STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of: DONG K. OK, APS DOMESTIC CORP., AND DSL SOURCING CO., INC., Petitioners, To Review Under Section 101 of the Labor Law: An Order to Comply with Article 19 of the Labor Law, dated December 7, 2018, - against - THE COMMISSIONER OF LABOR, Respondent.	DOCKET NO. PR 19-019 RESOLUTION OF DECISION

APPEARANCES

Andrew Chong, for petitioners.

Pico P. Ben-Amotz, *General Counsel*, *NYS Department of Labor*, Albany (*Steven J. Pepe* of counsel), for respondent.

WITNESSES

Andrew Chong for petitioners.

Senior Labor Standards Investigator Nicole Jeon and Cecilia Guaman, for respondent.

WHEREAS:

Petitioners Dong K. Ok, APS Domestic Corp. and DSL Sourcing Co., Inc. filed a petition in this matter on March 12, 2019, pursuant to Labor Law § 101, seeking review of an order issued against them by respondent Commissioner of Labor on December 7, 2018. Respondent filed her answer to the petition on April 15, 2019.

Upon notice to the parties a hearing was held in this matter on July 17, 2019, in New York, New York before Molly Doherty, 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.

The order to comply with Article 19 (hereinafter "minimum wage order") under review directs compliance with Article 19 and payment to respondent for unpaid wages due to claimants in the amount of $17,989.77 for the time period from February 5, 2012 to October 5, 2014, interest continuing thereon at the rate of 16% calculated to the date of the order in the amount of $12,464.67, 100% liquidated damages in the amount of $17,989.77, and assesses a 100% civil penalty in the amount of $17,989.77. The order also assesses a separate civil penalty for violation of Article 19 of the Labor Law, Section 661, and Department of Labor Regulations (12 NYCRR) § 142-2.6 in the amount of $2,000.00 and a separate civil penalty for violation of Article 19 of the Labor Law, Section 661, and Department of Labor Regulations (12 NYCRR) § 142-2.7 in the amount of $2,000.00. The total amount due in the order is $70,433.98.

Petitioners allege that the order is invalid and unreasonable because the amount due to one of the claimants, Cecilia Guaman (hereinafter "Guaman") is incorrect because she did not work on Sundays or Mondays but the respondent included Sundays and Mondays as work days for her and Guaman worked fewer hours than the respondent stated that she worked each week. The petition did not challenge the wages owed to claimants Leopoldina Garcia Castro (hereinafter "Garcia Castro") or Maria Valle (hereinafter "Valle").

During the hearing, after the petitioners finished putting on evidence for their prima facie case, the respondent moved to dismiss the petition asserting that petitioners failed to meet their burden of proving a prima facie case. For the reasons set forth below, the Board grants the motion to dismiss the petition.

SUMMARY OF EVIDENCE

Testimony of Andrew Chong

Andrew Chong (hereinafter "Chong") is the certified public accountant for petitioners. Chong did not work at the garment factory that is the subject of this proceeding. Chong testified that respondent's calculations for wages owed to Guaman were incorrect because she did not work on Sundays or Mondays and because she worked fewer hours each week than respondent determined that she worked. Chong presented a sample of some time cards purportedly for Guaman for the claim period, which included computerized time stamps from a time clock as well as some handwritten time notations. The sample of time cards were for only 7 weeks from June 9, 2014 to July 25, 2014. The claim period for Guaman was from February 5, 2012 to July 27, 2014 but Chong offered no time cards from before the week of June 9, 2014. Chong brought what he testified were all of Guaman's time cards for the relevant period to the hearing but he elected not to offer them into evidence on the date of the hearing because he did not make the necessary copies of those documents as instructed to do prior to the hearing and he did not want to lose possession of the original time cards by offering the originals at the hearing. Additionally, Chong testified that he felt it would take too long to make copies of, and to offer into evidence, all of the time cards.[1] Chong testified that the sample of time cards that were admitted into evidence proved that

[1] Chong was provided an additional opportunity to submit all of the time cards for Guaman prior to the hearing officer closing the record for the hearing. Chong was instructed on the record and in a subsequent letter sent via facsimile on July 18, 2019 to provide to the Board only Guaman's time cards and to do so by the close of business on July 19, 2019 and that he must, at the same time, send a copy to respondent's counsel. Chong did submit additional time cards to the Board but he did not mail them to the Board until July 20, 2019 and they were received by the Board on July 22,

