

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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In the Matter of the Petition of:

FEN F. LIM A/K/A DIANA F. LIM AND
KELANTAN CORP. (T/A NYONYA MALAYSIAN
CUISINE),

Petitioners,

To Review Under Section 101 of the Labor Law:
An Order to Comply With Article 6 of the Labor Law,
An Order to Comply With Article 19 of the Labor
Law, and an Order Under Articles 5, 6, and 19 of the
Labor Law, all dated January 21, 2014,

- against -

THE COMMISSIONER OF LABOR,

Respondent.
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DOCKET NOS.

PR 14-049 & PR 14-053

RESOLUTION OF DECISION

APPEARANCES

Lawrence Lo., Esq., for petitioner Fen F. Lim A/K/A Diana Lim.

Brian Kennedy, Esq., for petitioner Kelantan Corp.

Pico P. Ben-Amotz, General Counsel, NYS Department of Labor (Larissa Bates, Jake Ebers and
Fredy Kaplan of counsel), for respondent.

WITNESSES

Petitioner Fen F. Lim, Yoon Thiam Tham, Chea Khim Khaw, Jose Saucedo and Lice Keng Choo
for petitioners.

Supervising Labor Standards Investigator Emy Bautista and Leonardo Espinobarros for
respondent.

WHEREAS:

Min Soon Lim, Chee Loon Cheng, and Fen F. Lim A/K/A Diana F. Lim filed a petition
in this matter on March 14, 2014, seeking review of three orders issued by the Commissioner of
Labor (Commissioner or respondent) on January 21, 2014 against Cheong Kheng Ong A/K/A
Michael K. Ong and Fen F. Lim A/K/A Diana F. Lim and Min Soon Lim and Chee Loon Cheng

and Kelantan Corp. (T/A Nyonya Malaysian Cuisine). Cheong Kheng Ong A/K/A Michael K. Ong and Kelantan Corp. filed a separate petition for review of the orders on March 17, 2014. The Commissioner filed his answer to the petition of Min Soon Lim, Chee Loon Cheng, and Fen F. Lim on May 22, 2014. He filed an answer to the petition of Cheong Kheng Ong and Kelantan Corp. on May 12, 2014, and requested consolidation of the petitions by letter dated May 21, 2014, which was granted. On December 29, 2014, respondent requested permission from the Board to withdraw the orders with respect to Cheong Kheng Ong A/K/A Michael K. Ong, Min Soon Lim, and Chee Loon Cheng, which we granted. Fen F. Lim A/K/A Diana F. Lim and Kelantan Corp. are the remaining petitioners, whose petitions were consolidated and heard.

Upon notice to the parties a hearing held in this matter on January 22, March 23, May 29, and June 3, 2015, in New York, New York, before Jeffrey M. Bernbach, Administrative Law Judge, 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 make statements relevant to the issues. Additionally, the parties were directed to file post-hearing briefs according to a schedule set forth by the Hearing Officer and consented to by the parties. Petitioners filed timely briefs. Respondent's brief was not timely filed. Petitioners objected to the Board considering respondent's brief since it was filed late. We agreed with petitioners and rejected respondent's brief as untimely.

The order to comply with Article 19 (minimum wage order) under review directs compliance with Article 19 and payment to the Commissioner for unpaid minimum wages due and owing to 16 named and 4 unidentified employees in the amount of \$694,098.41 for the time period from September 2, 2002 to November 2, 2008, with interest continuing thereon at the rate of 16% calculated to the date of the order in the amount of \$650,210.15, liquidated damages in the amount of \$173,524.62, and assesses a civil penalty in the amount of \$694,098.41, for a total amount due of \$2,211,931.59.

The order to comply with Article 6 (tip appropriations order) under review directs compliance with Article 6 and payment to the Commissioner for tips appropriated from five named employees in the amount of \$8,863.00 for the time period from October 9, 2005 to October 26, 2008, with interest continuing thereon at the rate of 16% calculated to the date of the order in the amount of \$8,296.96, and assesses a civil penalty in the amount of \$8,863.00, for a total amount due of \$26,022.96.

