STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of:	:	
ORAZIO J. PETITO, JR. AND PETO MANAGEMENT CORP.,	:	
Petitioners,	:	DOCKET NO. PR 14-096
To Review Under Section 101 of the Labor Law: An Order to Comply with Article 6, an Order to Comply with Article 19, and an Order under Article 19 of the Labor Law, all dated March 12, 2014,	:	RESOLUTION OF DECISION
- against -	:	
THE COMMISSIONER OF LABOR,	:	
Respondent.	:	

APPEARANCES

Xue & Associates, P.C., Brooklyn (*Benjamin B. Xue and Robert L. Isabella* of counsel), for petitioners.

Pico P. Ben-Amotz, General Counsel, NYS Department of Labor, Albany (*Larissa C. Bates* of counsel), for respondent.

WITNESSES

Orazio Petito and Carlos Ordanana, for petitioners.

Mario Garcia, JhoJane Rodriguez-Mar, Israel Espinoza, Francisco Caballero, Labor Standards Investigator Jose Mendez, and Senior Labor Standards Investigator Gerard Capdevielle, for respondent.

WHEREAS:

On May 12, 2014, petitioners filed a petition with the Industrial Board of Appeals seeking review of three orders issued against them by respondent Commissioner of Labor, on March 12, 2014, which was subsequently amended on April 16, 2015. Respondent filed her answer on June 30, 2014. Upon notice to the parties, a hearing was held in New York, New York, on April 23, 2015, before Jeffrey M. Bernbach, the designated Hearing Officer in the proceeding. Each party was afforded a full opportunity to present documentary evidence,

examine and cross-examine witnesses, make statements relevant to the issues, and file post-hearing briefs.

The order to comply with Article 19 (minimum wage order) directs payment of wages in the amount of $113,649.42 due and owing to Francisco Caballero, Mario Garcia, and JhoJane Rodriguez-Mar, for the period from January 7, 2001 through April 8, 2012, $85,522.74 in interest at 16% calculated to the date of the order, $28,412.36 in liquidated damages, and $113,649.42 in civil penalties, for a total due of $341,233.94.

The order to comply with Article 6 (wage order) directs payment of $10,140.00 in wages to Israel Espinoza for the period from April 30, 2007 through January 10, 2009, $8,387.59 in interest at the rate of 16% calculated to the date of the order, and $10,140.00 in civil penalties, for a total due of $28,667.59.

The order under Article 19 (penalty order) directs that petitioners pay a civil penalty of $1,000.00 for failure to keep and/or furnish true and accurate payroll records for the period of August 1, 2003 through August 1, 2009 in violation of Labor Law § 661 and 12 NYCRR 141-2.1, and $1,000.00 for failure to provide each employee with a complete wage statement with each payment of wages from January 7, 2001 through April 8, 2012, in violation of Labor Law § 661 and 12 NYCRR 141-2.2.

The petition alleges that (1) Orazio J. Petito. Jr. is not an employer; (2) respondent incorrectly calculated the unpaid wages due to claimants by erroneously determining the number of units in the buildings where claimants worked, failed to include an apartment allowance as part of the wage calculation for some of the claimants, and incorrectly calculated claimants' duration of employment, hours worked and wages paid; and (3) the 100% civil penalty is unreasonable.

For the following reasons, we find petitioners did not meet their burden of proof and respondent's findings are reasonable as to all the orders under review, and we affirm them.

SUMMARY OF EVIDENCE

Respondent's Evidence

Testimony of claimant Mario Garcia

From 1994 until 2006, Mario Garcia worked for Orazio J. Petito, Jr., who owned and managed several buildings in Brooklyn. For the first three years, Garcia's role was limited to construction work but when the superintendent/janitor resigned, he assumed those responsibilities as well. As a janitor, Garcia was on-call day and night and worked about 22 hours per day at 545, 553 and 557 46th Street. He was responsible for maintaining the electrical system, collecting the garbage, recycling, cleaning, and construction work. Garcia testified that each of the three buildings on 46th Street had 16 apartments – 4 on each floor – plus a basement apartment (a total of 51 apartments). He worked day and night because the boilers[1] needed to be

[1] It is not clear from Garcia's testimony whether he is referring to the boiler(s) in one of the buildings or all of them.

turned off for four hours and on again for three. Garcia also did construction work at two additional sites – 330 Second Street and 10 Westminster.