Guaman worked fewer hours than the hours that respondent determined Guaman worked. Chong testified that he never visited the factory where Guaman worked so he could not testify about how the time clock that was used for the time cards worked, nor did he ever see Guaman or the employer use the time cards or write on the time cards. The sample of time cards that Chong used as evidence to show Guaman worked fewer hours than the hours set forth in Guaman's claim form included computer-stamped time in and time out, as well as the total hours worked per day. For example, the time card for the week from June 9 to June 13, 2014 indicated that Guaman punched in at 8:53 on June 10, 2014 and punched out at 5:41. The time card stated a total of 8 hours for that date. Chong testified that the time clock automatically deducted 30 minutes for a lunch break and that the time card rounded up or down anywhere from one to five minutes to explain why 8:53 to 5:41 would come out to an even 8 hours. The time card for the week of July 7 to July 11, 2014 states that Guaman worked 8 hours each day on July 8, July 9 and July 10, 2014. On July 8, it has Guaman punching in at 8:45 and punching out at 5:31; on July 9, she punches in at 8:55 and punches out at 5:31; on July 10, she punches in at 8:59 and punches out at 5:30. There was handwriting on some of the time cards and Chong testified he was not present when such writing was made. Chong testified that he received the time cards from the petitioners and that he was told about the hours in Guaman's time cards by petitioners.

Chong also testified that Guaman was paid per piece of clothing that she sewed and not an hourly wage. Included with the sample of Guaman's time cards that were admitted as evidence were some handwritten documents that Chong testified were Guaman's documentation of pieces that she sewed and money that she was owed for those pieces. Chong also testified that he did not see Guaman create those documents. Chong testified that because Guaman was paid a piece rate rather than an hourly wage, she refused to use the time cards. Chong did not testify about who punched the time card in and out each day if Guaman refused to use it. Also included with two of the time cards that came into evidence were documents that were purportedly pay check receipts but Chong did not offer any testimony about those receipts.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Board makes the following findings of fact and conclusions of law pursuant to the provisions of the Industrial Board of Appeals Rules of Procedure and Practice (hereinafter "Board Rules") (12 NYCRR) § 65.39.

Petitioners' burden of proof in this matter was to establish by a preponderance of the evidence that the order issued by the Commissioner is invalid or unreasonable (State Administrative Procedure Act § 306 [1]; Labor Law §§ 101, 103; Board Rules [12 NYCRR] § 65.30; *Matter of Garcia v Heady*, 46 AD3d 1088, 1090 [3d Dept 2007]; *Matter of Angello v National Fin. Corp.*, 1 AD3d 850, 854 [3d Dept 2003]; *Matter of RAM Hotels, Inc.*, Docket No. PR 08-078, at p. 24 [October 11, 2011]). A petition must state "in what respects [the order on review] is claimed to be invalid or unreasonable," and any objections not raised shall be deemed waived (Labor Law § 101 [2]). The Labor Law provides that an order of the Commissioner shall be presumed valid (*id.* § 103 [1]). The hearing before the Board is *de novo* (Board Rules [12

2019. Additionally, there was no evidence that copies of those time cards were sent to respondent's counsel and Chong included time cards for people other than Guaman with his mailing. As Chong was not prepared at the hearing to offer those time cards, nor did he submit those additional documents pursuant to the hearing officer's order on the record and in a letter, those time cards were not admitted into the record as evidence.

NYCRR] § 66.1 [c]). For the reasons discussed below, we find that petitioners failed to establish a prima facie case or otherwise meet their burden of proof that the penalty order is invalid or unreasonable. Accordingly, we grant respondent's motion to dismiss the petition.

The Minimum Wage Order

Claimants Garcia Castro and Valle

Petitioners did not challenge the wages owed to claimants Garcia Castro or Valle and, in fact, stated in the petition that they agree with the amount of wages owed to Garcia Castro and Valle. Petitioners also offered no evidence challenging the wages owed to these two claimants at hearing. As such, we affirm the minimum wage order for claimants Garcia Castro and Valle.

Claimant Guaman

At the conclusion of petitioners' case, which solely consisted of Chong's testimony and seven weeks of time cards from June and July 2014 for Guaman and some piece rate data for Guaman, respondent moved to dismiss the petition on grounds that petitioners failed to establish a prima facie case or otherwise meet their burden of proof that the minimum wage and penalty orders are invalid or unreasonable. A motion to dismiss made at the close of a petitioner's case "succeeds or fails on the evidence presented by that party" (*Matter of Benson v Cuevas*, 288 AD2d 542, 543 [3d Dept 2001]); *Matter of Mohammad Mansoor Mirza and 99 Cent Mini Depot Inc.*, Docket No. PR 15-031, at pp. 3-4 [January 25, 2017]; *Matter of Metz*, Docket No. PR 09-390, at p. 5 [May 30, 2012]). The Board must consider only evidence petitioners offered before respondent moved the Board to dismiss the petition (*see Benson*, 288 AD2d at 543).

The minimum wage order finds that petitioners violated Article 19 of the Labor Law by failing to pay three claimants the statutory minimum wage for work performed between February 5, 2012 and October 5, 2014 (*see* Labor Law § 651 [1]; Department of Labor Regulations [12 NYCRR] § 142-2.1). At issue is whether respondent's calculation of the wages due and owing is unreasonable or invalid. Specifically, petitioners challenge respondent's calculation of wages due and owing to Guaman because Guaman did not work Sundays or Mondays and because Guaman worked fewer hours than the respondent calculated. To support their contention, petitioners rely on the testimony of their representative, Chong, who had no personal knowledge of day-to-day work in the factory, and 7 weeks of time cards purportedly for Guaman for part of the claim period, which allegedly showed the correct number of hours Guaman worked per week.

