STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of: HISHAM S. GHAZALLE, Petitioner, To Review Under Section 101 of the Labor Law: An Order to Comply with Article 19, an Order to Comply with Article 6, and an Order Under Articles 5 and 19 of the Labor Law, all dated July 23, 2014, - against - THE COMMISSIONER OF LABOR, Respondent.	DOCKET NO. PR 14-217 RESOLUTION OF DECISION

APPEARANCES

Hisham S. Ghazalle, petitioner pro se.

Pico Ben-Amotz, General Counsel, New York State Department of Labor (Jake A. Ebers of counsel), for respondent.

WITNESSES

Hisham S. Ghazalle, for petitioner.

Wohidjon Rajjabov, claimant, and Labor Standards Investigator Jose Mendez, for respondent.

WHEREAS:

On September 19, 2014, and amended on January 12, 2015, petitioner Hisham S. Ghazalle[1] filed a petition for review of three orders the Commissioner of Labor (respondent or Commissioner) issued against him on July 23, 2014. Respondent filed an answer to the petition and amended petition on November 7, 2014, and January 15, 2015, respectively.

The order to comply with Article 19 of the Labor Law (minimum wage order) directs payment of $1,483.54 in wages due and owing claimant Wohidjon Rajjabov for the period of September 7, 2008 through November 17, 2008; together with interest at 16% per year calculated

[1] The orders under review were issued against Amr M. Mousa and Hisham S. Ghazalle (T/A Grill Master); the petition was filed on behalf of Ghazalle only.

to the date of the order, in the amount of $1,372.76; liquidated damages, at 25% of the minimum wages owed, in the amount of $370.91; and a civil penalty in the amount of $1,483.54, for a total due of $4,710.75.

The order to comply with Article 6 of the Labor Law (unpaid wages order) directs payment of $1,429.40 in unpaid wages owing claimant Wohidjon Rajjabov for the period of September 7, 2008 through November 17, 2008, $1,311.14 in interest at 16% per year calculated to the date of the order, and a civil penalty in the amount of $1,429.40, for a total amount due of $4,169.94.

The order under Articles 5 and 19 of the Labor Law (penalty order) imposes a civil penalty of $1,000.00 for violating Labor Law § 661 and 12 NYCRR 137-2.1 by failing to keep or/or furnish true and accurate payroll records for each employee for the period from on or about January 1, 2008 through December 31, 2008, and a civil penalty of $1,000.00 for violating Labor Law § 161 by failing to allow employees at least 24 consecutive hours of rest in any calendar week during the period from on or about September 7, 2008 through November 23, 2008, for a total due of $2,000.00.

Petitioner alleges that he was not an employer, and challenges the penalties and interest in the orders as unreasonable.

Upon notice to the parties, a hearing was held on January 20, 2015, before Board Member J. Christopher Meagher, the assigned hearing officer in this case. Each party was afforded a full opportunity to present documentary evidence, examine and cross-examine witnesses and raise relevant arguments.

SUMMARY OF EVIDENCE

Petitioner's Evidence

Testimony of Petitioner Hisham S. Ghazalle

Petitioner testified that he was the co-owner of Grill Master, a restaurant located at 3850B Nostrand Avenue in Brooklyn, NY. The restaurant opened in 2008 and went out of business after four months. The restaurant had no employees and was open from around 10:00 a.m. until 8:00 p.m. and was closed Sundays. Petitioner had "no role in the operation" of the restaurant, but would stop by the restaurant some evenings to pick up food or to visit on weekends; during those times, he saw no employees. The restaurant's employer identification number (EIN) was 262762928, as set out in tax returns and other business records petitioner entered into the record.

The restaurant was co-owned by Amr Mousa, who also owned two other restaurants in Brooklyn called Grill Master, one located on Avenue X and the other on Sheepshead Bay Road. Mousa's brother asked petitioner to invest in another restaurant Mousa wanted to open. Petitioner agreed and together with Mousa they formed Fast Food Spot, Inc., which did business as Grill Master. Mousa alone operated the restaurant as petitioner worked full time as an accountant in Manhattan and had a daily two-hour commute to and from his office. Mousa signed all the checks for the restaurant, as reflected in bank statements for an account in the name of Fast Food Spot Inc., which petitioner entered into the record.