Petitioners never paid Garcia during the 12 years he worked for them, even though Garcia often asked Petito to pay him. Garcia testified that he lived in and paid rent for his apartment at 545 46th Street prior to working for Petito. When Petito hired him, he stopped paying rent and received a credit of $700.00 a month, which was reflected in the monthly statements he received from petitioner Peto Management Corp.

Garcia denied that petitioners furnished him with two apartments, explaining that the second apartment was for his son who also worked for petitioners. Garcia paid rent for his apartments, with his labor credited by Peto Management Corp. towards all or a portion of the rent. Petitioners sold the buildings at 46th Street as a result of a foreclosure proceeding. Once petitioners no longer owned the buildings, Garcia paid rent to the bank that now owns them.

Testimony of claimant JhoJane Rodriguez-Mar

JhoJane Rodriguez-Mar testified that he worked as a "porter" in the same 46th Street buildings where Garcia worked, but from early 2008 until 2013, when Petito lost ownership and control of them. Rodriguez-Mar testified that he worked 18 hours per day, seven days a week, and Petito paid him $200.00 per month. He further testified that Petito did not provide him an apartment, but rather a room in a basement in which to sleep. When Rodriguez-Mar complained to Petito that he was not being properly paid, Petito promised to pay him later, but he never did.

Testimony of claimant Israel Espinoza

Israel Espinoza testified that he worked for Petito from 2004 until January 2015, initially doing construction work, and later working as a superintendent/janitor starting in 2006 after Garcia resigned. Espinoza testified that Petito paid him in cash at a rate of $300.00 per week for the first two years, which increased to $600.00 per week in 2006. When Petito started paying Espinoza the agreed upon $600.00 per week, he would often skip payments which were never paid. Espinoza worked seven days per week – 18 to 20 hours per day during the summer, and 14 to 15 hours per day during the winter. Despite Petito's failure to pay Espinoza his full $600.00 weekly salary, he continued to work because he needed a place to live, could not get another job, and continued to trust Petito's promises that he would pay him.

Espinoza worked in one of the buildings on 46th street, but Petito later transferred him to a building at 730 Second Street. When Rodriguez-Mar started working for Petito in 2008, Espinoza was his supervisor. Initially, Rodriguez-Mar was responsible for cleaning, but he eventually started helping Espinoza with the buildings' defective electrical systems. Espinoza testified that Rodriguez-Mar also worked 18 to 20 hours per day during the summer to help him with the power outages in the buildings.

Testimony of claimant Francisco Caballero

Francisco Caballero testified that he worked for Petito from 1995 until approximately 2014, when the bank assumed control of the buildings on 46th street. Caballero was primarily responsible for carpentry, planning and general construction work. He and Petito agreed that he

would work five days per week from 9:00 a.m. until 5:00 p.m. at a weekly rate of $600.00 starting in 2000. Caballero worked additional hours in case of emergencies. Petito called Caballero in for work two or three weekends out of the month, or afterhours during the week due to building emergencies. There were occasions when he had to work 24 hours in a day. Caballero recalls receiving overtime pay on two occasions. Caballero further testified that Petito told him that he would pay him the wages he owed him.

Petito ultimately paid Caballero approximately $100.00 or $200.00 per week, often promising to pay the balance soon. Petito, however, never actually paid Caballero the wages owed. On the weeks when Caballero did not receive any pay, he would stop working until Petito paid a portion of the owed wages. Caballero claims to have received partial payments for March 2010 to November 2010, but believes petitioners still owe him approximately $10,000.00 in unpaid wages.