The order under Articles 5, 6, and 19 (penalty order) assesses a \$1,000.00 civil penalty for violating Labor Law § 661 and 12 NYCRR 137-2.1 by failing to keep and/or furnish true and accurate payroll records for each employee from on or about September 2, 2002 through November 2, 2008; a \$1,000.00 civil penalty for violating Labor Law § 661 and 12 NYCRR 137-2.2 by failing to give each employee a complete wage statement with each payment of wages during the period from on or about September 2, 2002 through November 2, 2008; a \$1,000.00 civil penalty for violating Labor Law § 162 by failing to provide employees with at least thirty minutes off for the noon day meal when working a shift of more than six hours extending over the noon day meal period from eleven o'clock in the morning to two o'clock in the afternoon from on or about July 18, 2007 through November 2, 2008; a \$1,000.00 civil penalty for violating Labor Law § 196-d by collecting and distributing tips and/or withholding part of the tips collected for employees from on or about September 2, 2002 through November 2, 2008; and a \$1,000.00 civil penalty for violating Labor Law § 198-d by failing to post

regulations on prohibited deductions from wages and appropriation of tips (Labor Law §§ 193, 196-d) in a place accessible to employees in a visually conspicuous manner on or about September 2, 2002 through November 2, 2008; for a total amount due of \$5,000.00.

Petitioner Fen F. Lim A/K/A Diana F. Lim alleges the orders are invalid or unreasonable because she was not an employer under the Labor Law for the time periods and employees listed in the orders. Petitioner Kelantan Corp. alleges in relevant part that the orders are invalid or unreasonable because employees listed in the orders were not employed by Kelantan Corp., and the periods claimed are not within the statute of limitations.

For the reasons discussed below, we find petitioner Fen F. Lim A/K/A Diana F. Lim was not an employer; we find the minimum wage and penalty orders must be modified, and we revoke the tip appropriations order.

SUMMARY OF EVIDENCE

Petitioners' Evidence

Testimony of Diana F. Lim

Petitioner Fen F. Lim A/K/A Diana F. Lim testified that from 2003 to 2009 she worked at Nyonya Asian Cuisine, a Malaysian restaurant located at 194 Grand Street, New York, New York, operated by petitioner Kelantan Corp. She was not an owner, officer, or shareholder of the corporation. Records in evidence show that the president and sole owner of Kelantan Corp. was Kheng Cheong Ong A/K/A Michael Ong. Lim testified that she started in 2003 as a busser, and worked in that position for two years until she could understand and write sufficiently in Cantonese to be promoted to a position as server in 2005. Lim worked as a server until she was promoted to captain in September 2008, the position she held until Nyonya closed on October 12, 2009, at which time she opened her own restaurant across the street at 199 Grand Street, also doing business as Nyonya, operated by Grand Nyonya Corp. She used funds borrowed from relatives to open the restaurant at 199 Grand Street after learning from Ong that he would be closing the restaurant at 194 Grand Street. Lim explained that Nyonya¹ is a common name for Malaysian restaurants and the trademark is owned by a corporation that licenses the name to her for a fee. In addition to working at Nyonya at 194 Grand Street during the relevant time period, Lim owned another Malaysian restaurant in Brooklyn incorporated as Pangkor Corp, doing business as Nyonya, and run by Lim's husband, Boon Beng Ooi. Lim did not work at the Brooklyn Nyonya, which opened in September 2007.

Lim testified that from 2003 to 2008 she reported only to "Cheah," and beginning in 2007 she reported to Cheah and "Ming." She further testified that she had no authority to hire or fire employees at Nyonya, and never supervised employees, even after becoming captain. She described her job as captain as the same as a server except that "if [a] customer complains that the food or the meals are not good, so the captain can actually take the food back to the kitchen and ask the kitchen to redo it. Not really to redo the dishes, but just let the kitchen staff know that the dishes were not – the customers complain[ed] about the dishes." Lim was adamant that as

¹ Nyonya translates approximately to "grandmother's cooking."

captain she did not tell the servers or bussers what to do, and that the job mainly involved handling customer complaints and sometimes translating for customers because she is able to communicate in English. She further stated that her salary as a captain was the same as she had received as a server except that sometimes she was paid \$100.00 more by "the boss." She claimed that she did not need to supervise the other servers because they knew their jobs and what to do. However, at a hearing before the New York State Division of Human Rights in 2010 related to alleged national origin discrimination by Kelantan Corp. and Grand Nyonya Corp., she testified that she was a "floor manager" and that her work included managing the wait staff, but not the kitchen staff. With respect to tips, Lim testified that the night staff normally distributed the tips from each day and each server normally received an equal share.

Lim denied that she hired Jose Saucedo and Leonardo Espinobarros. She testified that Saucedo was working at Nyonya in 2003, but denied that she ever gave Saucedo his wages. She testified that she never saw Espinobarros working at Nyonya and that it is unlikely he could have worked there without her knowing.

