STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of:	:	
EDWARD GLOBOKAR AND GLORIA TRIBECAMEX, INC. AND J.A.I., LTD. AND 300 E. 5TH ST. REST., INC. (T/A MARY ANN'S),	:	
Petitioners,	:	DOCKET NO. PR 09-310
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 Articles 4, 6, and 19 of the Labor Law, issued August 14, 2009,	:	RESOLUTION OF DECISION
- against -	:	
THE COMMISSIONER OF LABOR,	:	
Respondent.	:	

APPEARANCES

Edward Globokar, *pro se* petitioner, and for petitioners Gloria Tribecamex, Inc., J.A.I., Ltd., and 300 E. 5th St. Rest., Inc.

Pico Ben-Amotz, Esq., Acting Counsel, NYS Department of Labor (Benjamin A. Shaw of counsel), for respondent.

WITNESSES

Fabricano Jimenez, Cloty Ortiz, James Balbi, Sandy Balbi, Juan Miguel Cortorreal, Harry Powell, Edward Globokar, Maria Dolores Pedraza Zacamo, Gustavo Flores Morales, Jose Luis Vasquez, Jesus Montufar, Julio Plata, and Gerado Vivar.

WHEREAS:

On October 10, 2009, petitioners Edward Globokar (Globokar), Gloria Tribecamex, Inc., J.A.I., Ltd., and 300 E. 5th St. Rest., Inc. (Mary Ann's or petitioners) filed a petition to review three orders that the Commissioner of Labor (Commissioner) issued against them on August 14, 2009. An amended petition was filed on November 17, 2009, and was supplemented on March 25, 2010. The respondent filed its answer on April 15, 2010.

The first order is an Order to Comply with Article 19 of the New York Labor Law (Wage Order) and directs petitioners to pay $260,535.01 in unpaid wages owed to twenty-nine employees (twenty-six named employees and three unidentified employees), $76,748.33 in interest, $65,133.75 in liquidated damages, and $260,535.01 in civil penalties for a total due of $662,952.10. The twenty-six named employees are:

1. Andradelima, Ivaldo
2. Bueno, Francisco
3. Canuto Luis, Joaquin
4. Carmona, Jonathan
5. Cepeda, Ciprian
6. Concepcion, Angel
7. Cotorreal, Juan
8. Diaz, Gustavo
9. Diaz, Manuel
10. Dominguez, Enrique
11. Garcia, Rodrigo
12. Leon Luis, Jaime
13. Leon Luis, Julia
14. Leon Luis, Prisciliano
15. Lopez, Luis
16. Martinez, Javier
17. Montufar, Jesus
18. Morales, Gustavo
19. Pedraza Zacamo, Maria
20. Plata, Julio
21. Quirino, Carlos
22. Rosette, Zoila
23. Silva, Alberto
24. Solis Olivar, Mariano
25. Vazquez Andon, Jose L.
26. Velez, Adriana

The second order is an Order to Comply with Article 6 of the New York Labor Law and directs petitioner to pay $70.00 in unpaid wages to one employee, plus $60.08 in interest, and $70.00 in a civil penalty for a total due of $200.08.

The third order was issued under Articles 4, 6, and 19 (Penalty Order) and directs petitioners to pay $12,000.00 in civil penalties based on: (1) the failure to keep and/or furnish the requisite payroll records for the period of September 28, 2008 through November 1, 2008 ($5,000); (2) the failure to provide wage statements to employees with every payment of wages for the same period ($5,000); (3) the failure to obtain an employment certificate for a minor, in violation of Labor Law § 132 ($1,000); and (4) violation of Labor Law § 144.1 by failing to conspicuously post a schedule for all minors employed ($1,000).

The petition, plus its attachments incorporated by reference, alleges that petitioners did not know, never employed, and/or had no records for fourteen of the twenty-six employees. Those fourteen names are:

1. Canuto Luis, Joaquin
2. Diaz, Manuel
3. Garcia, Rodrigo
4. Leon Luis, Jaime
5. Leon Luis, Julia
6. Leon Luis, Prisciliano
7. Lopez, Luis
8. Martinez, Javier
9. Montufar, Jesus
10. Morales, Gustavo
11. Pedraza Zacamo, Maria
12. Plata, Julio
13. Solis Olivar, Mariano
14. Vazquez Andon, Jose L.

In addition, petitioners allege that the hours and the length of employment were overstated for the other employees and all were paid more than minimum wage.