To "offset costs," Mousa was to operate the restaurant without the aid of employees because its rent was higher than the rent at Mousa's two other restaurants. Petitioner entered into the record tax returns for Grill Master that he had prepared and signed as treasurer, and an "Affidavit for New York Entities with No Employees ... That New York State Workers' Compensation and/or Disability Benefits Insurance Coverage Is Not Required", which petitioner had completed and signed as owner, and in which he had affirmed that Grill Master "does not require disability benefits coverage" and had no "employees, day labor, leased employees, borrowed employees, part-time employees, unpaid volunteers (including family members) or subcontractors."

Petitioner testified that claimant did not work at the Grill Master restaurant during the period of time he co-owned it with Mousa. When Grill Master failed and the site was repossessed by the landlord for nonpayment of rent, Mousa went back to operating his other restaurants. Petitioner testified that he recognized claimant at the hearing as one of the employees who worked for Mousa at his restaurant on Avenue X and that he was called "Zee."

As evidence that claimant did not work at the restaurant he co-owned with Mousa, and instead worked at the site on Avenue X, petitioner pointed to claimant's minimum wage/overtime and unpaid wages claim forms, both of which identified his work site as the Grill Master restaurant located at 3850 Nostrand Avenue, with an EIN of 263555576. According to petitioner, 3850 Nostrand Avenue and 3850B Nostrand Avenue were "two different places," and "two different restaurants." Petitioner asserted that Mousa was a partner in the Avenue X restaurant with an individual named Sharif El Gendy. As proof of the arrangement, he submitted verification from the Department of State showing that an entity named "El Gendy Food, Inc." was registered as an active corporation in October 2008, and an agreement by Mousa and El Gendy to sell the restaurant in 2013. Petitioner claimed that El Gendy confirmed to him in a telephone call that the tax identification number 263555576 was the number he created for El Gendy Food, Inc.

Petitioner also testified that claimant and respondent's Investigation Narrative Report incorrectly or inconsistently state that Mousa hired claimant and that petitioner was Mousa's partner.

Petitioner testified that he received a copy of respondent's August 20, 2013 letter addressed to Mousa regarding a compliance review of Grill Master, not Grill Master. He entered the letter into the record and testified that he [petitioner] had been sent the letter in error and it did not pertain to him as he was only copied on the letter and as the business name was incorrect. He testified that he had responded on August 30, 2013 to the letter "out of good faith" because he knew that Mousa would not. In his response, he had provided what he knew about Grill Master, even though he did not operate it, in an effort "to avoid any assessment of penalties." Thereafter, he had no further contact with respondent regarding the investigation because he had spoken with Mousa's brother and believed Mousa would handle it. Petitioner testified that he had received a letter, dated April 18, 2014, from respondent in which he was identified as "the responsible party" inviting him and Mousa to a compliance conference, which he did not attend.

Finally, petitioner confirmed that as an owner, he had "the power to do anything [he] wanted" and that although he had such power, he did not exercise it. He testified that while he had access to the bank account for Grill Master, he did not "handle any of the cash going in or out." He testified that it was "obvious" and that there was "no question" that he had the power to hire

and fire employees, and confirmed that he had filed tax returns for the company, based on financial information provided by Mousa.

Respondent's Evidence

Testimony of Claimant Wohidjon Rajjabov

Claimant Wohidjon Rajjabov testified that he worked at Grill Master restaurant, located at 3850B Nostrand Avenue in Brooklyn, at the corner of Nostrand and Avenue X. He testified that 3850 and 3850B Nostrand were the same address. His duties consisted of opening and closing the restaurant, food preparation, cleaning and taking care of the register. The restaurant had four permanent employees and other part-time employees, who worked at the restaurant "almost every day," including petitioner. He did not clock in or out of work and to his knowledge, petitioner did not keep track of the hours he worked.

