

**SAWERA CORP.
(T/A SUBWAY)**

Docket No. PR 08-077

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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In the Matter of the Petition of:

SAWERA CORP. (T/A SUBWAY),

Petitioner,

To Review Under Section 101 of the Labor Law:
An Order to Comply with Articles 6 and 19 of the
Labor Law and an Order under Articles 6 and 19 of
the Labor Law, both dated April 11, 2008,

- against -

THE COMMISSIONER OF LABOR,

Respondent.
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DOCKET NO. PR 08-077

RESOLUTION OF DECISION

APPEARANCES

Gurpreet Sidhu, *pro se* for Petitioner.

Maria L. Colavito, Counsel, New York State Department of Labor, Mary McManus of
Counsel, for Respondent, Commissioner of Labor.

WITNESSES

Gurpreet Sidhu for Petitioner.
Sean Walsh and Robert Smith for Respondent.

WHEREAS:

Respondent Commissioner of Labor (Respondent or Commissioner) issued an order to comply with Labor Law articles 6 and 19 (wage order) and a separate order under Labor Law articles 6 and 19 (penalty order) (together, orders). Both orders were issued against Petitioner Sawera Corp. (T/A Subway) (Petitioner or Subway or business) and are dated April 11, 2008.

The wage order finds that wages are due to thirteen employees for various periods between January 29, 2003 and February 9, 2007, and demands payment of \$4,514.16 in total

unpaid wages, \$2,029.43 in interest at 16% continuing to accrue from the date of the wage order, and \$2,257.00 as a civil penalty, for a total due of \$8,800.59.

The penalty order finds that Petitioner violated Labor Law §§ 191.1(a), 198-d, and 661 and regulations at 12 NYCRR § 137-2.1 by failing to: pay wages on a weekly basis from August 1, 2002 through June 30, 2007; maintain adequate payroll records from August 1, 2002 through June 19, 2007; and post notices from June 20, 2007 through July 10, 2007 that advise employees of prohibited employer deductions from wages. The penalty order assesses a penalty of \$550 for all of the violations.

The petition that commenced the Industrial Board of Appeal's review of the orders was filed on June 9, 2008, and asserts that by contractual agreement, employees were not to work more than 35-38 hours a week although at times an employee might take another employee's shift; Petitioner was in business for the first time and had a lot of employee turnover; Petitioner had payroll records, which were maintained by a payroll company; Petitioner kept accurate time records; and Petitioner displayed the required posters in a common area that was shared with another business, where the Department of Labor (DOL) investigator did not check.

Respondent's answer denies the material allegations of the petition and withdraws the civil penalty for violation of Labor Law § 191.1(a) from the penalty order on the ground that "it is an improper assessment of a civil penalty pursuant to Labor law § 218." Accordingly, we treat with this count of the penalty order on only a limited basis.

Upon notice to the parties, a hearing was held on January 23, 2009, before Susan Sullivan-Bisceglia, Esq., then Member of the Board and the designated hearing officer.

SUMMARY OF EVIDENCE

Subway does not dispute that the Claimants listed on the Schedule attached to the wage order (Schedule) were its employees during the period indicated for each in the Schedule; that each Claimant had the job title of "sub maker"; that it paid the Claimants at a straight-time rate for all of the hours that they worked on a biweekly basis; and that Petitioner was in the "restaurant industry" as that term is defined at 12 NYCRR § 137-3.1.

Gurpreet Sidhu (Sidhu), Subway's owner and operator, testified that Subway operated two locations from 10 a.m. to 10 p.m. on three or four shifts: "Morning person will leave at 2:30, then somebody will come at 3:00 and stay 'til 10:00 or some at 5:00 and work until 8:00. It depends; students and part-time workers." During her six years in business, Sidhu told employees when she hired them that they would be scheduled for only part-time work and would not be given overtime work: "I hired them for 40 hours or less."

However, Sidhu admitted that there were times when employees worked overtime. For example, at times employees worked their own assigned time and also worked additional hours for which other employees were scheduled but did not work. In other

instances, Sidhu admitted giving employees extra hours that resulted in overtime worked because she believed that they needed money. Sidhu also said that she drove a particular employee to work at one of Petitioner's locations because the employee did not have a car and the business was not on a bus route and then would give the employee additional work after the employee's shift was completed while the employee waited for a return ride from Sidhu.

Sidhu testified that she was kind to employees: she gave an employee an apartment; paid for employees' travel tickets because they needed help; and went to the police station to bail out employees who had been arrested. She also referred to some of the Claimants as being like family "and [referring to overtime] we didn't pay attention. Like, it was just . . . one hour extra." She testified that she paid for college for Claimant Ben Simmons, and "it was his trust to pay me back, and that's why we gave him extra hours to cover up. So, it was like not intentional." She also testified that there were a lot of people "practically stealing;" the business was often short bread that could not be accounted for.