Testimony of Yoon Thiam Tham

Yoon Thiam Tham testified that he worked as a cook at Nyonya from 2005 until it closed in 2009. Tham testified that Ong was the "boss." Tham was hired and supervised by the chef, "Along." Along also set Tham's rate of pay. Tham testified that Along was at the restaurant once a week preparing sauces and giving the kitchen staff their assignments for the week. If Tham wanted to take time off, he needed approval from Along. Tham testified that Jose Saucedo worked at Nyonya making roti. Tham did not see Saucedo at Nyonya after 2005. Tham did not recognize Espinobarros.

Tham testified that petitioner Diana F. Lim was a server, did not work in the kitchen, and did not give directions to the kitchen staff. He did not report to Lim and she did not set his schedule or determine his rate of pay.

Testimony of Chea Khim Khaw

Chea Khim Khaw testified that she worked at Nyonya from 1999 until it closed in 2009. She testified she was originally hired by Cheah as a busser, and he eventually promoted her to server. Khaw testified that Cheah was the manager and the wait staff reported to him. She explained that the front of the house and kitchen had the same "boss," but not the same supervisor. According to Khaw, the owner, Michael Ong, was the "boss," and Cheah supervised the front of the house. Khaw does not know who supervised the kitchen. Khaw testified that Diana Lim did not hire her, supervise her, set her work schedule, or determine her salary, and that there was no "head" of the servers, because although Cheah was the "head," he was not a server. Khaw further testified that Saucedo worked at Nyonya making roti. She does not know who he reported to. Khaw never saw Espinobarros working at Nyonya.

Khaw testified that tips at Nyonya were shared among the wait staff, who took turns splitting them. She testified that Cheah did not get any part of the tips, which were only shared with the servers.

Testimony of Lice Keng Choo

Lice Keng Choo testified that she worked at Nyonya starting in 2002 when she was hired by Cheah . Cheah supervised Choo from 2002 to 2007. Her supervisor in 2007 was Ming, and starting in 2008 Lim was her supervisor. Choo testified that Lim came to work at Nyonya in “approximately” 2006 and worked as a server until the middle of 2008, when she became captain. Starting in 2008, when Lim became captain, she needed to ask Lim if she wanted to take a day off, because Lim oversaw the servers. However, Choo also testified that Ong wrote down the schedules and the servers worked it out among themselves if they wanted to make changes.

Choo testified that she signed a claim form that was completed by a DOL investigator during an interview at the restaurant. The claim form states she started working at Nyonya on January 15, 2006, which is incorrect. The claim form also states she was hired by “Ana,” which Choo testified is incorrect and could not have been an attempt to write “Diana,” because Lim did not work at Nyonya yet at the time when Choo was hired. Choo also testified that the hours she worked as written on the claim form are not correct because the schedule often changed.

Choo received tips from customers for her work, which were pooled. She testified that the wait staff divided the tips themselves at the end of the day, and whichever servers calculated the shares placed the tips in envelopes that were put in a drawer any server could access. Choo testified that she sometimes did the tip calculations. The amount each server received from the pool depended on the amount of hours worked.

Testimony of Jose Saucedo

Jose Saucedo testified that he worked at Nyonya making roti. He filed a claim with DOL for unpaid minimum wages related to his work at the restaurant. He does not remember the year he started, but January 2002, which is written on his claim form, “could be” correct, although he testified before the Division of Human Rights in 2010 that he worked at Fen Yang, a Malaysian restaurant on Spring Street, until 2004. His last day of work at Nyonya was August 12, 2009.

The claim Saucedo filed with DOL states that Diana Lim hired him and was his “supervisor/manager/foreman.” However, Saucedo testified at the Division of Human Rights that he was hired by the chef, Along, who was also the chef at Fen Yang. Saucedo explained that he worked at Fen Yang until it closed and then Along sent him to work at Nyonya, where Diana Lim was the manager, and Along was “in charge” of the kitchen staff. Saucedo described Lim as in charge of the servers and the entire staff, and that she needed to be informed when there were any problems.

Saucedo testified that Along hired him, told him what his salary would be, and was the individual he asked when he wanted an increase in his wages. Saucedo never saw Lim give directions to Along or to any of the employees in the kitchen. He testified that Lim set the work schedules, but further testified that when he wanted a day off, he needed to ask “Stanley.”² Saucedo acknowledged that Along, who was only present once a week to make sauces, was his manager, and that there were no other managers for the kitchen on days when Along was not present. Saucedo testified that Lim gave him his wages, and that he believed she was the

² Based on the record, Stanley appears to be the same person as Cheah.

manager because she “was in charge of paying us,” and was the one who talked to people who came to the restaurant looking for work, although he could not understand what she discussed with them because he does not speak Chinese. He further testified that he did not speak with Lim because he cannot not speak English.

