

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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In the Matter of the Petition of:

NICK MALEGIANNAKIS AND NZM
RESTAURANT CORP. (T/A MICHAEL'S DINER),

Petitioners,

DOCKET NO. PR 09-254

To Review Under Section 101 of the Labor Law:

An Order to Comply with Article 19 of the Labor
Law, and an Order to Comply With Article 6 of the
Labor Law, both dated July 13, 2009, and an Order
Under Article 5 of the Labor Law, dated July 6, 2009,

RESOLUTION OF DECISION

- against -

THE COMMISSIONER OF LABOR,

Respondent.
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APPEARANCES

Towne, Ryan & Partners P.C. (John J. Hoke of counsel), for petitioners.

Pico Ben-Amotz, Acting Counsel, NYS Department of Labor (Larissa C. Bates of counsel),
for the respondent.

WITNESSES

John Moss, Pauline Koument, Donna Breault, Nick Malegiannakis, Michael Malegiannakis,
and Ramiro Marin for the petitioners; Senior Labor Standards Investigator Constance
Higgins-Ber and Darlene Shamus for the respondent.

WHEREAS:

The petition in this matter was filed with the Industrial Board of Appeals (Board) on
September 11, 2009, and seeks review of three orders issued by the Commissioner of Labor
(Commissioner or respondent) against petitioners Nick Malegiannakis and NZM Restaurant
Corp. (T/A Michael's Diner) on July 6 and 13, 2009. Upon notice to the parties a
consolidated hearing was held in this matter and another case involving the same petitioners
on March 9 and 10, 2010¹, in Albany, New York, before Sandra M. Nathan, then the

¹ On March 29, 2012, the Board issued a decision in PR 09-035 revoking an order to comply with Article 7 of
the Labor Law issued by the Commissioner against the petitioners on January 29, 2009.

Board's Deputy Counsel, 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, make statements relevant to the issues, and file post-hearing briefs.

Parties

Petitioner Nick Malegiannakis is the owner and president of petitioner NZM Restaurant Corp., and together with his son, Michael Malegiannakis, they have operated a restaurant in Windham, New York since 2002 trading as Michael's Diner. Respondent Commissioner of Labor is the head of the Department of Labor (DOL) (Labor Law § 10), and is authorized to enforce the Labor Law and issue orders (Labor Law § 21).

EVIDENCE

Penalty Order

The first order under review is an order under Article 5 of the Labor Law (penalty order), dated July 6, 2009, which imposes a \$500.00 civil penalty against the petitioners for violating Labor Law § 162 by failing to provide employees of or in connection with a mercantile establishment at least thirty minutes off for the noon day meal when working a shift of more than six hours extending over the noon day meal period from eleven o'clock in the morning to two o'clock in the afternoon from on or about July 1, 2008 through September 8, 2008.

DOL Senior Labor Standards Investigator Constance Higgins-Beer testified that she conducted an interview of Ramiro Marin, an employee of the petitioners, and he informed her that he did not have an uninterrupted thirty minute meal period during each shift in excess of six hours that he worked.

Wage Order

The order to comply with Article 19 (wage order) under review was issued by the respondent Commissioner of Labor against the petitioners on July 13, 2009. The wage order directs compliance with Article 19 and payment to the Commissioner for wages due and owing to seven named claimants in the amount of \$30,603.95 for the time period from May 5, 2002 through October 5, 2008, with interest continuing thereon at the rate of 16% calculated to the date of the order, in the amount of \$5949.68, and assesses a civil penalty in the amount of \$30,603.95, for a total amount due of \$67,157.58.

John Moss testified that he has been the accountant for the petitioners since 2007. In that role, he does the corporate payroll and quarterly tax returns for the diner. Moss explained that the petitioners call the payroll in each week on Monday or Tuesday and tell him the hours each employee worked. Moss then processes the paystubs based on the information provided by the petitioners and delivers them to the diner on Wednesday or Thursday. The petitioners do not provide Moss copies of cancelled checks or receipts of the wages paid, nor do they provide him with time cards or other records of the hours worked by the petitioners' employees.

Moss testified that the wage rate for restaurant servers employed by the petitioners in 2007 was \$4.60 an hour, and that the petitioners deducted FICA² taxes from the gross wages paid and remitted them to the taxing authorities on behalf of the employees. According to Moss, the petitioners paid the employees' portion of FICA for them.