Sidhu was ignorant of the requirement that an employer pay premium pay for overtime hours worked when there was, what she regarded as, an agreement to give employees "extra" hours for regular pay; that she did not believe that biweekly pay was unlawful because her husband was paid on a biweekly basis; that she employed an accountant and, at another time, the payroll company Paychex, and believed that her biweekly system of paying wages was for her convenience in that the burdens of running the business were overwhelming. Every week Sidhu recorded the information that went to the accountant and explained that she did not have weekly time records because "once the payroll was done, I clear the hours and I have the accountant filing everything."

Sidhu offered to mail records that she said existed but that she had not brought to the hearing. She claimed that the records showed that employees, including Claimant Sean Walsh (Walsh), borrowed money and took cash advances without her written permission. The Hearing Officer declined to accept any evidence that Sidhu could not produce immediately on the ground that the hearing day "was your opportunity to bring any information with you . . . You were notified of this several times."

According to Sidhu, money for child support was deducted from Walsh's wages pursuant to a court order only two times after which he quit. She denied that Petitioner retained anyone's money and said that another employee told her that on Walsh's last day, he had stolen from her but that she did not have an opportunity to confront him.

As to the Commissioner's finding that posters describing prohibited deductions from wages were not displayed, Sidhu disagreed and testified that the DOL investigator did not see them because they were displayed in a common area shared with the gas station which was the site of one of Subway's locations.

Referring to the Schedule as it pertains to Claimant William Ford, Sidhu challenged the notion that anyone could work 148 hours in a biweekly period and stated that she would

like to check her records that were unavailable at hearing. Hearing Officer Bisceglia again told her that evidence was required to be ready at the time of hearing.

The instant matter was Sidhu's first encounter with DOL and when advised that a DOL representative was at one of Petitioner's locations, she rushed there to meet him: "I was doing my job lawfully, correctly to my understanding."

Claimant Walsh testified on behalf of Respondent that he worked for Subway in 2006, opening the store, making bread and sandwiches, operating the cash register, doing dishes, cleaning up and doing whatever had to be done. He usually worked from 8 a.m. to 4 p.m., but at times also worked more than 40 hours a week. His rate of pay started at \$7.00 and was increased to \$7.50 and he was paid by check every two weeks, although on occasions when there were insufficient funds in the company account, Sidhu would ask him to sign his check over to her and she would cash the check out her personal funds and explain that there were insufficient funds in the business' account. He also testified that a couple of his paychecks bounced, resulting in checks that he wrote for groceries and bills also bouncing and causing him to be charged fees for insufficient funds.

Walsh worked at both of Petitioner's locations. He would work more than 40 hours a week upon Sidhu's request when other employees called into work sick; when employees quit, leaving the business without coverage; or when it was otherwise shorthanded. On one occasion, Sidhu was on vacation for about a month and he oversaw the business, including opening and closing it and, additionally, covering for employees who did not show up for work. Also, there were a couple of times when he was scheduled to have the day off but Sidhu called him in to work for a few hours "because she couldn't get there." He denied that he agreed not to receive premium pay for work that he performed in excess of 40 hours in a week.

When Walsh worked more than 40 hours a week, he was paid at only straight time rate although he asked Sidhu to pay him time and a half. According to Walsh, she responded that she didn't have to. He said that deductions from his pay check were taken because he was accused of stealing bread and were indicated as an advance on his pay stub but that, in fact, no advance was given.

On March 19, 2007, Walsh filed claims for unpaid wages with DOL. Walsh began employment with Petitioner in January 2006, and his last day of employment was in February 2007. He claimed wages of \$587.86 due for overtime worked during the biweekly pay periods ending January 26, February 10, February 24, March 10, April 7, April 21, May 5, May 19, and June 16, 2006, for which he was paid at a straight-time rate. However, the Schedule attached to the wage order finds that Walsh is due wages for the period of "06/03/06 - 02/09/07" and does not include the pay periods ending in January through May of 2006.

Walsh's claim form filed with DOL also asserts that Petitioner deducted money from his wages for purported advances that were actually for bread that he was alleged to have stolen and for child support payments that were to be forwarded to the child support

collection unit of the county Department of Social Services. Walsh testified that he learned during a family court proceeding that "only a couple of them [deductions from pay for child support] were sent in, not all." Payroll stubs from Petitioner's paychecks that were annexed to Walsh's claim form and admitted to evidence corroborate the payroll dates, hours worked, rate of pay, gross earnings, and deductions from pay. The paycheck stub for the biweekly pay period ending on June 16, 2006, confirms that Walsh earned \$7.50 an hour, worked 83.87 hours and that \$120, labeled "ADVANCE," was deducted from his pay. The stub for the pay period ending February 9, 2007, shows the same rate of pay and that \$55 as an "ADVANCE" and \$162.50 as "CHLDSUP" were deducted from his pay.

Walsh testified that he did not recall seeing any posters that gave employees notice of Labor Law requirements or prohibited employer deductions.