The Board is unable to credit these records as they are unsubstantiated, incomplete and facially inaccurate. Chong testified that he neither worked at petitioners' business nor visited the factory where Guaman worked and never saw Guaman or the employer use the time cards or write on the time cards. Petitioners entered only a sample of the time cards for Guaman, covering some seven weeks of the two plus year claim period despite Chong testifying that he had all of Guaman's time cards for the relevant period and being provided with sufficient opportunity to offer all of the time cards into evidence. Chong's testimony regarding the contents of the time cards was nothing more than reading what was on the time cards because he had no other knowledge of the contents. The Board has consistently held that general, conclusory and incomplete testimony about the work schedules of employees is insufficient to satisfy the high burden of precision required to meet an employer's burden of proof in the absence of complete and accurate required records (*Matter of*

Kehinde O. Adebowale, Docket No. PR 17-050, at p. 4 [June 6, 2018]; *Matter of Young Hee Oh*, Docket No. PR 11-017, at p. 12 (May 22, 2014)]. We find that Chong's testimony did not satisfy the high burden of precision required to make up for the lack of complete records for Guaman.

We also find the time cards to be unreliable as they are facially inaccurate. Despite containing stamped start and end times that are to the minute, the total daily number of hours worked on the time cards appear to be, in several instances, rounded whole numbers, as evidenced, for example, by the June 9 to June 13, 2014 time card. Chong's testimony that this discrepancy was a result of the time clock deducting a 30-minute lunch break was neither persuasive or supported nor was it an accurate explanation of how an even 8-hour day was worked for an arrival time of 8:53 and a departure time of 5:41. All of the time cards contained similar discrepancies. Petitioners' rounding methodology further demonstrates that petitioners' records are not reliable evidence sufficient to support an accurate estimate of the hours worked (*see Matter of Foley*, Docket No. PR 17-097, at p. 8 [January 30, 2019]; *Matter of Longia*, Docket No. PR 11-276, at p. 10 [Sept. 16, 2010]). Lastly, Chong testified that Guaman was paid per piece of clothing that she sewed and not an hourly wage as documented by certain handwritten records accompanying the time cards. This statement is not corroborated by anyone with personal knowledge of Guaman's work at the factory or agreement for pay.

We grant respondent's motion to dismiss the petition with respect to the minimum wage order because petitioners failed to establish a prima facie case regarding the wages owed to Guaman. As stated above, petitioners did not challenge the wages owed to Garcia Castro or Valle, nor did petitioners present any evidence to challenge the interest, liquidated damages, and civil penalties included in the order. As such, we affirm the minimum wage order in its entirety.

Non-Wage Related Civil Penalties

The order also assesses a separate civil penalty for violation of Article 19 of the Labor Law, Section 661, and Department of Labor Regulations (12 NYCRR) § 142-2.6 in the amount of $2,000.00 and a separate civil penalty for violation of Article 19 of the Labor Law, Section 661, and Department of Labor Regulations (12 NYCRR) § 142-2.7 in the amount of $2,000.00.

Article 19 of the Labor Law requires employers to maintain accurate payroll records that include, among other details, their employees' daily and weekly hours worked, wage rate, gross and net wages paid, and any allowances claimed as part of the minimum wage (Labor Law § 661; 12 NYCRR 142-2.6). Employers are required to keep such records open to inspection by the Commissioner or a designated representative at the place of employment and maintain them for not less than six years (Labor Law § 661; 12 NYCRR 142-2.6). Article 19 further requires that employers provide all employees with a complete wage statement with every payment of wages (12 NYCRR 142-2.7). Petitioners' evidence of payroll records was an incomplete set of time cards for one claimant, which were, as discussed above, unreliable, and two purported paystubs for which no testimony was offered to explain the contents. Petitioners presented no other evidence challenging the penalties under Article 19. As such, they are affirmed.

We find that petitioners failed to establish a prima facie case or otherwise meet their burden of proof that the penalty order is invalid or unreasonable. We grant respondent's motion to dismiss the petition for review with respect to the penalty order.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The petition for review is denied; and,
2. The minimum wage order is affirmed in its entirety; and
3. The civil penalties are affirmed.

Molly Doherty, Chairperson
New York, New York

Michael A. Arcuri, Member
Utica, New York

Gloribelle J. Perez, Member
New York, New York

Patricia Kakalec, Member
New York, New York

Najah Farley, Member
New York, New York

Dated and signed by the Members
of the Industrial Board of Appeals
on October 23, 2019.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The petition for review is denied; and,
2. The minimum wage order is affirmed in its entirety; and
3. The civil penalties are affirmed.

Molly Doherty, Chairperson
New York, New York

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Utica, New York

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