STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of: FIREQUENCH, INC., Petitioner. To Review Under Section 101 of the Labor Law: Two Orders to Comply With Article 6, and an Order Under Articles 6 and 19 of the Labor Law, all dated August 23, 2010, - against - THE COMMISSIONER OF LABOR, Respondent.	DOCKET NO. PR 10-339 RESOLUTION OF DECISION

APPEARANCES

Paskoff & Tamber, LLP (Adam Paskoff of counsel), for petitioner.

Pico Ben-Amotz, General Counsel, NYS Department of Labor (Melanie Scotto of counsel), for respondent.

WITNESSES

Mary Lloyd, for petitioner.

Dawn Hughes, Labor Standards Investigator, for respondent.

WHEREAS:

On November 1, 2010, petitioner Firequench, Inc. (petitioner or Firequench) filed a petition with the Industrial Board of Appeals (Board) seeking review of three orders issued by the Commissioner of Labor (Commissioner) against petitioner and Desmond J. Burke on August 23, 2010. Desmond J. Burke did not file a petition for review.

The first order (wage order) demands compliance with Article 6 and payment of $7,540.00 in unpaid wages due and owing to claimant employees John Dagata, Mark Dunston and Steven Davis, interest continuing thereon at the rate of 16% in the amount of $752.29, and a civil penalty in the amount of $15,080.00, for a total amount due of $23,372.29.

The second order (supplemental wage order) demands compliance with Article 6 and payment of $65.50 in expenses due and owing to claimant Davis, interest continuing thereon

at the rate of 16% in the amount of $2.90, and a civil penalty in the amount of $131.00, for a total amount due of $199.40.

The third order (penalty order) assesses petitioner a civil penalty of $3,000.00 for failure to keep and/or furnish true and accurate payroll records during the period October 15, 2009 to May 14, 2010, and $500.00 for failure to notify employees in writing or post notice of its fringe benefits policy during the same period, for a total penalty of $3,500.00.

The petition alleges that: (1) two of the three employees named in the wage order were independent contractors, not employees; (2) the individuals named in the orders are not due wages or expenses; (3) the Department of Labor (DOL) conducted an improper investigation, and; (4) the civil penalties assessed in the wage and penalty orders are excessive and unreasonable.

By motion filed with the Board on February 2, 2011, the Commissioner moved to dismiss the petition on the basis that it was filed after the 60 day statute of limitations set forth at Labor Law § 101 and Board Rule 66. By decision of the Board's Associate Counsel dated February 2, 2012, the Board denied the motion and directed the Commissioner to file an answer, finding that while the petition was not filed until after the sixty day period had expired, it was nonetheless timely since the Commissioner failed to serve the orders on petitioner's attorney who had filed a Notice of Appearance during the investigation (*see Matter of Coppa,* PR 08-172 [March 25, 2009] [tolling limitations period for failure to comply with Labor Law § 168 requiring notice on attorney who files Notice of Appearance during administrative proceeding]). The motion decision is adopted.

The Commissioner filed an answer to the petition on February 13, 2012, asserting that claimants filed claims with DOL stating that they had been employed by petitioner as fire safety technicians and repairmen and had not been paid wages and expenses due and owing during the period October 15, 2009 to May 14, 2010. Respondent asserts that the claimants were petitioner's employees, not contractors, and because petitioner failed to provide payroll records as required by law it failed to meet its burden to prove that they were paid the wages and expenses owed. The Commissioner further asserts that the civil penalties assessed in the orders are reasonable and valid in all respects.

Upon notice to the parties, hearings were held on March 6 and May 14, 2013, in New York, New York, before Board member and designated hearing officer J. Christopher Meagher, Esq. Each party was afforded a full opportunity to present documentary evidence, to examine and cross-examine witnesses, and to make statements relevant to the issues.

SUMMARY OF EVIDENCE

The Wage Claims

On October 30, 2009, claimant John Dagata (Dagata) filed a claim for unpaid wages with DOL stating that he was employed by petitioner as a service technician at the rate of $30 per hour, plus an incentive of $500, during the period October 9 to October 21, 2009. Claimant stated that he worked 89 hours during the payroll week ending October 21, 2009, was paid $1,650 for that week, and with the incentive was owed a balance of $2,450 in unpaid wages for the period of his claim.