DOL Labor Standards Investigator Robert Smith (Smith) investigated Walsh's claim. Smith first visited one of Petitioner's locations on June 20, 2007 and, as part of his standard investigative procedure, looked for but did not find posters directed to employees containing information about tips and unlawful deductions that Smith testified the Labor Law requires be posted in establishments in the restaurant industry such as Petitioner. He testified that during his June visit he gave the required posters to the manager, instructed that they be posted immediately, and saw the manager give them to Sidhu when she arrived. Smith subsequently visited both of Petitioner's locations. On each visit he checked for the posters but never saw any on the walls; however, after his initial visit, he did see the posters in a folder that Sidhu kept.

In response to Sidhu's testimony that the posters were displayed in an area that Petitioner shared with a gas station at one of its locations, Smith testified that the posters' contents were not applicable to a gas station and that the posters were required to be posted in Petitioner's business, not the separate gas station business.

During the initial visit, Smith interviewed two of the three employees who were present (Sidhu told him that the third employee was unable to communicate in English); reviewed employee Schedules, and asked Sidhu to have payroll and time records for the years 2003 through 2007 available for his review on July 10, 2007. Smith stated that the period for which records were requested covered the time that Petitioner had been in business. On July 10, Sidhu produced records, but for only the years 2003 and 2004. Smith made a third visit on July 16, 2007, and reviewed additional records, but the records were incomplete. According to Smith, Sidhu said that she had discarded time records of employees' daily and weekly hours.

Smith testified that the Labor Law requires that manual workers, such as Subway's employees, be paid weekly and, further, be paid at a premium rate (time and a half their regular or hourly wage rate of pay) for all time worked in a week that exceeds 40 hours. Smith found that Petitioner paid its employees biweekly and that the biweekly payroll records, which were the only records of the hours that each employee worked, contained the total hours worked during each two-week pay period and did not show the hours the

employee worked either on a daily basis or in each of the weeks within the two week payroll period.

Smith described the method he uses to calculate overtime pay that an employer may owe employees who are paid on a biweekly basis when daily or weekly records of the employees' work times do not exist. He divides the total hours worked in the biweekly pay period in half and then finds that the employee is entitled to premium pay for all work hours in excess of 40 hours in each week. He then calculates the pay that the employee should have received based on the employee's regular rate of pay, premium rate of pay and the number of overtime hours worked and subtracts from that total the wages that the employer actually paid.

Here, Smith calculated the wages due each Claimant based only on Petitioner's biweekly payroll records, the contents of a personnel file pertaining to deductions for child support that Petitioner maintained, and in the case of Walsh, his own records. As part of the wage computation process, Smith used a DOL form called a "Computation Sheet." Smith testified that he entered information on the Computation Sheet for each Claimant listed in the Schedule "based solely on [Petitioner's] records," and Sidhu signed the Computations Sheets, certifying to the accuracy of each Claimant's hours worked in each biweekly pay period, wages paid, hourly wage rate, dates paid, and deductions from pay, if any. Then after transferring this information to a second Computation Sheet, if the information showed work hours in a biweekly pay period exceeding 80, Smith calculated the wages due the Claimant as either an underpayment for failure to pay premium pay or for an unlawful deduction from wages if applicable, or both. Sidhu did not sign the Sheet on which Smith's calculations appear. The set of Computation Sheets for each Claimant (those reflecting Petitioner's records and signed by Sidhu and those reflecting the information obtained from Petitioner's records and the calculations based on the records) were entered into evidence as DOL's records over Sidhu's objection.

Smith prepared a DOL Recapitulation Sheet and in September 2007 brought it to one of Petitioner's locations and left it with Claimant Rebecca Moore, who identified herself as Assistant Manager. According to Smith, Moore said that she would give Sidhu the Recapitulation Sheet when Sidhu returned from vacation. Smith testified that he delivered two different types of Recapitulation Sheets, one for minimum wage underpayments and the other for unpaid wages. The former contains the results of his calculations of underpayments for overtime hours worked by each Claimant, while the latter shows deductions from wages that DOL found unlawful. Smith stated that the information corresponds with the information on the Computations Sheets, including the deductions from Walsh' pay for child support payments that had not been forwarded to the proper party and deductions from Walsh's and others' pay for "SHRT," either shirts or for being short. According to Smith, Sidhu could not remember what the abbreviation was for but did not deny that it represented a deduction.

Smith served Petitioner with a notice of Labor Law violations. The notice stated that Petitioner violated Labor Law § 661 by failing to "keep true and accurate records for no less than six years including daily and weekly hours." Smith testified that this violation occurred

because Petitioner did not have any time cards for employees or any daily or weekly record of their hours, and additionally, because Petitioner did not have all of the payroll records for 2006 and only half of the payroll records for 2004. The notice also stated that Petitioner violated Labor Law § 198 (d) by failing to post the requirements of Labor Law §§ 193 and 196-d for employees to see. These sections of the law relate to “illegal deductions from wages and tips by employers” (Labor Law § 198-d).