Moss further testified that he was present at a meeting where Nick Malegiannakis told a DOL investigator that he paid the servers \$3.00 an hour plus "meal money."

Pauline Koument testified that she has worked at Michael's Diner as a server for 22 years. She works 40 hours a week and is paid \$3.00 an hour. The petitioners take no deductions from her wages and the diner pays her taxes and provides her meals during her shifts. Koument testified that her hours are generally from 7:00 a.m. to 1:00 or 2:00 p.m. She does not work past the end of her shift. She further testified that there are no time cards. She filled out "a paper" at the end of each week with the hours she worked, which was given to the accountant. She further testified that she was paid at the end of each shift, and not given a receipt.

Donna Breault testified that she has worked for the petitioners as a server for four years. She worked from 7:00 a.m. to 2:00 p.m. for two years, and Noon to 9:00 p.m. for two years. She testified that the petitioners paid her \$3.00 an hour, and that the diner paid her taxes. She believed her total compensation included meals and taxes. She also explained that she did not have to pay anything back to the diner out of her wages. Furthermore, she testified that if she had to work after her shift ended because she still had a table to serve, she was paid for the extra time.

Petitioner Nick Malegiannakis testified he has owned Michael's Diner since 2002. He supervises the kitchen, and his son, Michael Malegiannakis, manages the front of the restaurant. He testified that he pays the servers in cash, and that "every shift when they finish, they told me the hours they finished, they give me a business card with a receipt, and I rang pay out. And I kept the - for the daily routine the diner, I kept the receipt that they gave me. They signed, and they got paid \$21, let's say." Malegiannakis testified that he threw the receipts out at the end of each week. He further testified that he paid the employees' taxes in full, never requested money from them, and provided meals to the servers as part of their compensation. During the relevant time period, the petitioners did not use a time clock to track the hours worked by their employees.

Michael Malegiannakis testified that he has been the manager of Michael's Diner since 2002. He testified that during the relevant time period, the petitioners paid their servers \$3.00 an hour cash wages.

Ramiro Marin testified that he was interviewed by Higgins-Ber, and that although he is a native Spanish speaker, the interview was conducted in English, because he preferred to speak to her in English. Marin started work at Mike's Diner in 2002. He is a cook. He testified that he made \$7.00 an hour when he started, which was raised to \$8.25 an hour in 2006. Marin is sure that he received a raise to \$8.25 an hour in 2006, because another cook

² Federal Insurance Contributions Act tax.

at the diner passed away on November 2, 2006, and Marin's salary was raised "after [his] friend died." Marin further testified that the petitioners did not keep track of the hours he worked, and that he was paid in cash. He signed a document after he spoke with Higgins-Beer, but never read it.

Darlene Shamus testified that she started working as a server at Mike's Diner in 1999, before it was purchased by Nick and Michael Malegiannakis in 2001. She left in February 2008, was rehired at the end of July 2008, and was terminated in October 2008. She worked different shifts over the years. She started on the night shift, then switched to day shifts. The night shift is 2:00 p.m. to 9:00 p.m. and the day shift is 7:00 a.m. to 2:00 p.m. By the end of her employment, she worked three days a week from noon to 9:00 p.m.

Shamus testified that the petitioners paid her \$3.00 an hour in cash at the end of each shift. If she worked beyond the scheduled shift, the petitioners paid her for the extra time. The petitioners provided Shamus with paystubs which did not accurately reflect the wages paid, because "it says pay rate is \$4.60. [She] did not actually get \$4.60 an hour. [She] got three dollars an hour." Shamus testified the petitioners provided her a meal during each shift, and took no deductions from the wages they paid her.

Higgins-Beer testified that she initiated contact with the petitioners in September 2008 after Darlene Shamus had filed a wage claim against them with DOL. She stated that the petitioners admitted to her that they paid their servers \$3.00 an hour, and they believed this was justified, because they provided the servers approximately \$10.00 a day in meals. For that reason, she did not credit the records provided by the petitioners which consisted of annual and quarterly summaries showing the servers were paid the minimum wage for food service workers. According to Higgins-Beer, the records showed the servers were paid more than \$3.00 an hour and therefore could not be accurate. Additionally, the only records of the hours worked provided by the petitioners consisted of incomplete work schedules for a short time period. The petitioners did not provide Higgins-Beer with any records of the tips received by the servers.