After claimant and a friend visited Grill Master, petitioner interviewed and hired him on the spot, and he began work the following day. Mousa determined his rate of pay but both petitioner and Mousa paid him his weekly wages. He believed that petitioner would have had the authority to fire him and to keep payroll records.

Claimant testified that petitioner was present at the restaurant "at least three times a week," for approximately 15 hours a week as he would come to the restaurant after his "work schedule," arriving between 5:00 and 6:00 p.m. and, sometimes, after 8:00 p.m., and stayed until the restaurant closed and work was finished, between 10:00 p.m. and midnight. When petitioner was at the restaurant, he worked at the register, took care of customers and collected money, which he put in the register or in his pocket.

The claimant also testified that the restaurant where he worked had an EIN of 263555576, which he had obtained, on the advice of a friend, from a document on the wall of the restaurant, after asking Mousa, in petitioner's absence, if he was going to pay him the wages he was owed and Mousa becoming "very aggravated." Claimant testified that he did not know if that was the right or wrong EIN for the restaurant.

Claimant filed with respondent a claim for unpaid wages and a claim for minimum wage/overtime in December 2008.

Testimony of Labor Standards Investigator Jose Mendez

Mendez testified that he is a Labor Standards Investigator and investigated claimant's claims, which respondent received in December 2008 and which alleged that claimant was not paid minimum wage or overtime for the duration of his employment, and had not been paid at all for his last few weeks of work.

Respondent's investigation revealed that claimant had worked for Grill Master located at 3850 Nostrand Avenue, a restaurant, which was owned and managed by petitioner and Amr Mousa, and that he had been hired by petitioner. Mendez conducted two field visits, but found that Grill Master was no longer in business at 3850 Nostrand Avenue; he did not recall seeing a business at 3850B Nostrand Avenue. On August 20, 2013, Mendez wrote Mousa, with a copy to

petitioner, seeking employment and other business records for Grill Master. Mendez sent the letter to Mousa as owner and had copied petitioner as Mousa's partner as it was his understanding that by copying petitioner on the letter to Mousa, petitioner was involved in the case and "would know that [the] investigation was going on." Respondent wrote the claimant on August 21, 2013 asking him to contact Mendez regarding "the location of Grill Master and its owners."

Mendez calculated underpayments and unpaid wages based on the claim forms because the employer had not submitted required payroll records. While petitioner had responded to Mendez's August 2013 request for employment records, his response was not useful in calculating the underpayments because he alleged that Grill Master had no employees and was a cash business, and did not submit time or payroll records or any evidence of wage payment. Mendez explained that he calculated minimum wage underpayments, overtime and unpaid wages based on claimant's information in the claim forms showing that he was paid $7.00 an hour for the duration of his approximately three-month employment, although under the Labor Law, the required minimum wage at that time was $7.15 an hour; that he had worked seven days a week; and that he had been paid for the weeks ending November 2, 2008 to November 23, 2008. Mendez calculated the wages owed by determining what the claimant should have been paid for regular hours worked and for overtime, less credits for meal and spread-of-hour allowances.

Mendez verified that the claimant had indicated that he worked at Grill Master located at 3850 Nostrand Avenue, Brooklyn, and had provided a tax identification number of 26355576. Mendez explained that respondent attempted to verify the employer's identity and the EIN supplied by claimant but found no "hits" for Mousa or petitioner at 3850 Nostrand Avenue at the time of the search in January 2014. Mendez contacted claimant, who confirmed that he had gotten the EIN from a document on the wall of the restaurant.

Mendez explained that Mousa and petitioner were sent a recapitulation and violation sheet in December 2013, which set out the investigation results. Both were given the opportunity to participate in a compliance conference to resolve open issues prior to respondent issuing an order to comply, but neither responded to respondent's invitation. Consequently, respondent issued the orders under review in July 2014.