In November 2007, following the September 2007 service of notice of Labor Law violations and the Recapitulations Sheets on Petitioner, a Senior Investigator for DOL sent Petitioner a letter sustaining the findings in those documents, declining to hold a District Meeting, requesting payment of \$4,514.16 within twenty days, and advising that absent receipt of such payment, an order would be issued without further notice and that the order would include 16% interest and up to a 200% penalty along with penalties of up to \$1,000 for each Labor Law violation.

DISCUSSION

Standard of Review and the Employer’s Burden of Proof

In general, on appeal from an order of the Commissioner, the Board reviews whether the order is valid and reasonable (Labor Law § 101). By statute, the Board is required to presume that the order is valid (Labor Law § 103). The petition, which commences the appeal, must specify the respects in which the order is claimed to be unreasonable or invalid (Labor Law § 101 and Board’s Rules of Procedure and Practice [Rules] 66.3 [e] [12 NYCRR 66.3 (e)]), and “[a]ny objections to the . . . order not raised in such appeal shall be deemed waived” (Labor Law § 101).

Rule 65.30 (12 NYCRR 65.30) provides that “[t]he burden of proof of every allegation in a proceeding shall be upon the person asserting it.” Where an order on review finds that wages are due to employees, an employer that has failed to keep adequate payroll records – that is, records required by Labor Law § 661 and implementing regulations at 12 NYCRR 137-2.1, which apply in the restaurant industry as here – has the burden of proving that the Claimants are either not entitled to the wages from the Petitioner or that the wages found due have been paid. *See* Labor Law § 196-a.

The Wage Order

The wage order finds that Subway failed to pay premium pay for overtime that employees worked in violation of the Minimum Wage Order of 12 NYCRR Part 137 and unlawfully withheld wages from employees’ pay in violation of Labor Law § 193.

Sidhu admitted that Subway paid employees on only a straight time basis and yet assigned overtime work to employees, and Walsh testified to overtime worked by himself and others. Computation Sheets, based on Petitioner’s own records and which Sidhu signed certifying as accurate, show that each Claimant listed on the Schedule worked over 80 hours

in various biweekly periods. As Petitioner does not have records to establish the daily or weekly hours that each employee worked, we cannot determine whether the biweekly record of hours worked that exceeds 40 show work performed in a single week or whether the record of hours worked that exceeds 80 show work performed in a two-week period. However, it is impossible to work over 80 hours in a two-week period without working overtime in at least one of the two weeks and, therefore, where Petitioner's records show that Claimants worked over 80 hours on a biweekly basis, we find that they performed overtime work. Further, we find that it was reasonable – indeed to Petitioner's advantage – to determine each employee's weekly overtime by dividing the biweekly hours by two in those biweekly periods where Petitioner's records show that the employee worked more than 80 hours.

To the extent that Petitioner claims that the payment of wages to Claimants at a straight time rate for overtime worked was justified by their agreement not to work more than 40 hours in a week, we reject such a claim. The evidence is clear that Petitioner both assigned overtime work and "suffered" employees to work overtime. (Labor Law § 2[7]). The law prohibits agreements by which employees purportedly waive their right to wages. See Labor Law §§ 662 (2) and 663 (1) and (2); *Matter of Am. Broadcasting Cos., Inc., v Roberts*, 61 NY2d 244, 250 (1984). Nor are Sidhu's claims that she was inexperienced, overwhelmed, and ignorant of the law bases for finding the orders unreasonable. Finally, the kindness that Petitioner, through Sidhu, showed Claimants must be its own reward. The law does not permit kindness, however valuable to an employee, to be a substitute for the payment of wages, and accordingly, does not establish a basis to find the orders unreasonable.

The regulations that implement Labor Law article 19 in the restaurant industry require "an employer [to] pay an employee for overtime at a wage rate of 1 ½ times the employee's regular rate for hours worked in excess of 40 hours in one workweek (12 NYCRR § 137-1.3). "Regular rate" means "the amount that the employee is regularly paid for each hour of work (12 NYCRR § 137-3.5). Accordingly, Subway's employees who earned \$6.00 per hour (their "regular rate") were entitled to \$9.00 for each hour they worked over 40 hours in a week (premium pay); those Claimants who earned \$7.00 per hour should have been paid \$10.50 for each hour of overtime in a week; those who earned \$7.50 per hour should have been paid \$11.25 for each hour of overtime in a week; and the sole employee who earned \$8.00 per hour should have been paid \$12.00 for each hour of overtime that he worked in a week.

Labor Law § 193 governs deductions from wages and provides in relevant part:

"1. No employer shall make any deduction from the wages of an employee, except deductions which:

"a. are made in accordance with the provisions of any law or any rule or regulation issued by any governmental agency; or

“b. are expressly authorized in writing by the employee and are for the benefit of the employee; provided that such authorization is kept on file on the employer’s premises. Such authorized deductions shall be limited to payments for insurance premiums, pension or health and welfare benefits, contributions to charitable organizations, payments for United States bonds, payments for dues or assessments to a labor organization, and similar payments for the benefit of the employee.