Higgins-Beer determined the amount of wages due to the petitioners' employees by interviewing two employees at the diner on September 8, 2008. Additionally, she mailed questionnaires to the petitioners' employees and four completed forms were returned to DOL. Finally, she used the information from claim forms filed with DOL by Georgia Lucas and Darlene Shamus.

Higgins-Beer testified she used the information provided to her in the interviews and questionnaires to determine the number of hours the servers worked, but discarded a lot of the information because she knew it was not true. Specifically, the returned questionnaires indicated the servers were paid \$4.60 an hour and they were paid weekly, which was inconsistent with the investigation. Instead, she calculated the underpayments to servers using \$3.00 an hour as the wage rate. She further testified that she used the payroll records provided by the accountant to determine the time periods worked by each employee. She calculated the underpayments due to Lucas and Shamus based on the information in their claim forms. The underpayment due to Marin was based on her interview with him, in

which he stated that his rate was \$7.00 an hour. For Donna Breault, Pauline Koument, and Krista Torres, Higgins-Beer calculated the hours they worked based on a questionnaire or an interview and the schedule of hours provided by the petitioners, "whichever was more favorable to the employee."

Higgins-Beer testified that Mary Antapasis was a cashier. Higgins-Beer never spoke to Antapasis. She calculated the wages owed to Antapasis at \$3.00 an hour, although she admitted that "I don't know if she was paid the same as the waitresses or not." Higgins-Beer further testified that to determine the hours worked by Antapasis:

"I looked at who else was employed during the time that she was employed. And it appeared that 30 hours filled in the labor gap that was left based on the other hours that were worked at the time."

Higgins-Beer explained that her calculations did not credit the petitioners with a meal allowance or tip credit, nor did she make any allowance for the taxes the petitioners claimed to have paid for their employees. With respect to meal allowances and tip credits, Higgins-Beer testified that employers must keep records of tips received and meals provided in order to receive a credit or allowance, and that the petitioners did not meet the burden of proof that the regulation places on them. With respect to an allowance for taxes, Higgins-Beer testified that:

"Assuming the hours in the payroll were actually the hours that they worked, after you took out the taxes, the net amount that they should have taken home after all the deductions was more than they were actually being paid with the three dollars per hour They weren't even receiving the net amount that they should have been receiving in cash."

Higgins-Beer agreed on cross-examination that she never asked Shamus about meals or taxes.

Higgins-Beer testified that she recommended a 100% civil penalty be imposed against the petitioners based on the size of the employer, good faith, history of past violations, and gravity of the violations. She explained that:

"The only reason I didn't recommend 200 per cent was the size of the employer. It was a small employer. That brought it down from the maximum that could have been. The history of past violations, there had been two previous cases where the employer had been served with violations for failure to keep true and accurate records of hours worked and wages paid. So obviously the employer had not come into compliance after two previous investigations alerting him to the fact that this was not appropriate."

Higgins-Beer testified that nobody refused to meet with her, the petitioners allowed her to interview employees, and provided her with some records. She agreed that the petitioners never refused to comply with any of her requests.

Deductions Order

The order to comply with article 6 (deductions order) was issued by the respondent Commissioner of Labor on July 13, 2009, and finds the petitioners violated Labor Law § 193 by making prohibited deductions from the wages earned by employees in the amount of \$759.20, and directs compliance with Article 6 and payment to the Commissioner for unlawful deductions in the amount of \$759.20, with interest continuing thereon at the rate of 16% calculated to the date of the order, in the amount of \$419.66, and assesses a civil penalty in the amount of \$759.20, for a total amount due of \$1,938.06.

Pauline Koument, Donna Breault, and Darlene Shamus each testified that the petitioners did not make any deductions from their cash wages, and Nick Malegiannakis denied making any deductions from his employees' wages or requesting any money or payments from them.