In his answer, the Commissioner alleges that petitioners failed to keep accurate time and payroll records, and therefore the orders and the audit of wages due petitioners' employees were based on its investigation, interviews, minimum wage claims and other information provided by the petitioners' employees. In addition, the employees were paid flat rates no matter how many hours they worked, which did not account for payment of overtime wages.

Upon notice to the parties, a hearing was held on April 5, 2012 and continued to May 21, 2012, in New York City before Anne P. Stevason, Chairperson of the Board and the designated Hearing Officer in this proceeding. Each party was afforded a full opportunity to present documentary evidence, to examine and cross-examine witnesses, to make statements relevant to the issues and to file post-hearing briefs.

I. SUMMARY OF EVIDENCE

A. Petitioner's Case

Testimony of Edward Globokar

Petitioners operate Mary Ann's which is a Mexican restaurant with several locations in New York City. The following locations are of interest in this case: (1) 1503 Second Avenue (78th Street), open from 2005 to 2007; (2) 1803 Second Avenue (93rd Street), open from the middle of 2005 to 2008; (3) 107 W. Broadway (Tribeca), open 1996 to 2010; (4) 2452 Broadway (91st Street), 1995 to 2006 or 7; (5) 116 8th Avenue (Chelsea), open since 1983; and (6) 300 East 5th Street, owned for 10 years and sold in 2009 or 2010.

For most of the time in question petitioners utilized a payroll company which they felt guaranteed that their employees were being paid properly and at least minimum wage. Petitioners' bookkeeper would call in the payroll on a weekly basis. Mr. Globokar stated that he

did not have the records with him because he had turned them over to his attorney, who had withdrawn from the case.[1]

The employees were paid for eight hours a day and no one's pay was docked for working less than eight hours. Two of the locations had time clocks for a short period of time but the employees did not like using them and petitioners did not enforce their use. Each person's salary was based on their schedule. However, sometimes employees would work each other's schedule without consulting Mr. Globokar and they would pay each other for the shift. Mr. Globokar no longer has any of the time records or schedules.

On the second day of hearing, Mr. Globokar submitted into evidence various documents: quarterly tax reports (including wage summaries), W-2s, and five weekly payroll summaries for the following years and locations: 78th Street- 2003 documents; 93rd Street – 2004 documents; Tribeca – 2004, 2005, 2006 documents plus three weekly payroll summaries for December 2007; 91st Street – 2001-2, 2003 documents plus two weekly payroll summaries for July 2007; Chelsea – 2005 and 2006 documents; and 5th Street – 2006 documents. Not all employees who worked for Mary Ann's were listed in these documents even though working for them at the time.

Testimony of Fabriciano Jimenez

Mr. Jimenez testified that he started working as a chef for petitioners in 1986 at the Chelsea restaurant, then in the 90's he moved to the 78th Street restaurant and then to the 93rd Street restaurant where he remained until 2007. He spent most of his working day which was from 8:00 a.m. to 4:00 p.m. in the kitchen. The public hours of the 93rd Street restaurant were 5:00 p.m. to 10:15 p.m. Monday through Thursday; Fridays they were open until 11:00 p.m.; Saturdays, 12:00 p.m. through 11:00 p.m.; and Sundays, 12:00 through 10:00 p.m. Mr. Jimenez worked six days per week and did not work Sundays.

As chef, Mr. Jimenez arrived at the restaurant at 8:00 a.m. There was only one other employee who arrived at that time and he was there to clean the restaurant. Mr. Jimenez would unlock the door as other employees came to work and therefore, was aware of their starting times. He remembered that Julio Plata came to work in the afternoon. When Mr. Jimenez left at 4:00 p.m. there would be two kitchen workers, a dishwasher and two waiters present at the restaurant. On Fridays and Saturdays there would be three waiters and a bartender. Everyone worked six days per week. Mr. Jimenez did not have a time card and did not remember if there was a time clock on the premises.

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[1] The hearing officer advised Mr. Globokar that since the hearing would have to be scheduled for another day, he would have the opportunity to obtain and/or subpoena the documents from his former attorney. At the close of hearing on April 5, 2012, the hearing officer again advised Mr. Globokar to obtain and/or subpoena records from his former attorney for the next day of hearing in May. At the close of the hearing on May 21, 2012, the hearing officer advised Mr. Globokar that he would have two weeks to submit additional evidence to the Board with a copy to respondent's attorney along with an affidavit identifying the documents submitted. Respondent's attorney would then have two weeks to request an additional day of hearing. On May 30, 2012, an individual dropped off a bag of original documents to the Board's New York City office and a letter. There was no affidavit authenticating the records or any indication that a copy of the documents had been provided to respondent's attorney. A telephone conference was held on June 15, 2012 at which time it was confirmed that respondent's attorney had not received a copy of the documents. The hearing officer then informed the parties that since the documents were not produced and served as directed and because the documents were paychecks, bank statements and quarterly reports for various time periods, they did not appear relevant to the proceedings. However, the hearing officer agreed to review the affidavit of the accountant.