Testimony of Labor Standards Investigator Jose Mendez

Labor Standards Investigator Jose Mendez testified that he made an initial site visit to petitioners in August 2011, during which he met Petito's father and left a revisit notice for him to give to Petito. The notice requested payroll records, which were never provided to respondent. Mendez also mailed a letter to petitioners requesting records. Since he did not receive any records, Mendez computed owed wages by applying the applicable state minimum wage rates to information gathered in respondent's investigation, including the information provided by claimants in their claim forms.

Testimony of Senior Labor Standards Investigator Gerard Capdevielle

Senior Labor Standards Investigator Gerard Capdevielle testified that he recommended imposing a 100% civil penalty against petitioners considering several factors, including the size of the business, the good faith of the employer, the gravity and history of violations, and whether there was a failure to maintain payroll records. Capdevielle did not have information as to the size of the business and number of employees. As to petitioners' good faith, Capdevielle testified that respondent never received a response to its request for records nor to the recapitulation sheet that was mailed to petitioners. Capdevielle determined that the violations were serious because of the large amount of wages owed. Capdevielle further testified that petitioners did not maintain required records or furnish wages statements to employees with each payment of wages. Petitioners did not have any history of prior Labor Law violations. Capdevielle concluded that his recommendation of civil penalties at a rate of 100% was fair and properly reflected the gravity of the violations, petitioners' failure to keep and produce records, and their failure to respond to respondent's letters and other communications.

Petitioners' Evidence

Testimony of petitioner Orazio Petito, Jr.

Petitioner Orazio Petito, Jr. testified that he owned three 17-unit buildings, located at 545, 553, and 557 46th Street in Brooklyn, and also owned petitioner Peto Management Corp., which managed the buildings for approximately 20 years, until the summer of 2010, when Petito defaulted on the buildings' mortgages and a resulting foreclosure proceeding led to a court-

appointed receiver assuming control of the properties. Petito hired janitors, also referred to as superintendents, for the three buildings. From January 2001 until August 2010, approximately three janitors worked at the 46th Street buildings. Mario Garcia was the janitor from 2001 until August 6, 2006, while Israel Espinoza and JhoJane Rodriguez-Mar were the janitors during separate periods after Garcia left. Petito also hired Carlos Ordanana, who did not work in the buildings, but instead handled administrative duties, including the task of paying employees on behalf of Petito, by handing them an envelope with cash inside – usually on a weekly basis.

Mario Garcia (Janitor):

Petito testified that he compensated Garcia by allowing him to use two two-bedroom apartments rent-free, located at 545 and 553 46th Street. Garcia lived in one and rented the other, keeping the approximately $1,500.00 in monthly rent that he collected. Petito did not pay Garcia any cash wages. Garcia stopped working for petitioners in 2006, and since Petito thought that he would start working for them again, Petito allowed him to use the two apartments, rent-free, after August 6, 2006 until 2010 when Petito lost control of the buildings. Since Petito provided the two apartments rent-free, and did not charge for utilities, he believed that he had properly compensated Garcia and therefore did not need to maintain payroll records for him.

JhoJane Rodriguez-Mar (Janitor):

Petito testified that JhoJane Rodriguez-Mar worked for petitioners part-time for less than a year, earning between $100.00 and $200.00 per week depending on the number of hours he worked, at a wage rate of approximately $8.00 per hour. Petito did not recall when Rodriguez-Mar worked for him, but testified that he was paid in cash, as were all his employees. Petito testified that he furnished Rodriquez-Mar with a basement apartment in which to live rent-free with utilities included. Petito was unable to access Rodriguez-Mar's payroll records because they are located in his parent's home which he is unable to access due to a dispute with his brother.

Israel Espinoza (Janitor):

Petito testified that he paid Israel Espinoza $300.00 per week and provided him a rent-free apartment in the basement of 557 46th Street with utilities included. Petito testified that he maintained weekly payroll records for Espinoza, but did not produce them to respondent because he has no access to them due to a dispute with his brother. Petito further testified that he never agreed to pay Espinoza a weekly salary of $600.00.