Higgins-Beer testified that the deductions order was based on a claim filed by Georgia Lucas in 2006 prior to the claim filed by Darlene Shamus that caused the present investigation. Lucas' claim alleged that she had to pay her own taxes in order for the petitioners to put her "on the books." A DOL investigator who has since retired investigated Lucas' claim and determined not to pursue it after Lucas failed to attend a compliance conference. No order was issued in that matter, nor was a hearing held.

Higgins-Beer conceded that she never spoke to Lucas or the investigator who investigated Lucas' claim. Higgins-Beer further conceded that no other employee complained about unlawful deductions, and nothing in her investigation corroborated Lucas' allegations.

ANALYSIS

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

Burden of Proof

The petitioners' burden of proof in this matter was to establish by a preponderance of the evidence that the orders issued by the Commissioner are invalid or unreasonable (State Administrative Procedure Act § 306 [1]; Labor Law §§ 101, 103; 12 NYCRR 65.30).

Penalty Order

Labor Law § 162 requires employers to provide a meal period of at least thirty minutes to each employee scheduled to work for six or more hours. Higgins-Beer testified that Marin told her during the investigation that the petitioners did not provide him a thirty

minute meal break when he worked more than six hours. The petitioners did not provide any evidence concerning meal breaks, and conceded during opening statements that they did not provide employees with a designated uninterrupted thirty minute meal break. Accordingly, the petitioners failed to meet their burden of proving that the penalty order is invalid or unreasonable, and we affirm it.

Wage Order

Article 19 of the Labor Law, entitled "Minimum Wage Act" sets forth the minimum wage that every employer must pay each of its non-exempt employees for each hour of work (Labor Law § 652 [1]). The applicable minimum wage rates during the time period covered by the wage order were \$5.15 an hour from May 5, 2002 to December 31, 2004; \$6.00 an hour in 2005; \$6.75 an hour in 2006; and \$7.15 an hour from January 1, 2007 to October 5, 2008 (Labor Law § 652 [1]; 12 NYCRR 137-1.2).³ Additionally, Labor Law § 652 (4) provides that the applicable wage rates for food service workers receiving tips during the time period covered by the wage order were \$3.30 an hour from May 5, 2002 to December 31, 2004, \$3.85 an hour in 2005, \$4.35 an hour in 2006; and \$4.60 an hour from January 1, 2007 to October 5, 2008, provided that the tips of such employees, when added to the cash wage, are equal to or exceed the relevant minimum wage rate (*see also* 12 NYCRR 137-1.5 [2009]).

The wage order finds that five servers and one cook were paid below the minimum wage rates required by Article 19 of the Labor Law from May 5, 2002 to October 5, 2008. All of the servers who testified at hearing stated that the petitioners paid them \$3.00 an hour. That was less than the applicable minimum wage rate at all times relevant to this proceeding. Furthermore, Moss and Higgins-Ber both testified that Nick Malegiannakis admitted to Higgins-Ber during a meeting that the petitioners paid the servers \$3.00 an hour. Additionally, Michael Malegiannakis testified that the servers were paid a cash wage of \$3.00 an hour. Accordingly, we find that the petitioners paid the servers they employed \$3.00 an hour during the time period covered by the wage order.

The petitioners did not maintain or produce legally sufficient payroll records. 12 NYCRR 137-2.1 (a), which was in effect during the relevant time period, provided that every employer was required to maintain weekly payroll records for each employee that included, *inter alia*, the wage rate, number of hours worked daily and weekly, the amount of gross wages, deductions from gross wages, allowances, if any, claimed from the minimum wage, and money paid in cash. There is no dispute that the petitioners failed to keep records of the hours worked by their employees, and no weekly payroll records were ever produced. The payroll records that were produced were monthly and quarterly records prepared by the petitioners' accountant based on unverified information provided by the petitioners each week over the telephone. As such, these records do not comply with Article 19, because

³ The regulations applicable to this matter were found in the Minimum Wage Order for the Restaurant Industry, which is codified at 12 NYCRR Part 137 (repealed effective January 1, 2011 and replaced by the Wage Order for the Hospitality Industry, 12 NYCRR Part 146). The wage order under review incorrectly references the Minimum Wage Order for Miscellaneous Industries which is found at 12 NYCRR Part 142 and is not applicable to the restaurant industry.

they do not show required information such as daily and weekly hours worked and wage rates.