In this case, Mendez's supervisor completed a cover sheet for the orders, based on information compiled by Mendez with regard to the number of hours claimant worked; how many employees there were, how many employees were claiming unpaid or minimum wages, and the length of time of the claim. He confirmed that respondent, in setting civil penalties in the minimum wage and unpaid wages orders, considered whether the employers had prior Labor Law violations, the number of claimants, overtime, the amount of wages owed, penalty amounts and the employers' good faith or lack thereof. Mendez explained that the employers in this matter had been considered "not generally cooperative" because they had not responded to the letter inviting them to participate in a compliance conference and because, other than petitioner's August 30, 2013 one-page letter, there had been no explanation or response from employers. Mendez testified that he believed the 100% penalty amount was appropriate, given the facts and circumstances of the case, although the highest recommended penalty could have been 200%. Liquidated damages were applied in this matter because the employers should have known to pay minimum wage and overtime.

GOVERNING LAW

Standard of Review and Burden of Proof

When a petition is filed, the Board reviews whether an order issued by the Commissioner is "valid and reasonable" (Labor Law § 101 [1]). A petition must state in what respects the order on review is claimed to be invalid or unreasonable. Any objections not raised shall be deemed waived (Labor Law § 101 [2]). The Labor Law provides that an order of the Commissioner is presumed to be valid (Labor Law § 103 [1]). The hearing before the Board is *de novo* (Board Rule 66.1 [c] [12 NYCRR 66.1 (c)]), and based on that hearing, if the Board finds that the order, or any part thereof, is invalid or unreasonable, the Board is empowered to affirm, revoke or modify the order (Labor Law § 101 [3]).

Petitioners have the burden to prove by a preponderance of the evidence that an order is invalid or unreasonable (*Matter of Ram Hotels, Inc.*, PR 08-078 at 24 [October 1, 2011]; Board Rule 65.30 [12 NYCRR 65.30]; State Administrative Procedure Act § 306 [1]; *Matter of Angello v Natl. Fin. Corp.*, 1 AD3d 850, 854 [3d Dept 2003]).

Employer under Articles 6 and 19 of the Labor Law

"Employer" is defined in Article 6 of the Labor Law to include "any person, corporation, limited liability company, or association employing any individual in any occupation, industry, trade, business or service" (Labor Law § 190 [3]). Article 19 of the Labor Law, also known as the Minimum Wage Act, defines the term to include "any individual, partnership, association, corporation, limited liability company, business trust, legal representative, or any organized group of persons acting as employer" (Labor Law § 651 [6]). "Employed" means "permitted or suffered to work" (Labor Law § 2 [7]).

Like the New York Labor Law, the federal Fair Labor Standards Act (FLSA) defines "employ" to include "suffer or permit to work" (29 USC § 203 [g]), and it is well settled that "the test for determining whether an entity or person is an 'employer' under the New York Labor Law is the same test . . . for analyzing employer status under the Fair Labor Standards Act" (*Chu Chung v. The New Silver Palace Rest., Inc.*, 272 F Supp 2d 314, 319 n6 [SDNY 2003]).

In *Herman v. RSR Sec. Servs. Ltd.*, 172 F3d 132, 139 (2d Cir 1999), the 2nd Circuit Court of Appeals set out the test used for determining employer status, 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 the 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 the economic reality test "no one of the four factors standing alone is dispositive. Instead, the economic reality test encompasses the totality of the circumstances, no one of which is exclusive" (*Id.* [internal quotations and citations omitted]).

Minimum Wage and Overtime

An employer must pay each covered employee a minimum wage for each hour of work (Labor Law § 652 [1]), and one and one-half times an employee's regular wage rate for hours worked over 40 each work week (12 NYCRR 137-1.3).[2] Employers are also required to pay an additional hour's pay at the basic minimum hourly wage for each day in which the spread of hours exceeds 10 (12 NYCRR 137-1.7). During the period for which claimant seeks payment of underpayment and unpaid wages, the minimum wage was $7.15 an hour (12 NYCRR 137-1.2).