Testimony of James Balbi

James Balbi testified that he worked at the 78th Street restaurant for six to seven years. At first he was the bartender and then during 2006 to 2007 he became the night manager for four days per week. He testified that there was no time clock but that a schedule was posted and time worked was computed according to the schedule. He testified that the restaurant opened at noon and on Mondays the kitchen would close by 10:00 p.m.; Tuesday and Wednesdays by 10:30 p.m.; and on Thursdays through Saturday it was open until 12:00 a.m. in the summer, and 11:00 p.m. in the winter. The kitchen would start "breaking down" 30 minutes before closing and close 30 minutes after closing. There were two shifts at the restaurant and a 30 minute overlap. Meals were provided and usually everyone ate by 5:00 p.m.

Julio Plata did not work there, he worked at another Mary Ann's restaurant though he may have taken someone else's shift on occasion. Gustavo Diaz and Luis, who were present at the hearing, were cooks at the 78th Street location, and Dolores worked there one to two days per week at the guacamole and tortilla station. He does not recall the exact schedule for that restaurant or who worked when or what happened on any specific day.

Testimony of Sandy Balbi

Sandy Balbi testified that he worked at Mary Ann's on 5th Street from 2000 to 2008 as a bartender and a night manager. The restaurant opened at 5:00 p.m. and closed at 10:00 pm. on Monday; 10:30 p.m. Tuesday, Wednesday and Thursday; and 11:30 p.m. on Fridays and Saturdays. The cooks came in at 4:00 p.m. and left about 15 minutes after closing. Sandy Balbi also covered for other people in other locations. He worked one day a week at 78th Street as a bartender and saw Luis and Gustavo there as cooks. He worked Wednesdays on 93rd Street for six months and knew that Julio Plata worked there.

Testimony of Juan Miguel Cottoreal

Mr. Cottoreal has worked at the Chelsea location from 2006 until the present. First, he was a waiter and then in approximately 2009 he became a manager. Before 2006, he worked at 78th Street where he arrived at 3:30 p.m. and left at 10:30 or 11:00 p.m. at the latest. Saturday brunch would start at 12:00 p.m. so he would arrive that day at 11:00 a.m. Sometimes he would work a double shift and sometimes he covered at 91st Street and 93rd Street.

Testimony of Harry Powell

Mr. Powell worked as a night manager at 91st Street from 2003 to 2008 and sometimes called in payroll. Once a week he would call the payroll company and tell them the hours worked by the employees. The waiters made an hourly wage plus tips. Mr. Powell worked with Julio Plata at the 93rd street location. Mr. Plata worked 5 to 6 days per week.

Testimony of Gerardo Vivar

Mr. Vivar began working at Mary Ann's 91st Street restaurant as a runner at $30 per shift, and in time became a bartender and then a manager, each at $50 per shift plus tips. The restaurant was only open for dinner, therefore the hours were from 3:30 p.m. to 10:00 or 10:30 p.m. during the week, and 11:00 or 11:30 p.m. during the weekends. The employees received a

meal at the beginning of the shift and sometimes at the end of a shift as well. The restaurant was open seven days per week. The 91st Street restaurant eventually closed in 2004 or 2005 and Mr. Vivar then started working at 78th Street. Mr. Vivar testified that he was always paid in cash.

B. Respondent's Case

Testimony of Cloty Ortiz, Sr. Labor Standards Investigator and Documents Presented.

The investigation of Mary Ann's restaurant commenced upon a referral from the Attorney General's office in June 2008. Several employees had gone to the Attorney General to complain about not being paid overtime wages, not receiving a wage statement or a meal break, and having to work long hours. The referral included a synopsis of the Attorney General's investigation and included schedules of time worked and wages paid to certain employees and affidavits from Gustavo Morales, Prisciliano Leon Luis, Joaquin Canuto Luis, Jose Luis Vazquez Andon, Jaime Leon Luis, Maria Dolores Pedraza Zacamo, and Julia Adriana Leon Luis. Included in the report were letters on petitioner's stationary, signed by either Globokar or petitioners' bookkeeper, verifying the employment of Jaime Leon Luis, Julia Leon Luis, Priscilliano Leon Luis, and Jose Luis Vasquez Andon.