Respondent's Evidence

Testimony of Leonardo Espinobarros

Leonardo Espinobarros testified that he worked at Nyonya from July 10, 1997 until 2006. He started as a dishwasher, took three months off for health reasons in 2004, and returned to work in the kitchen making rice and providing general kitchen help. He testified that when he started at Nyonya in 1997, Diana Lim was not yet working there. According to Espinobarros, Lim arrived at Nyonya in 2002 as a server, and became the manager in 2003. He testified that he had to report to Lim, but he was supervised by the “kitchen boss” Amed. Amed did not need to check with Lim or Ong when there were issues with the kitchen. Espinobarros described Lim's interaction with the kitchen staff as asking for things like spoons, plates, and glasses when the restaurant was busy, but otherwise giving no other instructions to the kitchen employees. He stated she was the manager of the wait staff, that she worked with the servers, managed them, and told them what to do. For example, he testified that Lim told the servers to move more quickly when the restaurant was busy. He also saw her helping the servers do their work. Espinobarros further testified that Lim asked the cooks to move more quickly when the restaurant was busy.

Espinobarros filed a wage claim with DOL, which he testified a DOL employee helped him complete. He reviewed the claim when it was completed and the information written down reflected the hours he worked and his rate of pay. However, Espinobarros conceded that he did not inform DOL that he was out of work for three months in 2004. Espinobarros further testified that he was not a plaintiff to a lawsuit against another Malaysian Restaurant, Penang, which was filed in 2007, explaining that he never worked for Penang. He also denied knowledge of the law firm that filed the lawsuit against Penang.

Several photographs were entered into evidence by respondent, which Espinobarros testified he took at Nyonya in 2004 and 2005, and later testified were taken by his nephew “Zacharias,” who also worked at Nyonya. He identified one of the photos as a picture of the area in the restaurant where he washed dishes, another as the station where rotis are made, and another as a photo he took of Lim in 2005. When asked why he brought the photos to the hearing, Espinobarros explained that he brought them because Lim had testified that she did not know him.

Testimony of Supervising Labor Standards Investigator Emy Bautista

Supervising Labor Standards Investigator Emy Bautista testified that in September 2009, she was assigned to investigate claims filed against the Nyonya Restaurant located at 194 Grand Street. Prior to September 2009, Investigator Wei Sha had been responsible for the investigation. Bautista recalled that in October 2009 she made a field visit to 194 Grand Street, found the restaurant was closed and witnessed an individual handing out menus and directing customers to a restaurant with the same name across the street at 199 Grand Street. When Bautista went across

the street, she met Lim at the new restaurant. Lim informed Bautista that the restaurant at 199 Grant Street had no relationship to the restaurant that had existed at 194 Grand Street. Despite Lim's explanation that the two restaurants were not related, Bautista demanded that Lim produce wage and hour records for the Nyonya that had been located at 194 Grand Street. Bautista testified that Sha had previously requested records of Kelantan before the restaurant on 194 Grand Street closed down, but no legally sufficient wage and hour records were ever produced to DOL.

Bautista testified that in the absence of legally sufficient wage and hour records, she determined the amount of wages due to Nyonya's employees based on their statements. She credited petitioners with meal allowances because employees indicated in their statements to DOL that petitioners had provided them with meals during their shifts. Petitioners were also provided a tip credit for employees who indicated to DOL that they received gratuities. Bautista reasoned that she had to rely on the employees' statements when determining liability because:

“[t]he payroll did not really match up what the employees were saying they earned. There was no wage statement, no proof of wage statement or proof of what they got paid. But in certain instances, the basic pay on their employer's record is much less than what the employee indicated was being paid. So we credited what the employees stated they received.”

Bautista also explained that her calculations included four unnamed employees – one server, one kitchen worker, one dishwasher, and one food preparer, because “[a]t least the company needs one of those positions to function. At least one. And they were plugged in for periods where the company was in business prior to the known employee.”

Bautista testified that she did not conduct any of the interviews with Nyonya's employees, because they were completed prior to her assignment to the investigation. She did, however, conduct phone interviews, and recalled that David Garcia told her he was supervised by Along, the chef. She also remembered interviewing Pablo Vega, who did not mention Lim as a supervisor. Bautista conceded that some of the employee statements do not mention Lim as a manager, while others list no “responsible person,” because nobody from DOL “bothered to ask.”