Employer's Obligation to Maintain Records

The Labor Law and its implementing regulations require that employers maintain and preserve for not fewer than six years, weekly payroll records that show every employee's name and address, social security number, regular and overtime wage rate, number of regular and overtime hours worked daily and weekly, the amount of gross wages, deductions from gross wages, any allowances claimed as part of the minimum wage, and net wages paid (Labor Law § 661 and 12 NYCRR 137-2.1). These records must be made available to the Commissioner upon her request at the place of employment. Additionally, every employer must furnish every employee with a statement with every payment of wages listing hours worked, wage rate paid, gross wages, any allowances, deductions and net wages (12 NYCRR 137-2.2).

Calculation of Wages in the Absence of Employer Records

Labor Law § 196-a provides, in relevant part, that:

> "Failure of an employer to keep adequate records, in addition to exposing such employer to penalties . . . shall not operate as a bar to filing of a complaint by an employee. In such a case the employer in violation shall bear the burden of proving that the complaining employee was paid wages, benefits and wage supplements."

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 calculations to the employer" (*See Matter of Garcia v Heady*, 46 AD3d 1088 [3d Dept 2007]; *Matter of Bae v IBA*, 104 AD3d 571 [1st Dept 2013]; *Matter of Ramirez v Commissioner*, 110 AD3d 901 [2d Dept 2013]; *Matter of Mohammed Aldeen*, PR 07-093 [May 20, 2009], aff'd *sub nom. Matter of Aldeen v Industrial Appeals Bd.* 82 AD3d 1220 [2d Dept 2011]).

When incomplete wage-and-hour records are provided, respondent is "entitle[d] to make just and reasonable inferences and use other evidence to establish the amount of underpayments,

[2] 12 NYCRR Part 137 was replaced by 12 NYCRR Part 146, effective January 1, 2011.

even though the results may be approximate" (*Matter of Hy-Tech Coatings v New York State Dept. of Labor*, 226 AD2d 378 [P1 Dept 1996] citing *Mid-Hudson Pam Corp.*). 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]).

Employer's Obligation to Allow Mandatory Day of Rest

Labor Law § 161 requires an employer of an employee of a factory, mercantile establishment, hotel, restaurant, or freight or passenger elevator at least 24 consecutive hours of rest in any calendar week.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Board makes the following findings of fact and conclusions of law pursuant to the provisions of Board Rule 65.39 (12 NYCRR 65.39). We find petitioner failed to meet his burden of proof. The orders, as discussed below, are affirmed.

Petitioner Was an Employer Under the Labor Law

Petitioner alleged that he was not an employer, asserting that he had "no role," no "operational involvement or any control in operating" the restaurant, and that Mousa was responsible for any unpaid wages due claimant. However, it is well settled that employees may have more than one employer. Even if Mousa were an employer, it does not follow that petitioner was not (*see, e.g., Matter of Franbilt,* PR 07-019 [July 30, 2008date]; *Matter of Frank Bova et al.*, PR 06-024 [November 28, 2007]).

We find that petitioner was an employer. On the record before us, there is ample evidence to support the *Herman* factors necessary to show employer status. It is uncontested that petitioner was an owner of the restaurant; petitioner himself testified to this. Petitioner's testimony that there were no employees and that he stopped by the restaurant just for takeout or to visit was not credible or corroborated. While he submitted tax records and an affidavit to exempt the business from Workers' Compensation and disability benefits, we give these documents no weight as they were completed by petitioner and he admitted that the business was run entirely on a cash basis.

We credit claimant's testimony concerning the operations of the restaurant and his hiring and employment by petitioner during the period of his claims, as it was detailed, specific, and credible. Claimant credibly testified that petitioner hired him, had the power to fire him, and was present in the restaurant some 15 hours a week operating the cash register and serving customers. Although Mousa determined his hourly rate, both petitioner and Mousa paid him his wages in cash every week. Claimant further testified that he did not clock in or out each day but petitioner had the authority to maintain wage and hour records for him. Indeed, petitioner himself admitted that he had full authority "to do anything [he] wanted" in the restaurant.