On November 30, 2009, claimant Mark Dunston (Dunston) filed a claim for unpaid wages with DOL stating that he was employed by petitioner as a fire alarm repairer at the rate of $15 per hour during the period October 23 to November 23, 2009. Claimant stated that he worked 57.5 hours and was paid $790 for the payroll week ending October 28, 2009; 69 hours and $1,100 the week ending November 4, 2009; 76.5 hours and $1,000 the week ending November 11, 2009; 83 hours and no wages the week ending November 18, 2009; and 19 hours and no wages the week ending November 25, 2009.

Dunston's claim form stated that he "was not paid" for the last two pay periods and that "Mary" was the person to whom he requested his "last check" on November 23 and 26, 2009. According to the claim form, "she said she didn't know when they would have a check for me." Dunston claimed he was owed a balance of $2,630 in unpaid wages for the period of his claim.

On May 24, 2010, claimant Steven Davis (Davis) filed a claim for unpaid wages with DOL stating that he had been employed by petitioner as a field technician at the rate of $40 per hour during the period May 10 to May 14, 2010. Davis stated that he worked 39 hours during the payroll week ending May 12, 2010, 22.5 hours the week ending May 19, 2010, and was paid no wages for either week. Davis claimed that he was owed a balance of $2,460 in unpaid wages and $65.50 in unpaid expenses for the period of his claim.

Petitioner's Evidence of Contractor Status

Mary Lloyd (Lloyd), petitioner's service manager and sole witness, described her responsibilities as setting up petitioner's projects and overseeing its technicians. Firequench is a service company that installs and maintains fire alarm systems in high-rise buildings.

Lloyd testified that petitioner issued IRS 1099 tax forms to Dagata and Dunston, rather than IRS W-2 forms that were issued to its employees. Workers issued 1099's are paid on a project-by-project basis and are considered "independent contractors." Those placed on the company's payroll like Davis are dispatched to any job that Firequench happens to be working on and are considered "employees." Both contractors and employees are paid on an hourly basis.

Lloyd acknowledged that all employees, including those considered contractors, had to fill out employment applications. In addition to providing education, training, previous employment, and references, the application requires that the applicant certify that he understands that the "employment relationship" with Firequench is "at will" and that the "Employer may discharge [the] Employee at any time with or without cause."

In evidence are Dagata's and Dunston's signed job applications. Attached to Dagata's is a "Letter of Agreement" between petitioner and the claimant that all prospective 1099 employees are required to sign. The Agreement details various conditions of employment, including a requirement to wear a company uniform, to strictly follow "the specific information and guidelines" regarding each job, and to be available to work the days and hours determined by Firequench.

Lloyd further testified that she assigned claimants to particular jobs; that their hours and workdays were set at the time of hire; that to her knowledge neither claimant was working elsewhere at the time of hire; that they were paid only for the specific hours worked; and that they recorded their hours on time sheets. Lloyd added that Dagata was expected to

have his own tools, although the Agreement provides for financing by petitioner if an applicant lacks the tools it requires.

Dagata began his employment with Firequench on October 12, 2009. Lloyd issued various letters of warning to him about his work performance, including an October 20, 2009 letter informing him that he had been late several times. A second letter criticized him for not responding to his beeper and cell phone and informed him that he had to call the office within five minutes of being beeped. A third letter on October 22, 2009 also criticized his work performance. Petitioner terminated Dagata based on the derelictions cited in these letters.

On November 10, 2009, Lloyd forwarded a "final warning" to Dunston informing him that despite previous warnings he was again late for work. A second memo admonished him for failure to call in and out from the job site and to follow office procedures. Dunston was warned that any future occurrences "shall result in termination of employment."

Petitioner's Evidence of Payment

Lloyd identified copies of Dagata's "Timesheet[s]" for the payroll weeks ending October 14 and 21, 2009 and five checks issued him for his services with the company. The backs of the checks showing Dagata's endorsement were not submitted. Lloyd testified that Dagata was not entitled to incentive or bonus pay.