“2. No employer shall make any charge against wages, or require an employee to make any payment by separate transaction unless such charge or payment is permitted as a deduction from wages under the provisions of subdivision one of this section.”

As more specifically discussed below, we find that Petitioner violated Labor Law 193 when it withheld wages without written employee authorization and for purposes that did not benefit employees within the meaning of Labor Law 193 (1) (b) and, further, when it failed to forward wages that were authorized withheld to the intended government authority.

Findings Regarding Each Claimant

The wage order Schedule finds that Petitioner owes Walsh \$853.32 for premium pay and unlawful deductions for the period June 3, 2006 through February 9, 2007. During the relevant period, Walsh’s regular rate of pay was \$7.50 an hour. Based on the Computation Sheets, other DOL records, and the pay stubs in evidence, we find that in the biweekly payroll period ending June 16, 2006, Walsh worked 83.87 hours and was paid \$509.04; in the biweekly payroll period ending June 30, 2006, he worked 87.42 hours and was paid \$585.66.

Applying Smith’s formula to determine Walsh’s weekly overtime worked, then computing the overtime wages due him based on the premium pay rate and adding the \$175 in wages unlawfully withheld for bread that Walsh was alleged to have taken and for those child support payments that were not forwarded to the proper authority (Smith testified that some of Petitioner’s deductions from Walsh’s wages were properly forwarded), we find that Walsh was underpaid \$162.44 in premium pay and \$175.00 for unlawful deductions in pay periods ending June 16, 2006 and February 9, 2007. He is owed a total of \$337.44. Although the investigation recap sheet indicates that Walsh was due \$853.32 for the period of January 2006 through February 2007, the wage order Schedule is limited to the period of June 3, 2006 to February 9, 2007 and therefore, the amount of wages due under the order is likewise limited to that period.

The wage order Schedule finds that Petitioner owes Brian Antoine \$23.07 for the period October 1 to October 7, 2003. The Computation Sheet that Sidhu signed for Brian Antoine shows that on October 7, 2003, a deduction of \$23.07 was made from his wages for “Shrt.” Smith’s testimony that Petitioner’s records did not contain any signed employee authorization for that deduction is un rebutted.

The wage order Schedule finds that Petitioner owes Cheryl Vautrin \$625.13 for the period March 3, 2004 to March 9, 2004. The Computation Sheets for Vautrin show that Petitioner deducted \$327.43 from her wages for the pay period ending March 9, 2004. Smith testified that the reason(s) for the deduction may have been for the employee being "short" or for payment for a shirt, hat, and loan. While the Computations Sheets show additional underpayments for various periods, and Smith testified that Vautrin was underpaid an additional \$297.70 in 2003 and 2004, the only underpayment that we find due to Vautrin for the time period concerning her that the Schedule covers is \$327.43.

The wage order Schedule finds that Petitioner owes Shah Azziz \$842.14 for the period "11/06/04-05/19/04." Smith testified that Azziz was underpaid for about "a year or so" for overtime work that he performed. The relevant Computation Sheets in evidence show underpayments to him for various periods from the workweek ending November 11, 2004 to the workweek ending May 19, 2006. Nonetheless, we are constrained to find that the period "11/06/04-05/19/04" makes no sense and did not provide the Petitioner with adequate or unambiguous notice such that she might assess the order's reasonableness and formulate and prove a claim to challenge the order as it applies to Azziz.

The wage order Schedule finds that Petitioner owes Darkala Merit \$70.80 for the period August 27, 2003 to September 9, 2003. The record evidence shows that Merit was paid at the straight-time rate of \$6.00 per hour for each of the 51.8 hours that she worked in each week of the biweekly period in the Schedule. As Petitioner paid her only \$310.80 for each workweek, she is owed premium pay for the 11.8 hours of overtime that she worked in each week, or a total of \$70.80 for the two weeks.

The wage order Schedule finds that Petitioner owes William Ford, Jr. \$238.00 for the period January 29, 2003 to February 11, 2003. The Computation Sheets in evidence show that Ford was paid at a straight-time rate of \$7.00 per hour for 148 hours worked during this biweekly period. While Sidhu's testimony challenges as unreasonable the finding that anyone could work 148 hours in a two-week period (74 hours a week), Sidhu signed the relevant Computation sheet showing Ford's 148 hours of work, certifying its accuracy. Furthermore, she presented no evidence to show that Ford did not work these hours. As it is possible to work 74 hours in a single week, as Petitioner failed to meet its burden to prove that Ford did not work those hours, and as the record evidence, including Smith's testimony, supports the order, we find that Ford is owed \$238.00 in premium pay for the period January 29, 2003 to February 11, 2003.