ANALYSIS

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

Burden of Proof

The petitioners' burden of proof in this matter is 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; *see also Matter of Ram Hotels, Inc.*, PR 08-078, at 24 [2011]). Respondent issued three orders against petitioners. A minimum wage order under Article 19 of the Labor Law for petitioners' failure to

pay minimum wage and overtime to 16 named and 4 unidentified employees, a tip appropriations order under Article 6 of the Labor Law for petitioners' appropriation of tips from 5 named employees, and a penalty order under Articles 5, 6 and 19 of the Labor Law for recordkeeping and other non-wage violations. As discussed below, we find that petitioner Diana F. Lim met her burden of proof to show that she was not an employer. The orders are otherwise affirmed as modified to conform to the record as discussed below.

Statute of Limitations

Petitioners allege the orders are invalid or unreasonable because the time periods are not within the statute of limitations. Labor Law §§ 198 (3) and 663 (3) provide that the six year statute of limitations for collection of unpaid wages and appropriated tips is "tolled from the date an employee files a complaint with the commissioner or the commissioner commences an investigation, whichever is earlier" (see also *Matter of 238 Food Corp.*, PR 05-068 at p 11-12 [April 23, 2008]). The earliest date covered by the orders is September 2, 2002, which is within six years of the first claims filed. Respondent's orders are not outside the statute of limitations.

Employer Status

Diana Lim alleges she was not an employer and, as such, not individually liable for any of the violations at issue in this proceeding. "Employer" means "any person, corporation or association employing any individual in any occupation, industry, trade, business or service" (Labor Law § 190 [3]; see also Labor Law § 651 [6]). "Employed" means "suffered or permitted to work" (Labor Law § 2 [7]). The federal Fair Labor Standards Act, like the New York Labor Law defines "employ" to include "suffer or permit to work" (29 USC § 203 [g]), and "the test for determining whether an entity or person is an 'employer' under the New York Labor Law is the same test . . . for analyzing employer status under the Fair Labor Standards Act" (*Chu Chung v The New Silver Palace Rest., Inc.*, 272 F Supp 2d 314, 319 n6 [SDNY 2003]).

In *Herman v RSR Sec. Servs. Ltd.*, 172 F3d 132, 139 (2d Cir 1999), the Second Circuit Court of Appeals stated that the test used for determining employer status by explaining that:

"Because the statute defines employer in such broad terms, it offers little guidance on whether a given individual is or is not an employer. In answering that question, the overarching concern is whether the alleged employer possessed the power to control the workers in question with an eye to the 'economic reality' presented by the facts of each case. Under the 'economic reality' test, the relevant factors include whether the alleged employer (1) had the power to hire and fire employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records" (internal quotations and citations omitted).

When applying this test, "no one of the four factors standing alone is dispositive. Instead the 'economic reality' test encompasses the totality of the circumstances, no one of which is exclusive." (*Id.* [internal citations omitted]). We find insufficient evidence in the record to support respondent's determination that Lim is individually liable as an employer.

Lim did not have authority to hire and fire

Lim testified that she did not hire or fire employees during her time at Nyonya, and specifically denied that she had hired Saucedo or Choo. Although many of the employees alleged in their statements that Lim hired them, no employee testified at hearing that they were hired by Lim, nor did any investigator with personal knowledge of the interviews testify. Tham testified he was hired by Michael Ong, and Khaw and Choo both testified they were hired by Cheah. Saucedo, who indicated on his claim form that he was hired by Lim, testified that it was actually the chef, Along, who hired him. Respondent did not present any reliable evidence to contradict Lim's testimony that she did not hire employees for Nyonya, and there is no evidence she fired employees or even had the authority to do so.

Lim did not supervise and control employee work schedules or conditions of employment

Although several employees alleged in their statements that Lim was their manager or supervisor, she testified that she never supervised employees at Nyonya or ordered employees, including servers and bussers to do anything, even after she became captain, and there is no evidence that she supervised or controlled employee work schedules or conditions of employment to the extent required to hold her individually liable as an employer.

