular basis or a regular salary. He was given \$20, \$30, or \$40 here and there.

Testimony of Luis Arrevalo

Mr. Arrevalo testified that he worked for petitioner as a dishwasher and also did cleaning and delivery. Arrevalo went to the restaurant on Monday, January 18, 2010 and found it empty. All that was left were some papers on the floor.

Work hours were recorded on a paper on the kitchen door. Arrevalo made 8 to 10 deliveries per day and was tipped \$1 to \$2 per delivery. His usual schedule was 10:00 a.m. to 12:00 a.m. Monday, Wednesday, Thursday and 10:00 a.m. to 8:00 p.m. Friday and Saturday. Arrevalo's claim form states that he received no tips.

Testimony of Julio Rodriguez, Labor Standards Investigator (LSI) and DOL file

LSI Rodriguez testified that the DOL investigation commenced upon the filing of the complaints against petitioner. All six employees in question filed claims with DOL. Rodriguez prepared the computations upon which the Wage Order was based and used the hours and wages reported by the claimants on their claim forms. A tip allowance was given to Marcelino since he reported receiving tips but not to the other employees who did not report receiving tips. No meal allowance was given since there was no evidence that the employees received meals.

The penalty of 100% was recommended by the senior investigator Cloty Ortiz.

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 [C]ommissioner under the provisions of this chapter' (Labor Law 101 § [1]). It also provides that a Commissioner's order 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 a petitioner's burden at the hearing to prove the allegations that are the basis for the claim that the order under review is invalid or unreasonable (Board 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"]; State Administrative Procedure Act § 306; *Angelo v Natl. Fin. Corp.*, 1 AD 3d 850, 854 [3d Dept 2003]).

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).

I. The Wage Order

A. An Employer's Obligation to Maintain Records

An employer's obligation to keep adequate employment records is found in Labor Law § 195 as well as in the New York Code of Rules and Regulations (NYCRR). Specifically, Title 12 of the NYCRR, § 137-2.1² provides, in pertinent part:

“(a) Every employer shall establish, maintain and preserve for not less than six years, weekly payroll records which shall show for each employee:

- (1) name and address;
- (2) social security number;
- (3) occupational classification and wage rate;
- (4) the number of hours worked daily and weekly, ...;
- (5) the amount of gross wages;
- (6) deductions from gross wages;
- (7) allowances, if any, claimed as part of the minimum wage;
- (8) money paid in cash; and
- (9) student classification.

“ . . .

“(e) Employers . . . shall make such records . . . available upon request of the commissioner at the place of employment.”

§ 137-2.2 further provides:

“Every employer. . . shall furnish to each employee 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.”

Therefore, it is an employer's responsibility to keep accurate records of the hours worked by its employees and the amount of wages paid and to provide its employees with a wage statement every time the employee is paid. This required recordkeeping provides proof to the employer, the employee, and the Commissioner that the employee has been properly paid.

Where an employee files a complaint for unpaid wages with DOL and the employer has failed in its statutory obligation to keep records, the employer bears the burden of proving that the employee was paid. Labor Law § 196-a provides, in relevant part:

² As of January 1, 2011, all restaurant and hotel industries are covered by the Hospitality Wage Order (12 NYCRR 146).

“Failure of an employer to keep adequate records, in addition to exposing such employer to penalties . . . shall not operate as a bar to filing of a complaint by an employee. In such a case the employer in violation shall bear the burden of proving that the complaining employee was paid wages, benefits and wage supplements.”

In the absence of payroll records, DOL may issue an order to comply based on employee complaints and interviews. In the case of *Angello v. National Finance Corp.*, (1 AD3d 850, 768 NYS2d 66 [3d Dept. 2003]), DOL issued an order to an employer to pay wages to a number of employees. The order was based on the employees’ sworn claims filed with DOL. The employer had failed to keep required employment records. The employer filed a petition with the Board claiming that the claims and therefore, the order, were overstated. In its decision on the petition, the Board reduced some of the claims. The court, on appeal, held that the Board erred in reducing the wages since the employer failed to submit proof contradicting the claims. Given the burden of proof in Labor Law § 196-a and the burden of proof which falls on the Petitioner in a Board proceeding, 12 NYCRR 65.30, “the burden of disproving the amounts sought in the employee claims fell to [the employer], not the employees, and its failure in providing that information, regardless of the reason therefore, should not shift the burden to the employees.” *Id.* at 854.

As the Appellate Division stated in *Matter of Mid-Hudson Pam Corp. v Hartnett*, (156 AD2d 818, 821 [3rd 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 calculations to the employer.”