The wage order Schedule finds that Petitioner owes Jeff Grady \$63.00 for the period January 29, 2003 to February 11, 2003. The Computation Sheets in evidence and Smith's testimony are consistent with the amount found due: Grady worked 101 hours during the two-week period and was paid at the straight-time rate of \$6.00 an hour for all of his hours or \$606 for the two weeks. According to the formula that Smith employed, Grady was credited with working 50.5 hours each week and due overtime wages of \$3.00 for each of the 10.5 overtime hours that he worked each week. Accordingly, we find that the order is correct, that he is due \$31.50 for each of the two weeks, or \$63.00 for the biweekly period that the order covers.

The wage order Schedule finds that Petitioner owes Angel Kafazov \$48.00 for the period January 29, 2003 to February 25, 2003. The Computation Sheets in evidence and Smith's testimony are consistent with the amount found due: Kafazov worked 86 hours during one biweekly pay period, 90 hours during the second biweekly pay period, and was paid at the straight-time rate of \$6.00 an hour for all of the hours worked. According to the formula that Smith employed, Kafazov was credited with working 43 hours in each of the first two weeks and 45 hours in each of the other two weeks. The records show that Petitioner paid Kafazov \$258 for each week in the first biweekly pay period and \$270 for each week in the second such period. We find that Kafazov is due overtime wages of \$3.00 for each of the 3 overtime hours worked in each of the weeks in the first biweekly period and \$3 for each of the 5 overtime hours he worked in the second biweekly pay period, or a total of \$48 in premium pay owed for the four-week period.

The wage order Schedule finds that Petitioner owes Mohammed Khan \$718.92 for the period from October 22, 2003 to May 25, 2004. The Computation Sheets in evidence show that that Khan worked overtime during 14.5 of the biweekly pay periods during this time, but was paid at only the straight-time rate of \$7.00 per hour for all of the hours that he worked:

Biweekly	Biweekly Hours	Weekly Hours	Weekly Overtime	Weekly Wages	Weekly & Biweekly	
Pay Period	Worked	Worked	Hours Worked	Paid	Wages Due	
End Date						
11/04/03	101	50.50	10.50	\$353.50	\$36.75	\$73.50
11/18/03	103.65	51.83	11.83	\$362.78	\$41.44	\$82.88
12/02/03	85	42.50	2.50	\$297.50	\$ 8.75	\$17.50
12/16/03	100	50.00	10.00	\$350.00	\$35.00	\$70.00
12/30/03	100	50.00	10.00	\$350.00	\$35.00	\$70.00
1/13/03	96.30	48.15	8.15	\$337.05	\$28.53	\$57.06
1/27/04	100	50.00	10.00	\$350.00	\$35.00	\$70.00
2/10/04	96	48.00	8.00	\$336.00	\$28.00	\$56.00
2/24/04	94	47.00	7.00	\$329.00	\$24.50	\$49.00
3/09/04	97.17	48.59	8.59	\$340.10	\$30.10	\$60.20
3/23/04	96.18	48.09	8.09	\$336.63	\$28.32	\$56.64
4/20/04	101.60	50.80	10.80	\$355.60	\$37.80	\$75.60
5/04/04	98.72	49.36	9.36	\$345.52	\$32.76	\$65.52
5/18/04	92	46.00	6.00	\$322.00	\$21.00	\$42.00
5/25/04	(one wk only)	46.57	6.57	\$325.99	\$23.00	

Based on the Computation Sheets, it appears that Khan earned \$868.98 during the period covered by the order. However, as the order finds that he is entitled to only \$718.92, we are constrained to limit our affirmance to that amount.

The wage order Schedule finds that Petitioner owes Mohammed Kiani \$62.72 for the period August 28, 2005 to October 21, 2005. The Computation Sheets in evidence show that in the biweekly pay period ending September 10, 2005, Kiani worked 82 hours, and in the biweekly pay periods ending October 7 and October 21, he worked 93.25 and 82.66 hours, respectively. Applying Smith's formula, Kiani worked 41 hours in each week of the first biweekly pay period, 46.63 hours in each week of the second biweekly pay period, and 41.3 hours in each week of the last biweekly pay period. Petitioner paid Kiani \$266.50 for each

week in the first pay period; \$326.38 for each week in the second pay period; and \$289.10 for each week in the last period.

The Computation Sheet that Sidhu signed indicates that Kiani was uniformly paid \$7.00 an hour during the relevant time period; however, the Computation Sheet in which the calculations were entered to determine any underpayment used \$6.50 an hour as the straight time rate that Kiani was paid for the biweekly pay period ending September 10, 2005. A straight-time rate of \$6.50 an hour for all hours worked is consistent with the \$533 that Petitioner paid Kiani for the first biweekly pay period as reflected in both the Computation Sheets that Sidhu signed and the Sheets in which calculations were entered. Based on this rate, the Commissioner found that Kiani was underpaid \$3.25 in each week of the first pay period and we agree.

