STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of: DIOGENES COLLADO (T/A EL REY RESTAURANT), 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 the Labor Law, each dated November 12, 2010, - against - THE COMMISSIONER OF LABOR, Respondent.	DOCKET NO. PR 10-365 RESOLUTION OF DECISION

APPEARANCES

Grant and Appelbaum, P.C. (Michael W. Appelbaum of counsel), for the petitioner.

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

WITNESSES

Diogenes Collado, Luis Collado, Rafael Genao, Bernanda Perez, Anygerine Taburcio-Luina, Norma Roman, Miguel Luna, and Rosa Rodriguez, for the petitioners.

Senior Labor Standards Investigator Angela Dean and Labor Standards Investigator Emily Nieves, for the respondent.

WHEREAS:

The petition in this matter was filed with the Industrial Board of Appeals (Board) on November 22, 2010, and amended on January 3, 2011, and seeks review of orders issued against petitioner Diogenes Collado on November 12, 2010. Upon notice to the parties a hearing was held in this matter on February 19, 2013 in New York, New York, 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, make statements relevant to the issues, and file post-hearing briefs.

The order to comply with Article 19 (minimum wage order) under review directs compliance with Article 19 and payment to the Commissioner for minimum wages due and owing to Enrique Fernandez in the amount of $72,708.25 for the time period from August 12, 2001 through June 10, 2007, with interest continuing thereon at the rate of 16% calculated to the date of the order, in the amount of $39,872.01, together with a civil penalty in the amount of $72,708.25, for a total amount due of $186,288.51.

The order under Article 19 (penalty order) under review assesses a $500.00 civil penalty against the petitioner for violating Labor Law § 661 and 12 NYCRR 137-2.1 by failing to keep and/or furnish true and accurate payroll record for each employee for the period from or on about August 10, 2001 through June 9, 2007, and assesses a $500.00 civil penalty for violating Labor Law § 661 and 12 NYCRR 137-2.2 by failing to give each employee a complete wage statement with every payment of wages from on or about August 10, 2001 through June 9, 2007, for a total civil penalty of $1,000.00.

EVIDENCE

On June 27, 2007, claimant Enrique A. Fernandez[1] filed a claim with the Department of Labor (DOL) alleging that he worked from August 10, 2001 to June 9, 2007 as a food preparer at El Rey Restaurant in Jamaica, New York. The claim alleges that Fernandez worked Monday through Saturday from 9:00 a.m. to 9:00 p.m. with no time off for meals, and was paid $250.00 per week in cash. The claim also alleges that the petitioner did not provide free meals to the claimant.

Petitioner Diogenes Collado testified that he owned and operated El Rey Restaurant from 1994 until he sold the business in 2008. He testified that the restaurant was open seven days a week from 7:00 a.m. to 11:45 p.m., with the last employees leaving at 12:00 a.m. Collado typically worked at the restaurant every day, arriving most days around 3:30 p.m. The restaurant was opened each morning at around 6:30 or 6:45 a.m. by a manager. According to Collado, the restaurant generally employed around 15 to 16 workers operating on more than one shift. Collado testified that employees at El Rey never worked more than 40 hours in a week.

Collado testified that the claimant, who he knows as Miguel Rodriguez, is his fiancée's brother, who lived with him and his fiancée from 2003 to 2006. He testified that he hired the claimant in August 2001 and that he worked for a "couple" of years as a dishwasher working from 8:00 a.m. to 4:00 p.m. six days a week for a weekly salary of $350.00 plus three meals per day. The claimant's job eventually changed around 2003 such that he worked cutting and preparing meats three days per week (Monday, Thursday, and Saturday) and at the steam table three days per week. On the days he worked with the meats, his hours of work were from 10:30 a.m. until he was done, which was normally around 3:30 or 3:45 p.m. On the other days, he worked from 8:00 a.m. to 4:00 p.m. Collado testified that at the time the claimant's job duties