The record is clear that she did not have a supervisory role in the kitchen. Tham, who worked as a cook, testified that Lim did not give directions to the kitchen staff and he did not report to her. Saucedo, who claimed he was managed and supervised by Lim, testified that he was actually managed and supervised by the chef, Along, that he never saw Lim give directions to Along or any other kitchen employees, and that there was no other kitchen supervisor other than Along. Saucedo testified that Lim made the schedule and was in charge of everything, but he also testified he could not communicate with Lim because he does not speak English or Chinese, and he only provided vague testimony of an impression that Lim was "in charge," instead of providing specific testimony of her actual role at Nyonya. Espinobarros, who worked in the kitchen, also claimed Lim was his manager or supervisor, but only offered vague testimony concerning his impression that she was in charge. He testified his supervisor was the kitchen boss, Amed, but that he had to report to Lim, although he gave no examples of what it mean to report to Lim. The only interaction Espinobarros described having with Lim was that when the restaurant was busy she would ask the cooks to move more quickly to get the orders out or ask for spoons, plates, and glasses. A front of the house employee urging the kitchen to work faster when a restaurant is busy is not evidence that the front of the house employee supervises or controls the employees in the kitchen.

The record also does not support a finding that Lim managed or supervised employees in the front of the house. Khaw testified that Cheah managed and supervised the wait staff. And that Lim was not her supervisor or manager and did not set her schedule. Choo, however, testified that starting in 2008, Lim was her supervisor and oversaw the other waitresses, and, although Ong made the work schedules and the servers made changes to it among themselves if necessary, that she needed permission from Lim to take a day off and had to bring issues with customers to her attention. Choo did not provide any examples of directions or instructions Lim gave to the servers that indicate she was anything other than an elevated or trusted employee. That Lim may have had some authority as captain over whether a server could take a scheduled day off from

work is not sufficient control over the work schedules and conditions of employment to find her individually liable as an employer.

Lim did not determine employees' rate and method of payment

There is no evidence that Lim determined employees' rates and method of payment. No employee testified that Lim decided how much they would be paid or how they would be paid. The record shows that Lim may have physically handed some employees their wages, which is not evidence that she set the pay rates or was responsible for deciding the method of payment. Physically handing an employee a pay envelope absent additional evidence of an individual's role in a business' policy making does not support a finding of individual liability as an employer (*Chan v Sung Yue Tung Corp.*, 2007 U.S. Dist. LEXIS 7770 *37 [SDNY 2007]).

Lim did not maintain employment records

There is no evidence that to the extent Nyonya maintained any employment records, that Lim kept the records or was responsible for doing so.

Lim is not individually liable as an employer

Based on the above, we find Lim met her burden of proof to show she was not an employer. The burden having shifted, respondent did not present sufficient evidence to show his determination is valid or reasonable.

Minimum Wage Order

The minimum wage order finds petitioners owe 16 known and 4 unknown employees \$694,098.41 in unpaid minimum wages and overtime. Article 19 of the Labor Law, known as the Minimum Wage Act, requires employers to pay not less than the applicable minimum wage to each covered employee (Labor Law § 652). During the time period relevant to this proceeding, the minimum wage was \$5.15 an hour from August 2, 2002 to December 31, 2004, \$6.00 an hour in 2005, \$6.75 an hour in 2006, and \$7.15 an hour from 2007 through the end of the claim period (Labor Law § 652 [1]; 12 NYCRR 137-1.2³). Article 19, in addition to requiring employers to pay the applicable minimum hourly wage rate to covered employees, requires payment of an overtime premium of time and one-half the regular hourly rate for hours worked over 40 in a week (12 NYCRR 137-1.3). With respect to tipped food service workers such as servers and bussers, the Minimum Wage Act required that petitioners pay them a cash wage of at least \$3.30 an hour from August 2, 2002 to December 31, 2004, \$3.85 an hour in 2005, \$4.35 an hour in 2006, and \$4.60 from 2007 to the end of the claim period so long as the tips of such employees when added to the applicable cash wage equal or exceed the applicable minimum wage rate (Labor Law § 652 [4]; 12 NYCRR 137-1.5).

Article 19 also requires employers to maintain for six years certain records of the hours their employees worked and the wages they paid them (12 NYCRR 137-2.1). The required records must show for each employee, among other things, the number of hours worked daily and weekly, the amount of gross wages, deductions from gross wages, allowances claimed, if

³ The wage order for the restaurant industry, which was in effect during the time period relevant to this proceeding, was repealed and replaced by the hospitality wage order effective January 1, 2011.

any, and money paid in cash (12 NYCRR 137-2.1 [a]). In the absence of these required records petitioners have 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, 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]). 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” (*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). Because petitioners produced no credible records, DOL based its determination of wages due on employee statements, which was the best available evidence. Respondent’s determination of wages owed is reasonable except as modified below.