The record shows that a \$7 hourly rate of pay was applied to Kiani's last two biweekly pay periods for which he was paid \$652.75 and \$578.20. According to the Computations Sheets and Smith's testimony, Kiani was entitled to an additional \$3.50 for each hour that he worked over 40 hours in each week of the second and third biweekly pay period. The Computation Sheets find that he is owed \$23.24 in each week of the second biweekly pay period. In the third biweekly period, Respondent finds that Kiani is due an additional \$4.87 for each week. We find that \$4.56 is the correct additional amount due for each week in the last biweekly pay period and that the total due to Kiani is \$62.08.

The wage order Schedule finds that Petitioner owes Rebecca Moore \$28.12 for the period covering "08/12/04 - 07/13/04." Smith testified that Petitioner owed this money because "on several occasions in 2004 she's [Moore] worked more than 80 hours during a biweekly period" and that in all but one instance she was not paid at the overtime rate. The Computations Sheets show that her regular rate of pay was \$6.50 an hour from January 2004 through the payroll period ending March 9, 2004, and thereafter was \$7.50 an hour. The Computation Sheets indicate that she worked 81.5 hours in the biweekly pay period ending July 13, 2004 and 86 hours in the biweekly pay period ending August 25, 2004; that she was underpaid \$2.81 in each week of the biweekly pay period ending July 13, 2004 and \$11.25 in each week of the pay period ending August 25, 2004, for a total underpayment of \$28.12. Nonetheless, we are constrained to find that the period "08/12/04-07/13/04" makes no sense and did not provide the Petitioner with adequate or unambiguous notice such that she might assess the order's reasonableness and formulate and prove a claim to challenge the order as it applies to Moore.

The wage order Schedule finds that Petitioner owes Ben Simmons \$888.44 for the period covering "12/24/04 - 09/10/05." Sidhu signed a Computation Sheet pertaining to Simmons that is in evidence, but it does not include these dates. However, the Computation Sheet reflecting Smith's calculations do cover the time relevant to Simmons in the Schedule, and according to Smith's testimony, is based on figures in Petitioner's records.

Smith's figures show that Simmons worked 44 hours during the week December 24-30, 2004, and was paid at the straight time rate of \$7.00 per hour, or \$308.00. As Petitioner did not pay any premium pay to Simmons, he was underpaid \$14.00 for the week. During

the biweekly pay periods ending June 17, July 29, August 12, and September 10, 2005, Simmons worked 97, 110.36, 120, and 115.54 hours, respectively, and was paid at the straight time rate of \$7.50 per hour. The following are the amounts that Petitioner paid Simmons; each is followed by the amount that Petitioner should have paid, including premium pay, for each of the biweekly payroll periods in 2005 that the Schedule covers for Simmons: \$363.75/\$395.63 for each week in the pay period ending June 17; \$413.85/\$470.78 for each week in the pay period ending July 29; \$450.00/\$525.00 for each week within the pay period ending August 12; and \$433.28/\$499.92 for each week in the period ending September 10, 2005. In total, Subway underpaid Simmons \$474.90 for the entire period in question.

Again, it must be noted that the period of employment during which wages are due to Simmons is different in the investigation recap and in the Schedule attached to the order. The time period in the order is less than the time period covered in the recap with the result being that the wages found due to Simmons under the order are reduced.

The wage order Schedule finds that Petitioner owes Mathew Swartz \$52.50 for the period covering "08/28/05 – 09/10/05." Smith testified that Swartz worked 95 hours during this period and was paid at only a straight time rate. The Computation Sheets show that Smith credited him with 7 ½ hours of overtime worked in each week during the biweekly pay period ending on September 10, 2005. The Computation Sheet for Swartz that Sidhu signed Swartz certifies that his straight time rate of pay was \$7.00 per hour, that he worked 95 hours during that pay period, and that he was paid \$665.00 for that biweekly period. As Petitioner should have paid Swartz \$358.75 a week (\$717.50 biweekly), we agree with the Commissioner and find that Petitioner owes wages to Mathew Swartz in the amount of \$52.50.

We find that the wages found due in the wage order totals \$2,416.14.

The Penalty Order

Payroll records.

Count I of the penalty order finds that Subway failed "to keep and/or furnish true and accurate payroll records for each employee . . . for the period August 1, 2002 through June 19, 2007" in violation of Labor Law § 661 and its implementing regulations for the restaurant industry at 12 NYCRR 137-2.1 and assesses a penalty of \$250.

As relevant here, Labor Law § 661 states:

"Every employer shall keep true and accurate records of hours worked by each employee covered by an hourly minimum wage rate, the wages paid to all employees, and such other information as the commissioner deems material and necessary, and shall, on demand, furnish to the commissioner or his duly authorized representative a

sworn statement of the same. Every employer shall keep such records open to inspection by the commissioner or his duly authorized representative at any reasonable time.”

