

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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 In the Matter of the Petition of: :
 :
 JONG HAK CHOI (T/A ROSEMARY FARM), :
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 Petitioner, :
 :
 To Review Under Section 101 of the Labor Law: An :
 Order to Comply with Article 19, and an Order under :
 Article 19 of the Labor Law, issued May 3, 2011, :
 :
 - against - :
 :
 THE COMMISSIONER OF LABOR, :
 :
 Respondent. :
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DOCKET NO. PR 11-203
RESOLUTION OF DECISION

APPEARANCES

John S. Lee, designated representative, for petitioner.

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

WITNESSES

Jong Hak Choi, Seon Hee Choi, and Marcos Lino-Sixto, for petitioner.

Marcos Lino-Sixto and Senior Labor Standards Investigator Wei Sha, for respondent.

WHEREAS:

On July 5, 2011, petitioner Jong Hak Choi (T/A Rosemary Farm) filed a petition to review two orders that the Commissioner of Labor (Commissioner) issued against him on May 3, 2011. The respondent filed its answer on August 19, 2011.

The first order under review is an Order to Comply with Article 19 of the New York Labor Law (Wage Order) and directs petitioner to pay \$65,348.13 in unpaid wages owed to former employee, Marcos Lino, \$26,812.43 in interest, and \$65,348.13 in civil penalties for a total due of \$157,508.69.

The second order was issued under Article 19 (Penalty Order) and directs petitioner to pay \$1,000.00 in civil penalties based on: (1) the failure to keep and/or furnish the requisite

payroll records for the period of July 24, 2004 through October 9, 2008 (\$500); and (2) the failure to provide wage statements to employees with every payment of wages for the same period (\$500).

The petition alleges that Marcos Lino was paid the correct wages including overtime and that although petitioner does not have all necessary records for the entire period in question, he does have records for October 2005 through June 2007 which show that Mr. Lino was properly paid.

In his answer, the Commissioner alleges that Mr. Lino filed a claim with the Department of Labor (DOL) alleging that he worked six days per week, 13 hours per day and was paid a flat salary of \$350 per week and that since Mr. Lino contested the accuracy of the records provided by petitioner, the amount of wages found due was based on Mr. Lino's claim.

Upon notice to the parties, a hearing was held on October 3, 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, and to make statements relevant to the issues.

I. SUMMARY OF EVIDENCE

Rosemary Farm is a fruit store owned by petitioner which went out of business in 2009. During the period in question, 2004 through 2008, it was open seven days per week from 8:00 a.m. to 8:00 p.m. Both petitioner and his wife, who worked at the store, testified that Marcos Lino (claimant) worked for Rosemary Farm from July 24, 2004 through October 9, 2008 six days per week, ten hours a day.

Petitioner maintained some payroll records. He produced records for the claimant for the period of October 27, 2005 through June 25, 2007. The records contained notations indicating the number of weekly hours worked, the amount of wages received, and an employee signature. All but one week indicates that claimant worked 60 hours per week. Also produced were two agreements which were written in both English and Spanish, one dated January 2006 and the other January 2007, which state that claimant's hourly wage was \$6.95 in 2006 and \$7.50 in 2007. Claimant was paid his wages in cash. Petitioner testified that claimant worked 60 hours per week, from 8:00 a.m. to 6:00 p.m. six days per week. Petitioner also submitted written statements of neighboring business owners that Rosemary Farms closed every night at 8:00 p.m.

Claimant filed a claim with DOL alleging that he worked from 8:00 a.m. to 9:00 p.m. six days per week and was paid \$350 from July 24, 2004 until October 9, 2008. At hearing he testified that he started at \$320 per week and was given periodic \$10 per week raises and that he made \$380 per week for the last four months that he worked for petitioner. He testified that the store was open past 8:00 p.m. when it was busy and that he cleaned the store after it closed. Mr. Lino does not remember signing the payroll records or the agreements although he may have signed one of them and the signatures do look like his, but he was not sure of what he was signing. Claimant also testified that from 2004 to 2008 he left his employment with petitioner three times, each time for approximately 20 days.

Senior Labor Standards Investigator (SLSI) Wei Sha testified that he supervised the DOL investigation into Rosemary Farms, which was initiated when Mr. Lino filed his claim. He also testified as to the contents of the DOL investigative file in this matter. After receiving Mr. Lino's claim an audit was conducted based on the information in the claim that Mr. Lino worked six days per week, 13 hours per day, from July 2004 to October 2008, and earned \$350 per week. It was determined that Mr. Lino was owed \$65,348.13 and a demand was made upon petitioner for payment. SLSI Sha testified that after receiving petitioner's payroll information for October 2005 to June 2007, the audit was revised to \$42,273.33. However, after Mr. Lino was interviewed again by a DOL investigator and submitted a statement by another employee, Miguel, that Mr. Lino worked from 8:00 a.m. to 9:00 p.m. six days per week, the audit was returned to its first calculation of \$65,348.13.

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, § 142-2.6 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) the wage rate;
- (4) the number of hours worked daily and weekly, ...;
- (5) when a piece-rate method of payment is used, the number of units produced daily and weekly;
- (6) the amount of gross wages;
- (7) deductions from gross wages;
- (8) allowances, if any, claimed as part of the minimum wage;
- (9) net wages paid; and
- (10) student classification.

“ . . .

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

§ 142-2.7 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:

“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).