Although the Attorney General's report involved six restaurants, at the time of the DOL inspection, only three of the six restaurants were still in business – Tribeca, Chelsea and East 5th Street. On October 30, 2008, the three restaurants were visited at the same time by three teams of three DOL investigators. Interviews were conducted and information was gathered concerning the hours of operation, the days and hours of work of the employees, the rates of pay, schedules and methods of payment.

DOL issued a Notice of Revisit for November 17, 2008 to inspect the payroll records for all three locations. At that time petitioners' accountant produced payroll quarterly reports for the years 2006 to 7, check registers from January 2008, and bank statements from 2007 and 2008. No time records were produced nor were any of the posted schedules kept. In reviewing the records produced it was noticed that three of the people interviewed were not on any of the records. Ms. Ortiz met with the accountant again at another location and was given additional income tax and quarterly records.

Due to the inadequacy of the records, Ms. Ortiz calculated the underpayment due the various employees based on the information obtained from the Attorney General's office and the information obtained from the employees interviewed. The main source of the underpayment was the fact that the employees were paid a flat salary no matter how many hours they worked resulting in some employees being paid less than minimum wage and others not being paid a premium for overtime. The employee statements supported the Attorney General's report. A meal allowance was given to petitioners in calculating wages due. In addition, in cases where employees indicated that they were tipped, minimum wage was calculated based on the fact that they were tipped employees.

Petitioners were given a notice of violations and a recap of wages due. In response, DOL received a letter from Globokar denying that any wages are due and stating that: "[m]ost of the claims against us are of people who we have no records of and who were never employed by any of our restaurants."

The calculation of the underpayments due Ivaldo Andre Delima, Carlos Quirino and Rodrigo Garcia was based on the records produced by petitioners which had the number of hours worked over 13 weeks, which indicated that they were not paid a premium for overtime hours. Two claims were filed by Zoila Rossette, one of which was paid by petitioners.

Ms. Ortiz testified that she recommended that a 100% civil penalty be added to the wage order given the fact that the underpayments had been ongoing for at least six years, there were other violations, such as a minor working without proper papers, and there were insufficient records produced.

Testimony of Maria Delores Zacamo

Ms. Zacamo testified that she started working for petitioners in January 2002 when she would prepare tamales and empanadas at the Tribeca location for $40 per day. During the six to seven years that she worked for petitioners, she worked an average of 56 hours during 6 days per week. She worked at different locations during the week making tortillas, guacamole, tamales and empanadas.

Ms. Zacamo testified that she worked with Julio Plata on 93rd Street on Wednesdays through Saturdays for a period of time when they would start working at 3:00 or 3:30 in the afternoon and leave at closing.

Testimony of Gustavo Flores Morales

Mr. Morales testified that he worked at various Mary Ann's restaurants for six years; first as a dishwasher and then as both a dishwasher and a cook. When he worked as a cook he received $65 per day. He received no pay for the time spent training to be a cook. He worked at 78th Street for two years and then he worked at the Tribeca location for four years. He worked six days per week, double shifts on weekends in Tribeca, from 8:00 a.m. to 12:00 P.M. and during the week he worked from 3:30 p.m. to closing, which was 10:30 or 11:00 p.m. Mr. Morales was paid a weekly salary which was always the same no matter how many hours he worked. The schedules in evidence were schedules taken from the wall of the 78th Street restaurant.

Testimony of Jose Luis Vasquez Andon

Mr. Vasquez testified that he first started working for petitioners in 2001 as a dishwasher and then eventually became a cook. He stopped working there around 2007 or 8. He was paid weekly and not by the hour. He was interviewed by the Attorney General's office and signed an affidavit concerning his hours and working conditions which was entered into evidence at the hearing.

Testimony of Jose Montufar

Mr. Montufar testified that he worked at the Tribeca restaurant and then split his workweek between the Tribeca restaurant and East 5th Street. He worked many double shifts especially toward the end of his employment there. A double shift was from 8:00 a.m. to 4:00 p.m. and then 4:00 p.m. to 11:00 p.m. He was employed as a busboy and food runner.