Francisco Caballero (Maintenance):

Petito testified that he hired Francisco Caballero as a maintenance worker and that his duties were not limited to the three buildings on 46th Street. Petito described Caballero's work schedule as not being steady; he worked full-time, part-time or not at all. Petito testified that he furnished Caballero with a three-bedroom apartment, rent-free, located at 10 Westminster Road.

Petito testified that he paid Caballero $15.00 per hour in cash, did not claim a credit for the apartment that he provided to him, but kept a contemporaneous log of hours worked and payments made to Caballero. These records show weekly earnings from June 20, 2009 through December 10, 2011, earnings-to-date as of each respective week, and the dates in which Petito

paid on those earnings, which oftentimes were about a year later. For example, for work performed from June 20, 2009 through August 8, 2009, Petito tendered payment on August 14, 2010. The three-page record indicates that Caballero earned approximately $35,000 in three years, most of which Petito paid. Caballero never signed off on these records, nor did he provide Petito a receipt of payments received.

Testimony of Carlos Ordanana

Carlos Ordanana testified that he worked for Peto Management Corp. for approximately 15 years, but does not remember which years. Ordanana's duties included collecting rent from some of the apartments, and paying petitioners' employees their wages. Ordanana testified that Petito gave him envelopes each week containing the employees' wages, which he handed to the employees. Ordanana testified that did not know the employees' salaries or how much money was in the envelopes

Ordanana testified that Caballero lived in an apartment in one of the buildings owned by Petito and managed by Peto Management Corp., but does not know whether Caballero paid rent. Caballero complained to Ordanana whenever he was not paid – sometimes petitioners did not pay him for two or three weeks at a time. Ordanana testified that when petitioners failed to pay Caballero, he would stop working until Petito paid him the owed wages.

Ordanana testified that Rodriguez-Mar and Espinoza worked for petitioners as part time janitors approximately 20 hours per week, although Rodriguez-Mar eventually started to work full time for petitioners. Ordanana could not recall their periods of employment, but explained that Rodriguez-Mar and Espinoza often worked together, although sometimes in different buildings. Espinoza complained to Ordanana that petitioners did not pay him. Ordanana testified that he was not privy to the financial agreements between Petito and his employees, and therefore did not know whether Petito ever agreed to pay Espinoza $600.00 per week.

Ordanana testified that Garcia also worked as a janitor and lived at 545 46th Street. He did not know whether petitioners provided Garcia with a second apartment, but testified that Garcia's daughter lived at 553 46th Street and he never collected rent from her apartment. In his years of employment with petitioners, Ordanana only gave Garcia an envelope containing cash two or three times. Because Garcia often complained about not getting paid, Ordanana relayed those concerns to Petito who told Ordanana that he would look into the matter.

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) (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 respondent are invalid or unreasonable (State Administrative Procedure Act § 306 [1]; Labor Law §§ 101, 103; [12 NYCRR] § 65.30 ["The burden of proof of every allegation in a proceeding shall be upon the person asserting it]; *see also Matter of Ram*

Hotels, Inc., PR 08-078, at 24 [2011]). For the reasons stated below, we find that petitioners did not meet their burden of proof to show that the orders are unreasonable.

Petitioner Petito was an Employer

Petitioner Orazio J. Petito, Jr. alleges respondent's determination that he is individually liable for wages owed to the claimants is unreasonable because he was not an employer, or not an employer for the entire time period. We find, as discussed below, that Petito failed to meet his burden of proof to show respondent's determination that he was an employer is invalid or unreasonable.

"Employer" as used in Articles 6 and 19 of the Labor Law means "any individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons acting as an employer" (Labor Law § 651 [6]; *see also* Labor Law § 190 [3]). "Employed" means "permitted or suffered 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]; *Ovadia v Industrial Bd. of Appeals*, 81 AD3d 457 [1st Dept 2011] *revd on other grounds* 19 NY3d 138 [2012]).