The implementing regulations require every employer to “establish, maintain and preserve for not less than six years weekly payroll records which shall show for each employee” (12 NYCRR 137-2.1 [a]) certain listed information including “the number of hours worked daily and weekly” (12 NYCRR 137-2.1 [a] [4]).

There is no dispute that the Claimants are employees “covered by an hourly minimum wage rate;” that DOL investigator Robert Smith is an authorized representative of the Commissioner who asked to see the Petitioner’s payroll records for August 1, 2002 through June 19, 2007; that during the relevant time, Petitioner did not maintain daily or weekly payroll records; and that Petitioner kept only biweekly records that did not show employees’ daily time worked and were maintained for a period less than six years.

We find that the evidence easily supports Count I of the penalty order that Petitioner violated Labor Law § 661 and 12 NYCRR 137-2.1.

Frequency of wage payments.

The Commissioner assessed a penalty of \$150 in Count II of the penalty order, finding that Petitioner violated Labor Law § 191.1(a) by failing to pay wages weekly to manual workers not later than seven calendar days after the end of the week in which the wages were earned during the period August 1, 2002 through June 30, 2007. As the Commissioner has withdrawn this violations, we treat with it only to strike Count II from the penalty order and to reduce by \$150 the total amount due in that order.

Posting requirements.

Count III of the penalty order finds that Subway violated Labor Law §198-d “by failing to post regulations on prohibited deductions from wages and appropriate tips . . . in a place accessible to employees in a visually conspicuous manner on or about June 20, 2007 through July 10, 2007.”

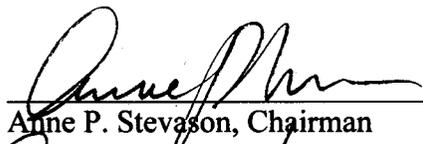
Labor Law § 198-d provides:

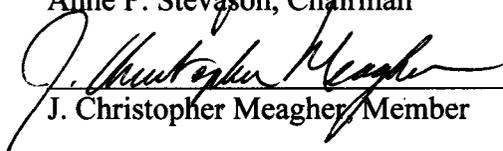
“Every employer engaged in the sale or service of food or beverages shall post in his establishment, in a place accessible to his employees and in a visually conspicuous manner, a copy of section one hundred ninety-three and one hundred ninety-six-d of this chapter and any regulations promulgated pursuant thereto relating to illegal deductions from wages and tips by employers.”

Employers are prohibited from making deductions from the wages of an employee except in very limited circumstances (*see* Labor Law § 193) and are also prohibited from

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

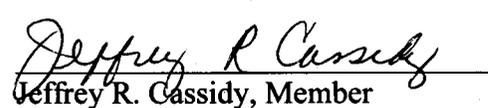
1. The petition be, and the same hereby is, dismissed; and
2. The Order to Comply with Articles 6 and 19 of the Labor Law, dated April 11, 2008, be, and the same is, modified so as to reduce the amount of wages due to \$2,416.14 and further modified so as to reduce the interest and the civil penalty as commensurate with the reduced amount in wages that the Board finds due; and
3. The Order under Articles 6 and 19 of the Labor Law, dated April 11, 2008, is hereby modified by striking Count II, finding that Petitioner violated Labor Law § 191.1(a), and striking the assessment of a penalty of \$150.00 for Count II, and as modified be, and the same hereby is, affirmed.



Anne P. Stevason, Chairman

J. Christopher Meagher, Member

Jean Grumet, Member

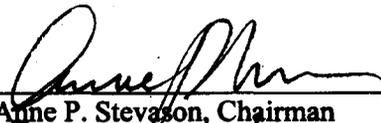
LaMarr J. Jackson, Member

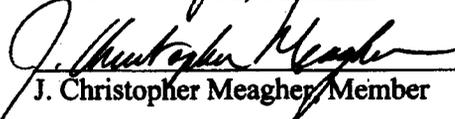
Jeffrey R. Cassidy, Member

Dated and signed in the Office
of the Industrial Board of Appeals
at New York, New York, on
June 23, 2010.

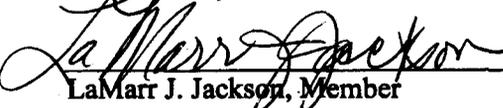
NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

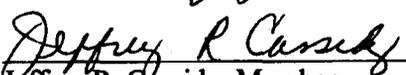
1. The petition be, and the same hereby is, dismissed; and
2. The Order to Comply with Articles 6 and 19 of the Labor Law, dated April 11, 2008, be, and the same is, modified so as to reduce the amount of wages due to \$2,416.14 and further modified so as to reduce the interest and the civil penalty as commensurate with the reduced amount in wages that the Board finds due; and
3. The Order under Articles 6 and 19 of the Labor Law, dated April 11, 2008, is hereby modified by striking Count II, finding that Petitioner violated Labor Law § 191.1(a), and striking the assessment of a penalty of \$150.00 for Count II, and as modified be, and the same hereby is, affirmed.


Anne P. Stevason, Chairman


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
June 23, 2010.