Testimony of Julio Plata

Mr. Plata testified that he started working at the Chelsea restaurant in 2001 as a dishwasher. After one year, he moved to the 93rd Street restaurant where he worked as a cook for three years and then he spent three years at the 91st Street restaurant and then a few months in Tribeca. The 91st Street restaurant provided lunch and Mr. Plata testified that he worked four double shifts per week while working there. He was paid $50 for a morning shift and $80 for an evening shift and $130 if he worked a double shift.

He was interviewed by the Attorney General's office and signed an affidavit concerning his hours and working conditions which was entered into evidence at the hearing. Mr. Plata also filed a claim with DOL.

GOVERNING LAW

Standard of Review and Burden of Proof

The Labor Law provides that 'any person . . . may Petition the board for a review of the validity or reasonableness of any . . . order made by the [C]ommissioner under the provisions of this chapter" (Labor Law 101 § [1]). It also provides that a Commissioner's order shall be presumed "valid" (Labor Law § 103 [1]).

A petition filed with the Board that challenges the validity or reasonableness of an order issued by the Commissioner must state "in what respects [the order on review] is claimed to be invalid or unreasonable" (Labor Law § 101[2]). It is a petitioner's burden at the hearing to prove the allegations that are the basis for the claim that the order under review is invalid or unreasonable (Board Rules of Procedure and Practice § 65.30 at 12 NYCRR § 65.30 ["The burden of proof of every allegation in a proceeding shall be upon the person asserting it"); State Administrative Procedure Act § 306; *Angelo v Natl. Fin. Corp.*, 1 AD 3d 850, 854 [3d Dept 2003]).

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).

I. The Wage Order

A. An Employer's Obligation to Maintain Records

An employer's obligation to keep adequate employment records is found in Labor Law § 195 as well as in the New York Code of Rules and Regulations (NYCRR). Specifically, Title 12 of the NYCRR, § 137-2.1[2] provides, in pertinent part:

[2] As of January 1, 2011, all restaurant and hotel industries are covered by the Hospitality Wage Order (12 NYCRR 146).

"(a) Every employer shall establish, maintain and preserve for not less than six years, weekly payroll records which shall show for each employee:
(1) name and address;
(2) social security number;
(3) occupational classification and wage rate;
(4) the number of hours worked daily and weekly, ...;
(5) the amount of gross wages;
(6) deductions from gross wages;
(7) allowances, if any, claimed as part of the minimum wage;
(8) money paid in cash; and
(9) student classification.
" . . .
"(e) Employers...shall make such records...available upon request of the commissioner at the place of employment."

§ 137-2.2 further provides:

"Every employer. . . shall 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."

Therefore, it is an employer's responsibility to keep accurate records of the hours worked by its employees and the amount of wages paid and to provide its employees with a wage statement every time the employee is paid. This required recordkeeping provides proof to the employer, the employee, and the Commissioner that the employee has been properly paid.

Where an employee files a complaint for unpaid wages with DOL and the employer has failed in its statutory obligation to keep records, the employer bears the burden of proving that the employee was paid. Labor Law § 196-a provides, in relevant part:

"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."

In the absence of payroll records, DOL may issue an order to comply based on employee complaints and interviews. In the case of *Angello v. National Finance Corp.*, (1 AD3d 850, 768 NYS2d 66 [3d Dept. 2003]), DOL issued an order to an employer to pay wages to a number of employees. The order was based on the employees' sworn claims filed with DOL. The employer had failed to keep required employment records. The employer filed a petition with the Board claiming that the claims and therefore, the order, were overstated. In its decision on the petition, the Board reduced some of the claims. The court, on appeal, held that the Board erred in reducing the wages since the employer failed to submit proof contradicting the claims. Given the burden of proof in Labor Law § 196-a and the burden of proof which falls on the Petitioner in a Board proceeding, 12 NYCRR 65.30, "the burden of disproving the amounts

sought in the employee claims fell to [the employer], not the employees, and its failure in providing that information, regardless of the reason therefore, should not shift the burden to the employees" (*Id.* at 854).

In *Anderson v Mt. Clements Pottery Co.* (328 US 680, 687-88 [1949]), superseded on other grounds by statute, the U.S. Supreme Court long ago discussed the fairness of relying on employee statements where the employer failed to keep adequate records:

> "[W]here the employer's records are inaccurate or inadequate....[t]he solution...is not to penalize the employee by denying him any recovery on the ground that he is unable to prove the precise extent of uncompensated work. Such a result would place a premium on an employer's failure to keep proper records in conformity with his statutory duty; it would allow the employer to keep the benefits of an employee's labors without paying due compensation as contemplated by the Fair Labor Standards Act."