The timesheet for the payroll week of October 15 to October 21, 2009 that is the subject of his claim shows starting and stopping times for seven days worked during that period, for a total of 89 hours. The dates on the face of the checks are unreadable. However, there is a typed notation under each check showing the following amounts and dates: $300 and 10/15; $200 and 10/19; $1,184.82 and 10/19; $153 and 11/02; and $1,650 and 11/02. The face of the check for $153 has a legible notation in the "Memo" space stating "Final payment for expenses."

Lloyd testified that Dunston was a contractor who worked for petitioner for $15.00 an hour. Lloyd identified Dunston's timesheets for the payroll weeks ending November 4, 11, and 18, 2009. There was no sheet submitted for the first payroll week of his claim ending on October 28, 2009. The timesheets submitted show starting and stopping times for 79 hours worked during the week ending November 4, 71 hours the week ending November 11, and 79 hours the week ending November 18. The latter sheet also shows 16.5 hours worked on November 19 and 21 that would fall during the payroll week ending November 25, 2009.

Lloyd identified four checks issued to Dunston for his services, with dates that are difficult to discern. The backs of the checks showing claimant's endorsement were not submitted but there are similar notations under each check. Asked how DOL would know that the checks were cashed by the claimant, Lloyd stated, "I'm only going on what's coming from the bank where it says the check was cashed on such and such a date." The checks are for $700.00 and 11/02, $1,157.15 and11/09, $1,065.00 and 11/16, and $1,432.50 and 12/02.

Lloyd testified that Steven Davis was a Firequench employee and not a contractor, and was paid for all hours worked. She identified timesheets filled out by Davis showing starting and stopping times for 32.5 hours worked during the payroll week ending May 12, 2010 and 22.5 hours during the week ending May 19, 2010. Lloyd provided expense statements submitted by Davis for the weeks ending May 12, 2010 ($45.00) and May 19, 2010 ($20.50), for a total of $65.50.

Lloyd identified a check and wage statement issued to Davis on May 14, 2010 for $1,300 (gross) and $1,054 (net) for 32.5 hours worked at the rate of $40 per hour during the pay period May 6 to May 12, 2010. The back of the check was submitted showing what appears to be Davis' endorsement.

A second check and wage statement were issued to Davis on June 11, 2010 for $336.66 (net). Lloyd explained that he worked 22.5 hours during the pay period covered by the second check for a gross total of $900 (22.5 hours x $40). The payment was reduced by $345 for parking tickets and $185 in towing charges for having his vehicle towed to a pier, for a remaining gross amount of $370. The back of the check was submitted showing what appears to be Davis' endorsement. No check was submitted showing payment of the $65.50 in expenses.

Responding to DOL's finding that petitioner failed to submit required payroll records, Lloyd testified that she received a collection letter from DOL dated December 3, 2009 requesting that petitioner respond to Dagata's claim and "include any payroll record, policy, contract, etc. to substantiate your position." By letter dated December 14, 2009, Lloyd replied that Dagata was hired as a subcontractor, was terminated for improperly performing his duties, and was paid for all hours worked. Lloyd testified that she enclosed a copy of Dagata's 1099 form to substantiate his contractor status and a copy of the check issued to him for $1,650 stating that he was paid in full for all services and expenses. Lloyd explained that she did not receive any collection letters for Dunston's and Davis' claims, and if she had, she would have responded and submitted relevant records.

DOL's Investigation

Labor Standards Investigator Dawn Hughes (Hughes) testified that she was not the investigator in this matter but was familiar with DOL's investigative file.

Hughes testified that DOL issued a collection letter on December 3, 2009 requesting that petitioner respond to Dagata's claim and that it "substantiate" its position "with any payroll record[s]." Subsequent notices were issued on July 15 and 16, 2010 adding Dunston's and Davis' claims. All three of the notices were sent to petitioner at its correct street address but to an incorrect zip code (10010 instead of 10016). Hughes testified that petitioner responded to the first letter. The second and third were not returned by the USPS. Petitioner did not submit payroll records in response to any of the notices.