Additionally, Article 19 requires employers to furnish to each employee a statement with every payment of wages listing hours worked, rates paid, gross wages, allowances, if any, claimed as part of the minimum wage, deductions, and net wages (12 NYCRR 137-2.2 [2009]). It is undisputed that the servers were paid on a daily basis, but were only provided a weekly wage statement. We do not find the wage statements credible. No records were kept by the petitioners of the tips received by their servers, yet the wage statements (and payroll records) report the gratuities they allegedly received. Furthermore, the weekly wage statements list wage rates, as noted by Higgins-Beer in her testimony, that are higher than the actual \$3.00 an hour wage rate paid. For example, Shamus' wage statement for the week ending September 3, 2006 indicates that she worked 39 hours at \$4.35 an hour and earned gross wages of \$169.65. However, after tax deductions and adjustments for tips allegedly received, her net pay of \$141.78 results in an hourly net rate of \$3.64 which is higher than the wage rate of \$3.00 an hour she was actually paid. We find that it was reasonable for Higgins-Beer to conclude that the employer's records were incredible and to give them little if any weight in her investigation.

In the absence of sufficient records, petitioners then bear the burden of proving that the disputed wages were paid (Labor Law § 196-a; *Angello v Natl. fin. Corp.*, 1 AD3d 818, 821 [3d Dept 1989]; *Garcia v Heady*, 46 AD3d 1088 [3d Dept 2007]). As the Appellate Division stated in *Matter of Mid Hudson Pam Corp v Hartnett*, 156 AD2d 818, 821 [3d Dept 1989], [w]hen an employer fails to keep accurate records as required by statute, the commissioner is permitted to calculate back wages due to employees by using the best available evidence and to shift the burden of negating the reasonableness of the Commissioner's calculation to the employer." Therefore, the petitioners have the burden of showing that the Commissioner's order is invalid or unreasonable by a preponderance of the evidence of the specific hours that the claimants worked and that they were paid for those hours, or other evidence that shows the Commissioner's findings to be invalid or unreasonable (*In the Matter of Ram Hotels, Inc.* Board Docket No. PR 08-078 [October 11, 2011]). Where incomplete or unreliable wage and hour records are available, DOL is "entitled[d] to make just and reasonable inferences and use other evidence to establish the amount of underpayments, even though the results may be approximate" (*Hy-Tech Coatings v New York State Dept. of Labor*, 226 AD2d 378, [(1st Dept 1996), citing *Mid-Hudson Pam Corp.*).

The petitioners failed to prove that the Commissioner's determination of the amount of wages owed to Breault, Koument, Lucas, Shamus, and Torres was unreasonable. In the absence of reliable payroll records, the Commissioner used the best available evidence, which were the interviews and claims of the employees, to calculate the amount of wages due. The inferences and evidence relied on by Higgins-Beer and the assumptions and conclusions she drew were reasonable. However, we find that the petitioners did meet their burden of proof with respect to Antapasis and Marin. The evidence shows that Antapasis was a cashier, not a waitress, and that Higgins-Beer determined the wages owed to her using the same \$3.00 an hour wage rate paid to the servers, despite admitting she did not know

how much she was paid. This was unreasonable and the wage order is reduced by the \$747.00 found due to Antapasis. Marin credibly testified at hearing that he was paid a wage rate in compliance with Article 19 at all times relevant to this proceeding. Therefore, the wage order must also be reduced by the \$106.00 in wages found due and owing to Marin.

The petitioners argue that the wage rate they paid to their servers did not violate Article 19, because they paid the servers' portion of FICA taxes, provided them meals during their shifts, and are entitled to pay the lower food service worker hourly wage rate because the servers received tips (*see* Labor Law 652 [4]; 12 NYCRR 137-1.5 [2009]). However, as discussed above, the records produced by the petitioners are not reliable, and the burden of proof was on them to show that the employees received sufficient tips to entitle them to classify the employees as food service workers (12 NYCRR 137-3.4 [c] [2009]). The records maintained of tips received are not accurate and one of the servers, Brault, testified that the petitioners did not keep track of the gratuities received by the servers. It was reasonable for the Commissioner not to calculate wages at the lower restaurant service wage where there are no records of the amount of tips received by the employees (12 NYCRR 137-3.4 [c] [2009]; *See also Bakerman, Inc. v Roberts*, 98 AD2d 965 [4th Dept 1983]; *Padilla v Manlapaz*, 643 F Supp 2d 302, 310 [EDNY 2009]). It was likewise reasonable for the Commissioner not to provide a meal deduction, despite the credible testimony that meals were provided, where the petitioners failed to keep records of the meal allowances claimed and did not provide any evidence that the food provided were meals as defined by 12 NYCRR 137-3.8 (2009) (defining a meal as including at least one of the types of food from each of fruits and vegetables; cereals, bread or potatoes; eggs, meat, fish or poultry; and milk, tea or coffee, except that for breakfast eggs, meat, fish or poultry may be omitted if both cereal and bread are offered) (*see Padilla*, 643 F Supp 2d at 310).