[1] The claim was filed under the name Enrique A. Fernandez, who was known by the petitioner as Miguel Rodriguez. A social security card in evidence shows the name Enrique Antonio Fernandez and a permanent resident card shows the name Enrique A. Fernandez Rodriguez. By the time of hearing, the parties understood that Enrique A. Fernandez and Miguel Rodriguez are the same person. We will refer to the claimant in this decision as Enrique A. Fernandez (or the claimant) because that is the name the claim was filed under and the name used by the respondent when issuing the orders.

changed, his weekly salary was increased to $450.00. Collado did not keep records of the claimant's hours of work or the wages that he was paid. Finally, Collado denied the allegations in the claim form, and testified that the claimant never worked past 4:00 p.m. or started work before 8:00 a.m.

Rosa Rodriguez is the petitioner's fiancée and the claimant's sister. She testified that the claimant worked at El Rey for seven years and that he lived at the house she shared with the petitioner for three or four years starting in 2003. Rosa Rodriguez did not work during that time period and was at home most days. She testified that she saw the claimant many times in the afternoon after he finished work. She testified that it takes between 30 to 45 minutes to get from the restaurant to the house and that she saw the claimant almost every day when he came home at 4:30 to 4:45 p.m.

Luis Collado, the petitioner's nephew, testified that he worked at El Rey Restaurant from 1994 until 2008 or 2009. He opened the restaurant in the mornings and worked six days a week from 6:30 a.m. to 4:00 or 4:30 p.m. The claimant, according to Luis Collado, worked at El Rey from 2001 to 2006 or 2007 three days per week at the steam table and three days per week chopping and seasoning meat. Luis Collado testified that the claimant did not work as a dish washer, but "might have done it once or twice if somebody called in sick." Luis Collado testified that he knew the claimant's work schedule was 10:00 or 10:30 a.m. to 3:30 or 3:45 p.m. on Mondays, Thursdays, and Saturdays, and 8:00 a.m. to 3:45 p.m. on Tuesdays, Wednesdays, and Fridays. According to Luis Collado, the claimant left every day before him, never left work after 4:00 p.m., and never started before 8:00 a.m. Luis Collado does not know how much the petitioner paid the claimant.

Bernanda Perez worked at El Rey from 2001 to 2005 as a waitress. She worked from 5:00 p.m. to 11:45 p.m., although she did not say how many days per week she worked for the petitioner. She knew the claimant because she lived on the second floor of the petitioner's house and the claimant lived in the basement. She also testified that the claimant attended meetings at El Rey when the petitioner held meetings for the entire staff. Perez testified that the claimant did not work the same hours she did and that she never saw him at the restaurant except at the staff meetings. Anygerine Taburcio-Luina also worked at a waitress at El Rey. She testified that she worked there five days a week from June 2004 to November 2005 from 5:00 p.m. to 11:45 a.m. Like Perez, she said that she never saw the claimant at the restaurant except at meetings.

Rafael Genao and Norma Roman worked at El Rey during the entire time period the claimant worked there. Genao worked as a cook from 6:45 a.m. to 3:00 p.m. but did not testify to the number of days per week he worked at the restaurant. Roman was a waitress and testified that she worked five days a week from 9:00 a.m. to 4:00 p.m. According to Genao, the claimant worked from 9:00 or 10:00 a.m. to "something like" 3:30 p.m. on the days he prepared meats, and from 8:00 or 8:30 a.m. to 3:00 p.m. on the other days. Roman testified that the claimant was never there when she arrived at work in the morning at 9:00 a.m., but also said that on the days he worked at the steam table, he started at 8:00 a.m. She testified that she left the restaurant at 4:00 p.m. and that the claimant left before she did, although "she wasn't paying attention." She agreed with the other witnesses that on the days the claimant seasoned the meat, he started his shift at 10:30 a.m.