Wages owed to Jose Saucedo

Respondent determined that petitioners owe Jose Saucedo \$52,418.08 in wages for work done at Nyonya for the time period from November 3, 2002 through November 2, 2008. Petitioner presented evidence, which was not rebutted by respondent, that this determination was not reasonable. Saucedo’s claim to DOL alleges he started at Nyonya in January 2002, however he testified that prior to working at Nyonya he worked at another Malaysian restaurant, Fen Yang, and did not start at Nyonya until Fen Yang closed. He was unable to remember when Fen Yang closed and when he started at Nyonya, but in prior testimony before the Division of Human Rights, he testified he worked at Fen Yang until 2004. Saucedo’s testimony concerning his wage rate and hours of work was consistent with his claim. Based on his testimony at hearing that he could not recall when he started at Nyonya and his prior sworn testimony that he worked at Fen Yang until 2004, we find Saucedo was not employed at Nyonya until January 1, 2004, and that Kelantan Corp. is liable for the wages due for the period from January 1, 2004 to November 2, 2008.

Wages owed to Leonardo Espinobarros

Respondent determined petitioners owe Leonardo Espinobarros \$36,263.62 in wages for working at Nyonya for the time period from September 2, 2002 to October 1, 2006. Petitioners alleged Espinobarros did not work at Nyonya during the relevant time period, arguing he may have worked for another Malaysian restaurant, Penyang. Lim and Khim testified that they never saw Espinobarros working at Nyonya. We do not credit their testimony. Espinobarros credibly testified that he worked at Nyonya and gave specific and detailed information of his work there, which was supported by photos taken of his work station, including a photo he testified that he took of Lim that discredits her testimony that she had never seen him prior to the hearing. We

disagree that a lawsuit Espinobarros filed against another Malaysian restaurant, Penyang, proves he did not work at Nyonya. In *Leonardo Espinobarros v Penang Corp. and Suan Lee Cheah d/b/a Nyonya Malaysian Cuisine*, Supreme Court, New York County, Index No. 116289/2006, Espinobarros alleged that defendants operated a restaurant at various locations, including 194 Grand Street.

Based on the credible evidence, we find Kelantan Corp., which operated the Nyonya restaurant at 194 Grand Street, employed Espinobarros from September 2, 2002 to October 1, 2006, and the order must be modified to reflect the three months Espinobarros testified he did not work in 2004.

Wages due to Zhao Mao Chen and Arturo Fernando Vasquez

Petitioners further alleged the minimum wage order is unreasonable in that it finds wages due to individuals who did not provide a statement to DOL. There is no record that Zhao Mao Chen or Arturo Fernando Vasquez were employed by petitioners during the claim period. Although respondent may include in an order employees who do not file claims or statements with respondent, there must be evidence that reflects the source of respondent including such names in an order. Having no such evidence on the record before us, the order must be revoked with respect to these alleged employees.

Wages due to unidentified employees

Petitioners also alleged respondent's determination of wages due to four unnamed employees is unreasonable and invalid. We disagree. Respondent may award wages to unidentified employees as long as the existence of the employees and the wages due are established by a preponderance of the evidence (*Matter of Prakash Hundalani*, PR 08-124 at p 11-12 [October 11, 2011]). Respondent's determination that the restaurant could not function without at least one server, one busser, one food preparer, and one cook during the time period for which no known employees stated they worked for Nyonya in those positions, is reasonable (*Matter of Anthony Boumassa et al.*, PR 09-058 at 13-14 [February 11, 2011]).

Liquidated Damages

The minimum wage order includes 25% liquidated damages pursuant to Labor Law § 663. Petitioners presented no evidence that the imposition of liquidated damages was unreasonable or invalid. We affirm imposition of 25% liquidated damages, which must be recalculated consistent with this decision.

Civil penalty

The minimum wage order also includes a 100% civil penalty pursuant to Labor Law § 218. Petitioners presented no evidence that the civil penalty was unreasonable or invalid. We affirm imposition of a 100% civil penalty, which must be recalculated consistent with this decision.

Interest

Labor Law § 219 (1) provides that when the Commissioner determines that wages are due, the order directing payment shall include “interest at the rate of interest then in effect as prescribed by the superintendent of financial services 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 per centum per annum.” The Commissioner’s determination of interest due was required by statute and did not exceed the statutory limit, and is therefore not unreasonable or invalid, but must be recalculated consistent with this decision.