In *Herman v RSR Sec. Servs. Ltd.*, 172 F3d 132, 139 (2d Cir 1999), the Second Circuit Court of Appeals described 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, we recognize that "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]).

Having testified that he not only owned the buildings in which the claimants worked, but also the corporate entity that managed those buildings, Petito's argument that he was not an employer is unpersuasive. The claimants' credible and detailed testimony that Petito hired them, set their rates of pay and method of payment, assigned (and sometimes re-assigned) them tasks, whether janitorial or construction work, was not rebutted by Petito. In fact, Petito corroborated much of the claimants' testimony regarding method of payment and his supervisory role, either

personally or through his agent, Ordanana, who reported claimants' grievances to him. We credit claimants' testimony that Petito was, in all respects, their employer and find respondent's determination that Petito is individually liable as an employer is reasonable and valid. There was no challenge to the employer status of the corporate petitioner.

Petitioners Failed to Maintain Required Records

The Labor Law requires employers to maintain payroll records, for at least six years, that show, among other things, the wage rate of each employee, the number of hours they worked daily and weekly, including the time of arrival and departure of each employee working a spread of hours exceeding ten, the amount of gross wages, and the net wages paid (Labor Law §§ 195, 661; *see also* 12 NYCRR 141-2.1 [a]). In the case of resident or non-resident janitors in the building service industry, payroll records must also show the number of units in the building (12 NYCRR 141-2.1). Articles 6 and 19 of the Labor Law further require employers to provide employees a statement with each payment of wages showing the hours worked – or in the case of janitors, the number of units in the building(s) – rates paid, gross wages, allowances, if any, claimed as part of the minimum wage, deductions and net wages (Labor Law §§ 195 [3], 661; 12 NYCRR 141-2.2). Payroll records must be produced to respondent for inspection when requested (Labor Law §§ 660, 661; 12 NYCRR 141-2.1).

Petitioners never produced any payroll records to respondent during its investigation. Petito argued that respondent never notified him of the claims filed against him nor requested payroll records. Petito's argument is unpersuasive as Labor Standards Investigator Mendez credibly testified that he left a Notice of Revisit with Petito's father at the address Petito conceded was where his office was located. The record also shows respondent sent petitioners correspondence concerning the investigation, and petitioners failed to respond to such correspondence. We find respondent notified petitioners of the investigation and requested payroll records.

Petito testified that although he maintained payroll records in an office located in his parent's home, he could not provide them to respondent because of an ongoing dispute he has with his brother that prevents him from accessing the premises. Despite being aware of respondent's investigation since at least 2011, Petito did not attempt to retrieve his records until about a month before the hearing before the Board. Petitioners produced no credible evidence that records were maintained, as required by the Labor Law.

Minimum Wage Order is Affirmed

The building service industry wage order applies to employees who work in the building service. Labor Law § 652 states that every employer "shall pay to each of its employees for each hour worked a wage not less than," the minimum wage rates in effect at the time. Pursuant to the building service industry wage order, employers in the building service industry must provide each employee wages in an amount that is not less than the minimum wage rates in effect at the time (12 NYCRR 141-1.1). The minimum wage for a residential building janitor is based on the number of units in the building(s) they serve (12 NYCRR 141.1.2). As such, janitors in a residential building are not entitled to the payment of overtime (12 NYCRR 141-1.4). While there are some restrictions, "[a]n apartment furnished by an employer to an employee in a

residential building, and occupied by him, may be considered part of the minimum wage" as can utility charges (12 NYCRR 141-1.5; *see also* 12 NYCRR 141-1.6).

In 12 NYCRR 141-3.4, the building service industry wage order defines "janitor" as:

> "a person employed to render any physical service in connection with the maintenance, care or operation of a residential building. Where there is only one employee, such employee shall be deemed the janitor. Where there is more than one employee in the building, the employer shall designate an employee who lives in the building as the janitor. No building may have more than one janitor."