B. Petitioner has failed to keep required records.

Petitioner has failed to keep records which meet all of the requirements of section 142-2.6 of the Minimum Wage Order (12 NYCRR § 142-2.6), listed above. However, petitioner did produce some records for the period of October 27, 2005 to June 25, 2007 which provide rate of pay, weekly wages received and include the claimant's signature on a weekly basis. The weekly hours are listed on the records and consistently state 60 hours per week (except for one week which was 50). The records are insufficient as time records since they do not include the number of daily hours. In addition, the lack of diversion from the 60 hours per week calls into question whether the records even accurately reflect the weekly hours. Given the fact that petitioner has failed to keep the required time records, the number of hours worked shall be based on claimant's statements and testimony that he worked from 8:00 a.m. to 9:00 p.m. six days per week. In its audit, DOL subtracted one half hour for a meal and calculated that claimant worked 75 hours per week.

The records produced do indicate the amount of wages paid to claimant and includes claimant's signature, signed when payment was received, per petitioner's testimony. Claimant's testimony concerning the records was inconsistent. He stated that he remembered signing one page and then stated that he did not sign any pages and in any event did not understand what he was signing. In the case of the employment agreement, which he does recall signing, the agreement was written in both English and Spanish. Although DOL argues that the records should be given no weight, we find that the records are credible since they were signed, look weathered, have the appearance of not being created at the same time, and because they represent only a part of the time period in question. We find that the records, while insufficient as time records, shall be given credence as pay records.

C. Calculation of Unpaid Wages Due

DOL has calculated the unpaid wages due based on Mr. Lino's claim. However, the hearing before the Board is *de novo* (Board Rule 66.1 [c]), and therefore, we must consider the testimony and evidence received at the hearing in making our determination whether to affirm, revoke or modify the Orders.

The Board finds that claimant worked 75 hours per week. Petitioner's records reflect payment for 60 hours per week. We therefore find that claimant is still owed 15 overtime hours per week for each of the weeks covered by petitioner's records, October 27, 2005 to June 25, 2007. For the other periods of time, we find that the DOL audit is a reasonable approximation of wages due. Based on the pay records produced by petitioner, the DOL audit for the time not reflected in petitioner's records and based on claimant's testimony that he was out 20 days per year, we modify the wage order to find that the following wages are due.

Time Period	Hours worked	Underpayment per week	Number of weeks	Spread of Hours	Total Due
7/28/04 to 12/31/04	75	\$157.28 (amount determined in DOL audit)	15+	(included in audit)	\$2,381.08
1/1/05 to 10/26/05	75	\$241.00 (amount determined in	39	(included in audit)	\$9,399.00

		DOL audit)			
10/27/05 to 12/31/05	75 (15 unpaid)	\$135.00 (15 overtime hours x \$9.00/hr) ¹ (records used)	10	\$309.00	\$1,659.00
1/1/06 to 12/31/06	75 (15 unpaid)	\$156.45 (15 overtime hours x \$10.43/hr) ² (records used)	51	\$2,065.50	\$10,044.25
1/1/07 to 6/25/07	75 (15 unpaid)	\$168.75 (15 overtime hours x \$11.25/hr) ³ (records used)	23	\$986.70	\$4,867.95
6/26/07 to 12/31/07	75	\$354.28 (amount determined in DOL audit)	26	(included in audit)	\$9,211.28
1/1/08 to 10/9/08	75	\$354.28 (amount determined in DOL audit)	38	(included in audit)	\$13,462.64

TOTAL DUE: \$46,157.25

The wages due include amounts for “spread of hours” which is defined at 12 NYCRR 142-3.16 as: “the interval between the beginning and end of an employees workday.” The Minimum Wage Order provides that an employee shall receive one hour’s pay at the basic minimum wage if the spread of hours for any day exceeds 10 hours (12 NYCRR 142-2.4). Since Mr. Lino was at work more than 10 hours six days per week, he is entitled to another hour at minimum wage for each day or six additional hours at minimum wage per week.

D. The Civil Penalty is upheld.

The order imposes a 100% civil penalty against the petitioners. Since petitioner failed to contest the penalty it is affirmed at 100%, however, the amount is modified according to the recalculation of the wages.

II. The Penalty Order is Affirmed in full.

Petitioners were cited \$500 for failure to maintain and furnish payroll records; and \$500 for failure to provide wage statements with each payment of wages. Petitioners failed to allege or prove any defense to this order and therefore, the Board affirms the penalty order in full.

¹ From 10/27/05 to 12/31/05 the minimum wage was \$6.00 per hour. Therefore, the overtime rate was \$9.00 per hour or 1.5 times the hourly minimum wage.

² The 2006 wage agreement signed by the parties provided that claimant would be paid \$10.43 for each overtime hour.

³ The wage agreement for 2007 provided that claimant would be paid \$11.25 per overtime hour.

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.

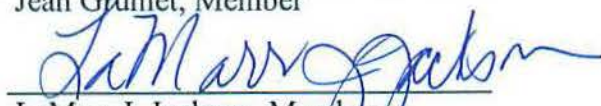
NOW THEREFORE, IT IS HEREBY RESOLVED THAT

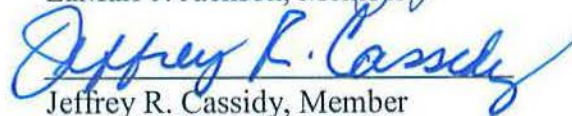
1. The Wage Order is modified to reduce the wages due and owing to \$46,157.25 with the amount of interest and penalty adjusted accordingly; and
2. The Penalty Order is affirmed; and
3. The Petition for review be, and the same hereby is, otherwise denied.



Anne P. Stevason, Chairperson

J. Christopher Meagher, Member

Jean 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
February 27, 2014.