Anderson further opined that the court may award damages to an employee, "even though the result be only approximate. . . [and] [t]he employer cannot be heard to complain that the damages lack the exactness and precision of measurement that would be possible had he kept records in accordance with the [recordkeeping] requirements of . . .the Act" (*Id.* at 688-89). Wages may be found due even if it is based on an estimate of hours (*Reich v Southern New England Telecommunications Corp.*, (121 F.3d 58, 67 [2d Cir 1997] [finding no error in damages that "might have been somewhat generous" but were reasonable in light of the evidence and "the difficulty of precisely determining damages when the employer has failed to keep adequate records"]).

As the Appellate Division stated in *Matter of Mid-Hudson Pam Corp. v Hartnett*, (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."

B. Petitioners have failed to keep adequate records.

In the instant case, petitioners have failed to maintain any time records for its employees at its various restaurants. Although Globokar testified that there was a time clock for a limited period of time, no time records were ever produced. In addition, while quarterly tax documents were in evidence, not all employees were listed. Petitioners initially argued that certain employees did not work for them because they were not listed on these reports. However, petitioners' own witnesses, including Globokar, testified at hearing that individuals that they initially denied employing such as Julio Plata, in fact worked many years for petitioners. In addition, the evidence concerning the hours worked by the employees was varied, making it impossible to calculate the precise number of hours worked by each employee.

The Board finds that petitioners failed to maintain adequate records.[3] Therefore, the petitioners' burden is to show 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 the 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, June 11, 2011, *appeal pending*.)

C. Calculation of Wages under the Minimum Wage Order

Article 19 of the Labor Law, known as the Minimum Wage Act, requires every employer to pay each of its employees in accordance with the minimum wage orders promulgated by the Commissioner (Labor Law § 652). The Minimum Wage Order for Restaurant Industries, 12 NYCRR 137-1.3 (2009), requires an employer to pay employees "at a wage rate of 1 ½ times the employee's regular rate" for all hours worked over 40 in a work week. The term "regular rate" is defined at 12 NYCRR 137-3.5:

> "The term *regular rate* shall mean the amount that the employee is regularly paid for each hour of work. When an employee is paid on a piece rate basis, salary or any other basis than hourly rate, the regular hourly rate shall be determined by dividing the total hours worked during the week into the employee's total earnings."

The Acts do not forbid work hours of over 40 in a week but they provide that a worker must be compensated at a premium, "stepped-up" rate of one and one-half times the employee's regular rate for these overtime hours. The imposition of this premium is the way in which overtime hours are discouraged.

> "The Supreme Court instructs more generally that courts must construe the FLSA overtime provisions broadly; a finding that a salary included overtime, in the absence of an agreement so stating would be the sort of 'narrow, grudging' FLSA application that the Court rejected soon after enactment. *Tenn. Coal, Iron & R.R. Co. v. Muscoda Local No. 123 et al.*, 321 U.S. 590, 597, 64 S. Ct. 698, 88 L.Ed. 949 (1944)" (*Giles v. City of New York*, 41 FSupp2d 308, 317 [SDNY 1999]).

Petitioners argue that they paid their employees correctly since the employees were paid more than the hourly minimum wage and more than time and one-half the hourly minimum wage rate for overtime hours. However, as stated above, this is not the proper method of calculating premium pay for overtime. As the Board discussed in *Matter of Cayuga Lumber*, PR 05-099 (Decision on Reconsideration, September 26, 2007), the regular rate of pay, which is the basis for determining the premium pay for overtime, is calculated by dividing the employee's weekly salary by the number of hours worked per week.

Therefore, the weekly salary or shift pay given to the employees in this case, no matter how many hours were worked, must be divided by the actual hours worked to determine whether

[3] Pursuant to the Minimum Wage Order for the Restaurant Industry, an employer must "establish, maintain and preserve" the required records for six years (12 NYCRR 137-2.1 [1995]).

the minimum wage was paid and also, to determine the regular rate of pay for purposes of determining the premium due for the overtime hours.

D. Calculation of Unpaid Wages Due

DOL has calculated the unpaid wages due based on the claims and employee interviews that it received. This is a reasonable basis for the calculation since Petitioners have failed to keep or maintain time or payroll records. However, the hearing before the Board is *de novo* (Board Rule 66.1 [c]), and therefore, we must consider the testimony and evidence received at the hearing in making our determination whether to affirm, revoke or modify the Orders.