While a "resident janitor" is defined as "a janitor . . . who resides in the building where he or she renders services, or in another building within a distance of 200 feet therefrom" (12 NYCRR 141-3.5), a "nonresident janitor" is defined as a janitor who does not reside in a building where he or she renders services (12 NYCRR 141-3.6). Whether Garcia, Rodriguez-Mar and Espinoza were janitors is not an issue before us as the parties are in agreement that they all performed janitorial tasks and at no point has petitioner challenged their assertions that they were janitors. As further discussed below, respondent correctly determined the wages owed to some of the claimants based on an hourly-rate rather than unit-rate because a residential building can only have one janitor at a time and, here, some of the claimants' time-periods working as janitors overlapped (12 NYCRR 141-3.4).

Furthermore, since petitioners failed to maintain required records, they bear the burden of proving that the disputed wages were paid. Where the employer has failed to keep such records, the Commissioner may draw reasonable inferences and calculate unpaid wages based on the "best available evidence" drawn from employee statements or other evidence, even though the results may be approximate (*Matter of Mid-Hudson Pam Corp. v Hartnett*, 156 AD2d 818, 820-21 [3d Dept 1989]; *Matter of Ramirez v Commissioner of Labor*, 110 AD3d 901 [2d Dept 2013]; *Matter of Garcia v Heady,* 46 AD3d 1088 [3d Dept 2007]). As the Appellate Division stated in *Matter of Mid-Hudson Pam Corp.*, 156 AD2d 818, 821 (3rd 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 calculations to the employer." In addition, the employer "cannot be heard to complain that the damages lack the exactness and precision of measurement that would be possible had he kept records" as required (*Anderson v Mt. Clemens Pottery Co.*, 328 US 680, 688-89 [1949]; *see also Mid-Hudson Pam Corp.* 156 AD2d at 821; *Matter of Mohammed Aldeen el al*, PR 07-093 [May 20, 2009], aff'd *sub nom Matter of Aldeen v IBA*, 82 AD3d 1220 [2d Dept 2011]).

While the claim period spans from January 2001 through August 2011, the burden shifting described above (wherein petitioner has to negate the reasonableness of the Commissioner's calculations) is applicable only to the period from September 2005 to August 2011, because an employer is only required to preserve records for six years. Since DOL first contacted petitioners in August 2011, and there is no evidence that petitioners knew about respondent's investigation prior to that date, petitioners were not legally required to preserve records dating back prior to September 2005 because that would be longer than the required six years. However, even though Labor Law § 196-a's presumption against petitioners does not

apply for the January 2001 through August 2005 time-period, petitioners still had to prove that they paid Garcia – whose claim falls within that time period – the minimum wages due to him pursuant to the building service industry wage order (12 NYCRR 141-1.1). As such, with regard to the claim spanning the time-period from January 2001 through August 2005, petitioners failed to meet their burden to show that Garcia was compensated as Petito testified that he did not pay Garcia any cash wages. In addition, having failed to produce legally sufficient payroll records as required by Labor Law § 195 (4), respondent's calculation of wages for work performed from September 2005 to August 2011 must be credited because petitioners did not meet their burden.

Petito's testimony was conclusory in nature, and he provided a number of admissions in respondent's favor. In addition to his vague explanation as to why he did not have required records, Petito provided no evidence of the hours worked by the hourly employees, nor evidence of there being a total of 51 (rather than 52) units in the three buildings on 46th Street. Petitioners allege the buildings had 51 units, but failed to prove respondent's determination that the buildings consisted of 52 units was unreasonable. Respondent gave petitioners a credit towards wages due to Garcia in the form of an apartment allowance, despite no obligation to do so (see 12 NYCRR 141-2.1[d] [3] [housing allowance not allowed when records are not provided]; *see also* 12 NYCRR 141-2.4 [housing allowance not permitted unless an employer provides the rental records to the Commissioner of Labor]).