Miguel Luna testified that he worked at the counter at El Rey Restaurant from 2003 to 2006 five days per week from 3:30 p.m. to 11:45 p.m. He testified that when he arrived for work between 3:30 p.m. to 3:45 p.m., the claimant was already changing his clothes and getting ready to leave. According to Luna, 4:00 p.m. was the latest the claimant stayed at the restaurant.

Labor Standards Investigator Emily Nieves testified that she investigated the claim filed against El Rey Restaurant. She visited El Rey and learned that the petitioner had sold the business. She testified that the petitioner did not produce records of the hours the claimant worked or the wages he was paid, although he did provide tax records to DOL. Nieves calculated the underpayments due to the claimant based on his statement, because the petitioner did not have records. DOL gave the petitioner credit in the final calculations for two meals per day and a 30 minute meal break.

Senior Labor Standards Investigator Angela Dean participated in a district meeting with the petitioner and the claimant, and stated that she was aware that the statement the claimant made at that time that he worked from 6:00 a.m. to 8:00 p.m. was different than what he alleged in the claim form. She further testified that she recommended imposition of a 100% civil penalty in this matter based on the size of the establishment, the good faith of the employer, and the gravity of the monetary violation.

ANALYSIS

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

A. Burden of Proof

The petitioners' burden of proof in this matter was to establish by a preponderance of the evidence that the orders issued by the Commissioner are invalid or unreasonable (State Administrative Procedure Act § 306 [1]; Labor Law §§ 101, 103; 12 NYCRR 65.30).

B. 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 minimum wage order were $5.15 an hour from the start of the claim period to December 31, 2004; $6.00 an hour from January 1, 2005 to December 31, 2005; $6.75 an hour in 2006; and $7.15 an hour from January 1, 2007 to the end of the claim period (Labor Law § 652 [1]; 12 NYCRR 137-1.2).[2] 12 NYCRR 137-2.1 (a), which was in effect during the relevant time period, provided that every employer was required to maintain weekly payroll records for each employee that included, *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, and money paid in cash. It is undisputed that the petitioner not only failed to

[2] 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).

maintain the records required by the regulation, but kept no records of the hours worked by the claimant or the wages he was paid.

In the absence of 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 minimum 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]). Although it is well established that in the absence of the required payroll records, 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.*; *see also Matter of Bae v Industrial Board of Appeals*, 104 AD3d 571; *Matter of Ramirez v Commissioner of Labor*, 110 AD3d 901), the burden on the petitioner is not an impossible one to meet (*See, e.g. In the Matter of Mohammed Aldeen*, PR 07-093, [May 20, 2009], *aff'd* 82 AD2d 1220 [2d Dept 2011]).

Here, we find that although the petitioner did not maintain the legally required records, he nonetheless met his burden of proof by means of other evidence, where the claimant did not testify nor was there any other evidence to corroborate his claim, to show that the claimant did not work the number of hours alleged, and where the claim form itself was inconsistent with a later statement provided to DOL. The witnesses agreed that the claimant worked two different jobs for the petitioner, and based on their credible testimony, we find that on Monday, Thursday, and Saturday the claimant prepared meats, and on Tuesday, Wednesday, and Friday he worked at the steam table. The petitioner's witnesses consistently and credibly testified that the claimant never worked later than 4:00 p.m. irrespective of whether he was working at the steam table or preparing meats, and DOL presented no evidence other than the claim form to contradict this.