We find the evidence establishes that petitioner had the requisite authority to hire and fire the claimant, supervise and control his work schedule and conditions of employment, determine the manner and means of payment, and maintain employment records, regardless of whether he exercised all of those powers during the period of time the claimant was employed. An employer does not have to "continuous[ly] monitor . . . employees. Control may be restricted, or exercised only occasionally, without removing the employment relationship from the protections of the FLSA, since such limitations on control 'do not diminish the significant of its existence'" (*Herman*, 172 F3d at 139). Additionally, while petitioner testified that the restaurant was "a cash business," and produced bank, tax and other business records, he did not produce any payroll or wage and hour records. Based on the totality of the circumstances, we find that petitioner was an employer under the Labor Law during the period covered by the orders.

While petitioner testified that he had seen the claimant working at Mousa's other Grill Master restaurant on Avenue X in Brooklyn, we credit claimant's specific testimony concerning his employment at the Nostrand Avenue site over petitioner's general denial. Petitioner also argued that discrepancies in the claim forms prove that claimant was employed at the Avenue X restaurant, and not Nostrand Avenue. However, the difference of one letter between the name of the restaurant on the claim form and the name of the restaurant owned by petitioner, as well as the difference of one letter in the address of the worksite is, in this matter, not significant. The claimant's testimony that he obtained the EIN set out in his claim form from the wall of Grill Master where he worked was also credible. Petitioner's other arguments concerning the tax identification number and respondent's investigation do not rebut respondent's evidence.

We find there was sufficient evidence in the record to support respondent's conclusion that claimant worked at Grill Master restaurant on Nostrand Avenue in Brooklyn, that petitioner was his employer, and that petitioner is responsible for any wages owed him under the Labor Law.

The Minimum Wage Order Is Affirmed

The minimum wage order finds that claimant is owed minimum wage and overtime wages in the amount of $1,483.54 for the period of the claim. The amount of underpayment was calculated by respondent based on the claim forms because, as discussed above, petitioner failed to maintain or provide required records. We find that petitioner failed to meet his burden of proof that claimant was properly paid minimum or overtime wages. Petitioner denied that he had any employees, supplied no wage-and-hour or other time or payroll records, and the remainder of his evidence to the effect that he himself was infrequently at the restaurant and that claimant likely worked at another of Mousa's restaurants was not credible. Claimant testified credibly, and consistently with the information he supplied in his claim forms, that he received $7.00 an hour for a 78-hour work week during the claim period, and that petitioner paid him a cash wage. Petitioner did not present credible evidence or reliable records to meet his burden of showing precise hours the claimant worked or that he was correctly paid for all the hours he worked. Mendez testified in credible and specific detail about his method for, and results of, calculating what the claimant was owed based upon the claimant's claim forms, and petitioner presented no evidence to challenge this. We find that respondent's basis for the minimum wage order was reasonable and valid. We affirm the minimum wage order.

The Unpaid Wages Order Is Affirmed

The unpaid wages order finds that petitioner failed to pay the claimant for several weeks of work as the restaurant was failing. Respondent relied on information in the claim forms because petitioner failed to maintain or produce records. The Labor Law requires employers to maintain and make available to respondent requisite payroll records, as set out above. Without the requisite records, respondent may draw reasonable inferences, which she did here. Petitioner did not submit any evidence to challenge respondent's calculation of unpaid wages, and offered nothing to show claimant had been paid for the weeks he claimed he was not paid. We affirm respondent's determination that petitioner owes the claimant the wages claimed as reasonable and valid, and affirm the unpaid wages order.

The Civil Penalties Are Affirmed

The minimum wage order and the unpaid wages order each include a 100% civil penalty. Labor Law § 218 (1) provides that when determining the amount of civil penalty to assess against an employer who has violated a provision of Articles 6 or 19 or § 161 (mandatory day of rest) of the Labor Law, the Commissioner shall give:

> "due consideration to the size of the employer's business, the good faith basis of the employer to believe that its conduct was in compliance with the law, the gravity of the violation, the history of previous violations and, in the case of wages, benefits or supplements violations, the failure to comply with record-keeping or other non-wage requirements" (*id.*).