Respondent's witnesses, on the other hand, provided specific and detailed testimony. Claimants credibly testified about their duties as a janitor or carpenter, as the case may be, the wages received (if any), how they would often stop working to prompt petitioners to pay them owed wages, the long hours worked as required by the malfunctioning boilers, and whether they were provided housing (regardless of whether they were legal dwellings). Mendez explained that respondent based the underpayment calculations on claimants' statements and information gathered during respondent's investigation of petitioners. In the absence of accurate and reliable payroll records, petitioners failed to meet their burden to show that claimants were paid in full. As such, we affirm the minimum wage order in its entirety, as explained below.

Garcia

Respondent calculated an underpayment of wages in the amount of $50,700.02 for the period of January 7, 2001 through August 6, 2006, reflecting a total of 64 units in four buildings managed by petitioner Peto Management Corp., and a weekly apartment allowance of $59.37. We find that it was reasonable for respondent to find wages due for the time period from January 2001 through August 2005 because those dates are within six years of the January 8, 2007 filing of Garcia's claim (see Labor Law 663 [3] [six year statute of limitations tolled from date claim is filed]). Petito testified that he did not pay Garcia wages, and Garcia testified that while working as a superintendent/janitor for petitioners, he was provided a rent-free apartment in lieu of wages. Pursuant to 12 NYCRR 141-1.1, building service industry employers are to provide each employee wages in an amount that is not less than the minimum wage rates in effect at the time. Whether Garcia was provided one or two apartments rent-free, petitioners were still required to pay him wages. We affirm respondent's determination of wages owed to Garcia.

Rodriguez-Mar

Respondent determined that petitioners owe Rodriguez-Mar $42,684.40 in unpaid wages for the period of March 18, 2008 through April 8, 2012, reflecting a total of 52 units in the three buildings on 46th street. In what investigator Mendez testified to being a calculation error, the order reflects a credit to petitioners of $200.00 per month, or $50.00 per week, rather than $200.00 per week as that was Rodriguez-Mar's weekly compensation according to respondent's investigation log. However, we credit Rodriguez-Mar's credible and corroborated testimony that he was compensated $200.00 per month. Rodriguez-Mar's claim form also notes a salary of $200.00 per month. As such, we affirm respondent's finding of Rodriguez-Mar's underpayment of wages.

Caballero

Respondent calculated an underpayment of wages in the amount of $20,265.00 for the period of March 1, 2010 through November 24, 2010.[2] The calculations were based on information provided on the claim form, which indicated that he worked 35 hours per week at a rate of $15.00 per hour. Caballero testified that, as of the year 2000, he was paid $600.00 per week while working from 9:00 a.m. until 5:00 p.m. (40 hours per week times $15.00 per hour equals $600.00) with some overtime work for which he was not compensated. The claim form indicates that he was not compensated for his lunch hour, while his testimony indicates that he was. Further, Caballero credibly testified, and Petito corroborated, that he was paid some of the owed wages claimed, with a balance of approximately $10,000.00 remaining. However, since Caballero based the balance due on what he thought he was supposed to earn, rather than on how much he was entitled to earn pursuant to the Labor Law, and given that petitioners did not prove that payments made were to be credited towards the wages owed as determined by respondent in the order, we do not give petitioners a credit. As such, we affirm respondent's finding of Caballero's underpayment of wages.

We note that while Petito testified that Caballero was provided a rent-free apartment, he did not submit any evidence to support that assertion and Caballero's underpayment was not calculated pursuant to the building services order, for which a housing allowance is available, because he was not a janitor. Instead, calculations were based on the hours worked as indicated on his claim form and investigation. While petitioners provided Caballero's payroll records at hearing, they fail to include required information such as the employee's name, hours worked or rate of pay gives it little value, so we do not credit them.