The evidence concerning the claimant's starting time, however, was not as consistent. The petitioner, the petitioner's nephew, and Genao each testified that on the days when the claimant worked at the steam table he started work at 8:00 a.m., an hour earlier than alleged in the claim form, whereas Roman testified that the claimant was never at the restaurant when she started her shift at 9:00 a.m. Likewise, there was inconsistent testimony as to when the claimant started on the days he seasoned the meat. The petitioner testified that the claimant started on those days at 10:30 a.m., the petitioner's nephew said it was 10:00 a.m., Genao recalled the claimant started on those days at 9:00 a.m., and Roman agreed with the petitioner that it was "sometimes" 10:30 a.m. This evidence is not sufficiently precise to overcome the petitioner's high burden of proof in the absence of required records. Accordingly, we accept the petitioner's own testimony, which was corroborated by his nephew, that the claimant started work at 8:00 a.m. on Tuesday, Wednesday, and Friday; and find that, as alleged in the claim form and

corroborated by Genao, that the claimant started work at 9:00 a.m. on Monday, Thursday, and Saturday. Likewise we accept the petitioner's testimony that the claimant worked six days a week as a dishwasher until 2003, and started work at 8:00 a.m. during that time period. We therefore find that the claimant worked 42 hours per week from January 1, 2003 to June 10, 2007, which includes the 30 minute meal period each day the respondent found was given to the claimant; and 45 hours per week from August 10, 2001 to December 31, 2002 which also includes a daily 30 minute meal period.

In the absence of records, we cannot accept the petitioner's testimony, absent any corroboration, that he paid the claimant $350.00 per week, later raised to $450.00 per week. Accordingly, we accept the allegations in the claim form that the petitioner paid the claimant $250.00 per week. We find that the claimant's regular hourly rate of pay from August 19, 2001 to December 31, 2002 was $5.56, and his regular hourly rate from January 1, 2003 to June 10, 2007 was $5.95 (12 NYCRR 137-3.5 [2010]). The claimant's overtime rate was $8.34 from August 19, 2001 to December 31, 2002, and was $8.93 from January 1, 2003 to June 10, 2007 (12 NYCRR 137-1.3 [2010]); however since the minimum wage rate was higher than the claimant's regular rate from January 1, 2005 to June 10, 2007, we use the minimum wage rates then in effect in determining the wages due to the claimant (*see* 12 NYCRR 137-1.2 [2010]). The respondent credited the petitioner with twelve meals per week (12 NYCRR 137-1.9 [a] [2010]), and we do not disturb that finding.

Based on the above, we find that the petitioner owes no wages to the claimant for the time period from August 10, 2001 to December 31, 2005; owes $12.65 per week for the time period from January 1, 2006 to December 31, 2006; and $28.05 per week for the time period from January 1, 2007 to June 10, 2007; for a total due and owing of $1,302.95.

Civil Penalty

The minimum wage order imposes a 100% civil penalty against the petitioner. Senior Labor Standards Investigator Dean testified that in determining the civil penalty, she considered the size of the restaurant, the good faith of the employer, and the gravity of the monetary violation (*See* Labor Law § 218). We find that the considerations required to be made by the Commissioner in connection with the imposition of the civil penalty percentage in the wage order is proper and reasonable in all respects, however the amount must be modified to reflect the reduced amount of wages due.

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."

C. Penalty order

The penalty order assesses a $500.00 civil penalty against the petitioner for violating Labor Law § 661 and 12 NYCRR 137-2.1 by failing to keep and/or furnish true and accurate

payroll record for each employee for the period from or on about August 10, 2001 through June 9, 2007, and assesses an additional $500.00 civil penalty for violating Labor Law § 661 and 12 NYCRR 137-2.2 by failing to give each employee a complete wage statement with every payment of wages from on or about August 10, 2001 through June 9, 2007, for a total civil penalty of $1,000.00. It is undisputed that the petitioner did not maintain payroll records of the hours worked by the claimant and the wages paid to him or provide him with wage statements with each payment of wages. Accordingly, we affirm the penalty order.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The wage order is modified to reduce the wages due and owing to $1,302.95, with interest recalculated on the new principal amount, and the civil penalty reduced to $1,302.95; and

2. The penalty order is affirmed; and

3. The petition for review be, and the same hereby is, granted in part and denied in part.

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
January 16, 2014.