We are likewise not persuaded by the petitioners' defense that they should receive a credit or offset against the minimum wage for taxes paid on behalf of their employees. As noted above, the records produced by the petitioners do not comply with the recordkeeping requirements imposed by Article 19, and the weekly wage statements are not reliable because they reflect net pay amounts after withholdings and tip credits that are more than the actual \$3.00 an hour the servers received. Absent reliable records of the amounts allegedly paid in taxes on the employees' behalf, it was reasonable for the Commissioner not to provide any offset or credit for such taxes, and the petitioners failed to prove at hearing the amount of the taxes allegedly paid.

Civil Penalty

The Wage Order assesses a 100% civil penalty. The Board finds that the considerations required to be made by the Commissioner in connection with the imposition of a 100% civil penalty were proper and reasonable in all respects.

Interest

Labor Law § 219(1) provides that when the Commissioner determines that wages are due, then the order directing payment shall include "interest at the rate of interest then in effect as prescribed by the superintendent of banks pursuant to section fourteen-a of the banking law per annum from the date of the underpayment to the date of payment. Banking

Law section 14-A sets the “maximum rate of interest” at “sixteen percent per centum per annum.”

Deductions Order

Labor Law § 193 prohibits employers from making deductions from their employees’ wages that are not otherwise allowed by the statute, or from requiring payments by separate transaction that would not be allowed as deductions from wages. There is no reliable evidence in the record that the petitioners made unlawful deductions from their employees or required them to make prohibited payments by separate transaction. The servers who testified stated that the petitioners did not make any deductions from their wages or require them to make payments to them from their wages. Nick Malegiannakis testified that he did not make any deductions from his employee’s wages. The evidence relied on by the Commissioner to rebut such testimony consisted of Lucas’ claim form from 2006 that on its face is unclear as to the allegation, and that DOL originally decided not to pursue after Lucas failed to attend a compliance conference⁴. Higgins-Beer never spoke to Lucas about her claim, nor did she speak to the investigator who originally investigated it. This is insufficient, in light of the petitioner’s and the servers’ credible testimony, to sustain the order. Therefore, the deductions order is unreasonable and must be revoked in its entirety.

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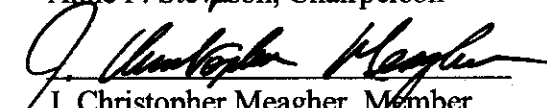
⁴ The petitioners argue that the deductions order is invalid or unreasonable because DOL had closed the case and was therefore estopped from subsequently issuing an order. However, equitable estoppel is not applicable in matters, such as this, where no prior adjudication took place and where the agency issuing the order is not acting in a quasi-judicial capacity (*Lombardo v DeBuono*, 233 AD2d 789, 791-92 [3d Dept 1996]).

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The order to comply with Article 5 of the Labor Law, dated July 6, 2009, is affirmed;
and
2. The order to comply with Article 19 of the Labor Law, dated July 13, 2009, is modified to reduce the wages due and owing to \$29,750.95, and the civil penalty and interest are reduced proportionately; and
3. The order to comply with Article 6 of the Labor Law, dated July 13, 2009, is revoked;
and
4. The petition for review be, and the same hereby is, granted in part and denied in part.



Anne P. Stevason, Chairperson




J. Christopher Meagher, Member



Jean Grumet, Member

LaMarr J. Jackson, Member



Jeffrey R. Cassidy, Member

Dated and signed in the Office
of the Industrial Board of Appeals
at New York, New York, on
May 30, 2012.