Unpaid Wage Order is Affirmed

Petitioners did not provide records to show that Espinoza – the only claimant with an unpaid wage order – was paid. Respondent calculated Espinoza's underpayment of wages in the amount of $10,140.00 for the period of April 30, 2007 through January 10, 2009. The calculations were based primarily on the information provided on his claim form, which indicated that he usually worked six days per week earning between $240.00 and $600.00 per

[2] We note that there is an error in Caballero's date-range section of the minimum wage order. Caballero's claim form reflects a March 1, 2010 through November 24, 2010 claim period, but the order covers a time period from January 3, 2010 through November 24, 2010. The error is likely a misunderstanding of Caballero's entry in his Spanish-language claim form, which inverses the month and day entries, where March 1, 2010 is written as 1/3/10. During the hearing, and in letters, respondent and claimant referred to the time-period commencing March 1, 2010.

week. However, Espinoza credibly testified that during the claim period, he worked seven days per week, earning $600.00 per week, and the figures that he wrote in the earned wages column of the claim form merely reflect the balance still owed, rather than his earnings, for a particular week. While we cannot modify the order to increase the amount of unpaid wages owed to Espinoza, we find his testimony to be credible. Inasmuch as petitioners failed to maintain true and accurate payroll records and produce evidence sufficient to negate inferences reasonably drawn from the Commissioner's evidence, we credit Espinoza's credible testimony and affirm the unpaid wage order.

Civil Penalty

The minimum and unpaid wage orders each assessed a 100% civil penalty pursuant to Labor Law § 218 in the amount of $113,649.42 and $10,140.00, respectively. Petitioners challenged the civil penalties on grounds that the rate of 100% was excessive given the management company's size and the lack of prior violations. Considering the factors delineated in Labor Law § 218, investigator Capdevielle weighed the gravity of the violation that involved a significant quantity of wages spanning many years, petitioners' failure to provide the requested records, and their failure to respond to any of respondent's communications. The 100% civil penalty is reasonable inasmuch the record shows respondent properly considered the statutory factors. We affirm respondent's determination of civil penalties in each of the orders.

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 (1) sets the "maximum rate of interest" at "sixteen per centum per annum." In light of the fact that petitioners failed to submit evidence at the hearing challenging the interest assessed in the orders, the issue is waived pursuant to Labor Law § 101 (2).

Liquidated Damages

The wage orders impose liquidated damages in the amount of 25% of the wages owed. Labor Law §§ 198 (1-a) and 663 (2) provide that when wages are found to be due, the Commissioner shall assess against the employer the full amount of the underpayment and an additional amount as liquidated damages, unless the employer proves a good faith basis for believing that its underpayment of wages was in compliance with the law. Such damages shall not exceed 100% of the total amount of wages found to be due. Petitioners failed to challenge the liquidated damages assessed in the orders and the issue is thereby waived pursuant to Labor Law § 101 (2).

Penalty Order is Affirmed

Labor Law § 218 (1) provides that when the Commissioner determines that an employer has violated a provision of Article 19, he must issue an order directing compliance therewith, which shall describe particularly the nature of the violation, and include "an appropriate civil penalty." Where the violation involves "a reason other than the employer's failure to pay wages,"

the amount of the penalty shall not exceed $1,000.00 for a first violation, $2,000.00 for a second violation, and $3,000.00 for a third or subsequent violation.

Here, the penalty order assessed civil penalties against petitioners in the amount of $2,000.00 for violating Labor Law § 661 of Article 19 and 12 NYCRR 141-2.1 and 2.2 — a $1,000.00 penalty for failing to keep and/or furnish true and accurate payroll records for each employee for the period from August 1, 2003 to August 1, 2009, and another $1,000.00 penalty for failing to give each employee a complete wage statement with every payment of wages for the period from January 7, 2001 through April 8, 2012. As previously noted, petitioners did not maintain any payroll records as required by Article 19 of the Labor Law, and Petito did not prove (or even mention) that he provided wage statements. The penalty order, therefore, is affirmed.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The minimum wage order is affirmed;
2. The unpaid wage order is affirmed;
3. The penalty order is affirmed;
4. The petition be, and hereby is, denied.

Vilda Vera Mayuga, Chairperson

J. Christopher Meagher, Member

Michael A. Arcuri, Member

Molly Doherty, Member

Gloribelle J. Perez, Member

Dated and signed in the Office
of the Industrial Board of Appeals
in New York, New York
on March 1, 2017.