Tip Appropriations Order

The tip appropriations order finds petitioners violated Labor Law § 196-d by appropriating tips from Zhao Mao Chen, Teck Meng Foo, Choo Lice Keng [*sic.*], Zhenhe Li, and Hai Bin Wen in the amount of \$8,863.00 for the time period from October 9, 2005 to October 26, 2008. Labor Law § 196-d prohibits any employer from demanding or accepting either directly or indirectly any part of the tips received by any employee. Having found that Lim was not an employer, and in the absence of evidence that she had meaningful authority over servers and bussers, it was not unlawful for her to share in the tips because it is undisputed that her duties as a captain included serving customers (*Barenboim v Starbucks Corp.*, 71 NY3d 460 [2013]). In the absence of evidence that any owner or manager at Nyonya unlawfully appropriated tips from employees, we find the tip appropriations order unreasonable and revoke it.

Penalty Order

The penalty order assesses a \$1,000.00 civil penalty for violating Labor Law § 661 and 12 NYCRR 137-2.1 by failing to keep and/or furnish true and accurate payroll records for each employee from on or about September 2, 2002 through November 2, 2008; a \$1,000.00 civil penalty for violating Labor Law § 661 and 12 NYCRR 137-2.2 by failing to give each employee a complete wage statement with each payment of wages during the period from on or about September 2, 2002 through November 2, 2008; a \$1,000.00 civil penalty for violating Labor Law § 162 by failing to provide employees with at least thirty minutes off for the noon day meal when working a shift of more than six hours extending over the noon day meal period from eleven o’clock in the morning to two o’clock in the afternoon from on or about July 18, 2007 through November 2, 2008; a \$1,000.00 civil penalty for violating Labor Law § 196-d by collecting and distributing tips and/or withholding part of the tips collected for employees from on or about September 2, 2002 through November 2, 2008; and a \$1,000.00 civil penalty for violating Labor Law § 198-d by failing to post regulations on prohibited deductions from wages and appropriation of tips (Labor Law §§ 193, 196-d) in a place accessible to employees in a visually conspicuous manner on or about September 2, 2002 through November 2, 2008; for a total amount due of \$5,000.00. For the reasons set forth below, we affirm counts 1, 2, 3, and 5 of the penalty order, and revoke count 4.

Count 1: Failure to maintain payroll records

Labor Law § 661 and 12 NYCRR 137-2.1 require employers to keep certain wage and hour records with respect to their employees. Petitioners presented no evidence that these required records were maintained. We affirm this count of the penalty order.

Count 2: Failure to provide wage statements

Labor Law § 661 and 12 NYCRR 137-2.2 require employers to give employees a complete wage statement with each payment of wages. Petitioners presented no evidence that wage statements were provided to their employees. We affirm this count of the penalty order.

Count 3: Failure to allow employees a 30 minute uninterrupted meal break

Labor Law § 162 requires restaurant employers to allow each employee a 30 minute uninterrupted meal break. Employee statements from both front of the house and kitchen employees indicate petitioners did not allow them a 30 minute uninterrupted meal break. Petitioners presented no evidence to refute these statements. We affirm this count of the penalty order.

Count 4: Tip appropriations

As discussed above, we find that petitioners did not violate Labor Law § 196-d by demanding or accepting either directly or indirectly any part of the tips received by any employee. This count of the tip appropriations order is revoked.

Count 5: Failure to post a required poster

Labor Law § 198-d requires employers to post regulations on prohibited deductions from wages and appropriation of tips in a place accessible to employees in a visually conspicuous manner. Petitioners presented no evidence that the poster required by Labor Law § 198-d was posted at Nyonya. This count of the penalty order is affirmed.

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NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The minimum wage order is revoked as to petitioner Fen F. Lim A/K/A Diana F. Lim only, and otherwise modified as described herein and respondent is directed to issue and serve a modified minimum wage order within 60 days of service of this decision that is consistent with the findings therein.
2. The tip appropriations order is revoked.
3. The penalty order is revoked as to Fen F. Lim A/K/A Diana F. Lim only, and otherwise affirmed as to counts 1, 2, 3, and 5, and revoked as to count 4, with the amount due and owing reduced to \$4,000.00.
4. The petitions for review be, and the same hereby are, granted in part and denied in part.


Vilda Vera Mayuga, Chairperson
J. Christopher Meagher, Member
LaMarr J. Jackson, Member
Michael A. Arcuri, Member

Dated and signed in the Office
of the Industrial Board of Appeals
at Albany, New York, on
April 13, 2016.