We find, in general, that DOL's Wage Order was a reasonable approximation of the hours worked by the employees and it was reasonable for the Commissioner to rely on that approximation to calculate back wages, even if possibly over-inclusive. To fault the order for its possible imprecision, even when caused by petitioners' failure to keep records, would reward the employer for its unlawful conduct. The following are the findings of the Board as to each employee. We make changes only where the totality of the evidence reflects a more accurate estimate of the hours.

1. Uncontested Wages due.

Initially, petitioners denied employing anyone on the schedule of wages due if the person was not listed on their records. However, based on the DOL investigation which showed that at the time of the inspection there were people working who also were not on petitioners' records, and based on the testimony at the hearing, petitioners could not rely on its records to determine if someone was employed. Petitioners' initial response was misleading and calls into question the credibility of all of petitioners' evidence. In addition, petitioners failed to provide any specific credible information contesting the wages due the following employees and therefore, the order is affirmed in full as to their wages:

	Employee Name	**Amount due**
1.	Andradelimo, Ivaldo	$ 54.08
2.	Bueno, Francisco	$ 8,471.72
3.	Carmona, Jonathan	$ 2,176.20
4.	Cepeda, Ciprian	$ 276.75
5.	Concepcion, Angel	$ 483.64
6.	Diaz, Manuel	$ 3,542.36
7.	Dominguez, Enrique	$ 9,837.52
8.	Garcia, Rodrigo	$ 37.18
9.	Leon Luis, Jaime	$ 11,839.83
10.	Leon Luis, Julia	$ 10,395.10
11.	Leon Luis, Prisciliano[4]	$ 23,808.48
12.	Lopez, Luis	$ 233.20
13.	Morales, Gustavo[5]	$ 2,105.12

[4] Petitioners allege that Jaime, Julia and Prisciliano Leon Luis were not employed by them since there were no records regarding them. However, included in the DOL file are letters verifying their employment signed by Globokar or petitioner's bookkeeper. In addition, the name "Prisciliano" appears on the work schedule.

14.	Quirino, Carlos	$ 40.56
15.	Silva, Alberto	$ 1,305.00
16.	Solis Olivar, Mariano	$ 4,032.86
17.	Vazquez Andon, Jose L.	$ 8,921.05
18.	Velez, Adriana	$ 11,846.11

2. Employees whose wages are modified based on a miscalculation in the audit.

a. Joaquin Canuto Luis

The calculation of wages due to Mr. Luis included $28.60 per week for spread of hours. However, the "interval between the beginning and end of [his] workday" was not 10 hours or longer on any day (12 NYCRR § 137-1.7; 137- 3.11). Therefore, he is not due the spread of hours payment. Since he was awarded $28.60 for 127 weeks, his total wages due must be reduced by $3,632.20. Therefore, the order concerning wages due to Mr. Luis is modified to be $11,653.49.

b. Javier Martinez

The wages due to Mr. Martinez are based on a phone interview taken in January 2009. The interview notes entered into evidence are somewhat confusing and result in a determination that Mr. Martinez worked 92 hours per week for one and one-half years from 2005 to 2006 while working as a dishwasher. It is proper for DOL to rely on an estimate of hours worked where there are no time records. However, in this case it appears that statements such as Mr. Martinez "sometimes" worked until 1:00 a.m. were used to determine his hours so that the calculation of unpaid overtime was based on Mr. Martinez working until 1:00 a.m., four days a week, and working seven days per week. We find this to be an unreasonable estimate. Therefore, in keeping with the totality of evidence, we find that Mr. Martinez worked six days per week during the period that he worked as a dishwasher, eliminating the Sunday hours, and that from Thursday night through Saturday he left work at 11:00 p.m. The order is remanded to DOL to recalculate the wages owed to Mr. Martinez to reflect that from October 3, 2004 to April 2, 2006, he worked 69 hours per week and was paid $450 per week plus one meal per day.

c. Jesus Montufar

Mr. Montufar testified that he worked five days per week which was consistent with his interview sheet. However, the calculation of wages due only provides for three days per week. His interview sheet indicates that he worked 46 hours per week but was given a half hour meal period per shift. Therefore, the order is remanded to recalculate the wages owed to Mr. Montufar based on the fact that he worked 43.5 hours per week and was paid $140.00 per week.

3. Contested Wages Due

a. Gustavo Diaz

[5] It is suspected that Mr. Morales worked for a longer period of time and longer hours, however, the evidence concerning the extra hours and time was not consistent so we affirm the audit with regard to Mr. Morales, as is.