B. Petitioners have failed to keep adequate records.

In the instant case, petitioners have failed to produce records for their employees. While the testimony was consistent that time records were kept on the door of the kitchen, no time records were produced at hearing. Petitioners argue that the reason they did not have records was because the employees took the records along with a computer and some cash, when they appeared for work on January 17, 2010. The claimants testified that the only paperwork that was taken by them was two or three pages that contained a copy of petitioner’s driver’s license and social security number since it appeared to them that the restaurant was no longer operational since the equipment had been removed and they needed some identifying information for petitioner so that they could be paid their remaining wages.

The Board finds the claimants’ version of the events to be credible. While there were some minor discrepancies, the overriding story was that when they showed up to work and found that the pita making machine was gone, they realized that the petitioner had closed the restaurant, and the only paper taken was a piece of paper that would identify the employer so that they could get their unpaid wages. Petitioner admitted that the employees were owed at least for their last week of work. On the other hand, petitioner’s story that he assumed that the employees stole the payroll records because there was no sign of forced entry and the employees had the keys, yet failed to file a police report even though a computer and cash were missing, fails to ring true and is speculative at best.

C. Calculation of Wages under the Minimum Wage Order

Article 19 of the Labor Law, entitled “Minimum Wage Act” sets forth the minimum wage that every employer must pay each of its non-exempt employees for each hour of work (Labor Law § 652 [1]). The applicable minimum wage rates during the time period covered by the wage order were \$7.15 an hour from January 1, 2007 to July 23, 2009 (Labor Law § 652 [1]; 12 NYCRR 137-1.2) and \$7.25 thereafter.³ Additionally, Labor Law § 652 (4) provides that the applicable wage rates for food service workers receiving tips during the time period covered by the wage order were \$4.60 an hour from January 1, 2007 to July 23, 2009, and \$4.90 thereafter, provided that the tips of such employees, when added to the cash wage, are equal to or exceed the relevant minimum wage rate (*see also* 12 NYCRR 137-1.5 [2009]).

However, as discussed above, no records were produced by the petitioners, and the burden of proof was on them to show that the employees received sufficient tips to entitle them to classify the employees as food service workers, and claim a tip allowance (12 NYCRR 137-3.4 [c] [2009]). It was reasonable for the Commissioner not to calculate wages at the lower restaurant service wage where there are no records of the amount of tips received by the employees (12 NYCRR 137-3.4 [c] [2009]; *See also Bakerman, Inc. v Roberts*, 98 AD2d 965 [4th Dept 1983]; *Padilla v Manlapaz*, 643 F Supp 2d 302, 310 [EDNY 2009]).

D. Calculation of Unpaid Wages Due

In the absence of sufficient payroll records, petitioners then bear 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]; *Heady v Garcia*, 46 AD3d 1088 [3d Dept 2007]). 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” (*see also Matter of Bae v Industrial Board of Appeals*, 104 AD3d 571 [1st Dept 2013], *cert denied* 2013 NY Slip Op 76385 [2013]). Therefore, the petitioners have the burden of showing that the wage order is invalid or unreasonable by a preponderance of the evidence of the specific hours that the employees 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]).

Here, DOL has calculated the unpaid wages due based on the claims that it received. The claims were the best available evidence. This is a reasonable basis for the calculation since Petitioners have failed to produce time or payroll records or any evidence of the specific hours worked or amounts paid (See Labor Law § 196-a).

³ The regulations applicable to this matter were found in the Minimum Wage Order for the Restaurant Industry, which is codified at 12 NYCRR Part 137 (repealed effective January 1, 2011 and replaced by the Wage Order for the Hospitality Industry, 12 NYCRR Part 146).

E. The Civil Penalty is upheld.

The order imposes a 100% civil penalty against the petitioners. Petitioners failed to contest the civil penalty, therefore, it is affirmed (See Labor Law § 101[2]).

II. The Penalty Order is Affirmed in full.

Petitioners were cited \$4,000 for failure to maintain and furnish payroll records; \$1,000 for failure to provide wage statements with wages; and \$2,000 for failure to keep and/or furnish true and accurate payroll records for each employee; and \$1,000 for failure to provide a thirty minute meal period.

Petitioners failed to allege or prove any defense to this order and therefore, the Board affirms the penalty order in full.

III. Interest is due.


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." Therefore, the interest imposed by the wage order is affirmed.

NOW THEREFORE, IT IS HEREBY RESOLVED THAT

1. The Wage Order is affirmed; and
2. The Penalty Order is affirmed; and
3. The Petition for review be, and the same hereby is, otherwise denied.



Anne P. Stevason, Chairperson



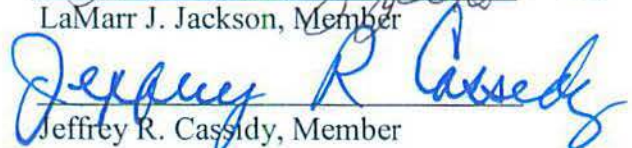
J. Christopher Meagher, Member



Jean Grunnet, 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
October 2, 2013.