Petitioner offered general assertions in objecting to the penalties and testified that he had responded in "good faith" to respondent's August 2013 letter in spite of the fact that he was not an employer and in an effort to avoid penalties. Thereafter, he did not respond to, or participate in, respondent's efforts to investigate and resolve this matter. Instead, petitioner testified that after talking to Mousa's brother, he believed Mousa would handle the matter. Mendez testified credibly that respondent considered the duration of the claim, the amount of wages owing, the good faith or lack thereof on the part of the employer and any prior violations in determining the penalty amount. We find that the necessary considerations were applied and the civil penalty amounts assessed in the minimum wage order and in the unpaid wages order are affirmed.

Liquidated damages

Labor Law § 218 [3] provides that when wages are found to be due, respondent shall assess against the employer the full amount of the underpayment or unpaid wages and an additional amount as liquidated damages, unless the employer proves a good faith basis for believing that its underpayment or nonpayment of wages was in compliance with the law. Petitioner did not submit any credible evidence that he had a good faith basis for believing the violations were in compliance with the Labor Law. We note, nevertheless, that the unpaid wages order did not include liquidated damages in the total due, in spite of having set out in the Commissioner's findings, at Letter F, that

[3] While Labor Law § 218 requires the Commissioner to include 100 % liquidated damages in her orders to comply, Labor Law §§ 198 and 663 provide that liquidated damages shall be calculated by the Commissioner as "no more than" 100 % of the underpayments found due.

liquidated damages in the amount of 25 % were due and owing. As no amount of liquidated damages was set out in the total due in the unpaid wages order, none will be affirmed here.

Interest

Labor Law § 219 (1) provides that when the Commissioner determines that wages are due, the order directing payment shall include "interest at the rate of interest then in effect as prescribed by the superintendent of financial services pursuant to section fourteen-a of the banking law per annum from the date of the underpayment to the date of payment." Banking Law § 14-A sets the "maximum rate of interest" at "sixteen per centum per annum."

After a general objection to the interest in his amended petition, petitioner failed to submit sufficient evidence at hearing to challenge the interest respondent is required by statute to assess. We affirm the interest imposed in the minimum and unpaid wages orders.

The Penalty Order Is Affirmed

The penalty order imposes a penalty on petitioner for violating Labor Law § 161 by failing to provide at least 24 consecutive hours of rest in any calendar work week and for violating Labor Law § 661 and 12 NYCRR 137-2.1 for failing to establish, maintain and preserve for no fewer than six years, contemporaneous, true, and accurate weekly payroll records and making such records available upon the request of the Commissioner at the place of employment.

Having found, as discussed above, that petitioner was an employer, he was required by Labor Law § 661 and 12 NYCRR 137-2.1 to maintain required records and produce them to respondent upon request. Petitioner failed to prove that he maintained required records. The $1,000.00 penalty for violating Labor Law § 661 and 12 NYCRR 137-2.1 is affirmed.

Labor Law § 161 requires in relevant part that an employer allow an employee of a restaurant at least 24 consecutive hours of rest in any calendar week. Claimant testified credibly that the restaurant was open seven days a week and that he worked seven days a week; his claim forms were consistent with this testimony. Petitioner testified that Grill Master was open six days a week and that he was not there on weekends. As petitioner did not have or supply actual records of when the claimant worked, we credit claimant's testimony. We therefore find respondent's conclusion that claimant worked seven days a week from September 7, 2008 through November 23, 2008 at the restaurant co-owned and operated by petitioner, without the required day of rest, to be reasonable. We affirm the $1,000.00 penalty in the penalty order for this violation.

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NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The minimum wage order is affirmed;

2. The unpaid wages order is affirmed;

3. The penalty order is affirmed; and

4. The petition for review be, and the same hereby is, otherwise dismissed.

Vilda Vera Mayuga, Chairperson

J. Christopher Meagher, Member

Michael A. Arcuri, Member

Molly Doherty, Member

Gloribelle J. Perez, Member

Dated and signed by the Members
of the Industrial Board of Appeals
at New York, New York, on
October 26, 2016.