Petitioners argue that Mr. Diaz is not owed any wages based on the interview he provided to the DOL investigators on October 30, 2008 and on the DOL questionnaire that he returned. Petitioners also allege that Mr. Diaz did not start working at Mary Ann's until 2007 and not 2002 as indicated on the audit. However, DOL Labor Standards Investigator Ortiz testified that Mr. Diaz called DOL after giving the above statements and told DOL that he was instructed by management to give the replies he supplied and that they were not true. He started working for petitioners in 2002 but was not reported on their payroll until 2008. In comparing the information initially supplied by Mr. Diaz with the other evidence, we find that the audit based on his subsequent statement is the more accurate estimate of the hours that he worked. This is supported by the one schedule in evidence which indicated that a "Gustavo" cook worked 6 days per week, with two double shifts and one day in which he began work at 12:00 p.m. instead of 3:30 p.m.

We affirm the $17,953.99 found to be owed to Mr. Gustavo Diaz.

b. Maria Pedraza Zacamo

Petitioners argue that Ms. Zacamo only worked two days per week and that her hours are greatly inflated. It must be noted that in its petition, petitioners allege that Ms. Zacamo never worked for them and that she died two years ago in Mexico. Surprisingly, Ms. Zacamo testified at hearing. She testified that though, at times, she worked more hours, she averaged 56 hours per week. We find that Ms. Zacamo's wages should be calculated at 56 hours per week for the whole period of her employment and that the order is remanded to DOL to recalculate her unpaid wages based on 56 hours per week.

c. Julio Plata

Initially, petitioners alleged that Mr. Plata did not work for them. At hearing, there were numerous witnesses, including some of petitioners' witnesses who testified that Julio Plata did indeed work at the different locations of Mary Ann's restaurant. Mr. Plata, himself was a witness at the hearing. In addition, he filed a claim with DOL and signed an affidavit for the Attorney General. We find, in general, that the audit of unpaid wages due to Mr. Plata is supported by the evidence and affirm the finding that he is due $26,318.61.

4. Wages Due the Unidentified Employees

There are three unidentified employees listed in the audit: two dishwashers, and one delivery boy. In the case of *The Matter of the Petition of Anthony Boumoussa and Bay Parkway Super Clean Car Wash, Inc.*, Docket No. PR 09-058 (Decided February 7, 2011), the Board affirmed, but modified, an order which included wages owed to unidentified workers. DOL included a number of unidentified employees on the audit to account for the total number of employees observed at the time of inspection and the complete time period. The Board based its finding on the case of *Reich v Petroleum Sales, Inc.*, 30 F3d 654 (6th Cir 1994), where the court held that it could award damages to unidentified employees under the Fair Labor Standards Act (FLSA) as long as the existence, work hours and wages of these employees is established by a preponderance of the evidence.

> "Such awards benefit the public interest by depriving the employer of any benefits accrued as a result of its illegal pay practices and by protecting those employers who comply with the FLSA from unfair competition with those employers who do not" (*Id.* at 657).

In the instant case, however, there is conflicting evidence as to the number of employees at each restaurant during different periods of time. Therefore, the Board finds that the amount found due to the unidentified employees is not supported by a preponderance of the evidence and we modify the Order to eliminate the wages due to the three unidentified employees.

E. The Civil Penalty is upheld

The order imposes a 100% civil penalty against the petitioners. Senior Labor Standards Investigator Ortiz testified that she recommended this penalty based on the fact that the failure to pay minimum wage and overtime were violations that were ongoing for over six years and the fact that petitioners were guilty of other labor violations such as employing a minor without papers and failure to have records.

The Civil Penalty of 100% of the wages due is affirmed but will need to be modified according to the recalculation of the wages.

II. The Penalty Order is Affirmed in full

Petitioners were cited $5,000 for failure to maintain and furnish payroll records; $5,000 for failure to provide wage statements with wages; and $1,000 for failure to obtain an employment certificate from a minor employee; and $1,000 for failure to conspicuously post a schedule for the minor employed.

Petitioners failed to allege or prove any defense to this order and therefore, the Board affirms the penalty order in full.

III. Interest is due

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." Therefore, the interest imposed by the wage order is affirmed.

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NOW THEREFORE, IT IS HEREBY RESOLVED THAT

1. The Wage Order is modified and remanded to the Department of Labor for recalculation of wages due in accordance with this decision; and

2. The Penalty Order is affirmed; and

3. The Petition for review be, and the same hereby is, otherwise denied.

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
July 25, 2013.