Hughes explained that petitioner forwarded some payroll records to DOL after the claims were referred for orders to comply but the records were insufficient. The timesheets did not delineate claimants' hours on a weekly basis and proof of payment was not coordinated with the timesheets. It is also insufficient for an employer to provide the days and hours of work without stating the beginning and end of each pay period to establish that the claimed wages were paid. Hughes added that the cancelled checks submitted after the orders were issued were insufficient proof of payment, as the employee's signature of endorsement on the back is the proof needed to show that the employee cashed the checks and was paid. The only paystub for any of the claimants that petitioner submitted was a June 11, 2010 paystub for Davis showing deductions for parking tickets and a towing charge, which Hughes opined were illegal deductions from Davis' wages.

In support of the 200% civil penalties assessed in the wage and wage supplements orders, DOL submitted a report by Senior Labor Standards Investigator Steven Konsistorum

titled "Background Investigation – Imposition of Civil Penalty," dated July 16, 2010. In a section of the report referencing history of past violations, the report stated that the "Employer has a history of not paying employees their wages. The last 2 claims are going to judgment. My recommendation is the maximum allowed by law." The report referenced the dates and nature of each of the prior violations.

In support of the penalties assessed in the penalty order, Konsistorum completed a second report titled "Labor Law Articles 6, 19, and 19-A Violation Recap" that recommended a penalty of $3,000 for violation of Labor Law § 661 for the period October 15, 2009 to May 14, 2010 because the "Employer did not provide us with all of the payroll and time records we requested." A penalty of $500 was recommended for violation of Labor Law § 195.5 because the "Employer failed to provide a copy of the company's written benefits policy" regarding Davis' claim for expenses.

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]). If the Board finds that the order, or any part thereof, is invalid or unreasonable it shall revoke, amend, or modify the same (Labor Law § 101[3]).

A petition filed with the Board that challenges the validity or reasonableness of an order issued by the Commissioner shall "state in what respects [the order on review] is claimed to be invalid or unreasonable" (Labor Law § 101[2]). The Board's Rules provide that "[t]he burden of proof of every allegation in a proceeding shall be upon the person asserting it" (12 NYCRR § 65.30). The burden is by a preponderance of evidence (State Administrative Procedure Act § 306[1]).

An Employer's Obligation to Maintain Records

An employer's obligation to keep adequate employment records is found in Labor Law §§ 195 and 661 as well as in the New York Code of Rules and Regulations (NYCRR). Specifically, Title 12 of the NYCRR § 142-2.6 provides, in relevant part:

> "(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) wage rate;
> (4) the number of hours worked daily and weekly . . . .
> (5) . . .
> (6) the amount of gross wages;
> (7) deductions from gross wages
> (8) allowances, if any, claimed as part of the minimum wage;
> ***

> "(d) Employers . . . shall make such records . . . available upon request of the commissioner at the place of employment."

Section 142-2.7 further provides:

> "Every employer . . . shall furnish to each employee a statement with every payment of wages listing hours, rates paid, gross wages, allowances, if any, claimed as part of the minimum wage, deductions and net wages."

It is therefore an employer's responsibility to keep accurate records of the hours worked by its employees and the amount of wages paid and to provide them 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.

Civil Penalties

Labor Law § 218 (2010), extant during the claims herein, provides that once the Commissioner determined that an employer has violated Article 6 or 19 of the Labor Law, he shall issue to the employer an order directing compliance therewith, which shall describe with particularity the nature of the violation. The statute also provided:

> "In addition to directing payment of wages, benefits or wage supplements found to be due, such order, if issued to an employer who previously has been found in violation of those provisions [of the Labor Law], rules or regulations, or to an employer whose violation is willful or egregious, shall direct payment to the commissioner of an additional sum as a civil penalty in an amount equal to double the total amount found to be due. In no case shall the order direct payment of an amount less than the total wages, benefits or wage supplements found by the commissioner to be due, plus the appropriate civil penalty. Where the violation is for a reason other than the employer's failure to pay wages, benefits or wage supplements found to be due, the order shall direct payment to the commissioner of a civil penalty in an amount not to exceed one thousand dollars for a first violation, two thousand dollars for a second violation or three thousand dollars for a third or subsequent violation. In assessing the amount of the penalty, the commissioner shall give due consideration to the size of the employer's business, the good faith of the employer, 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 recordkeeping or other non-wage requirements."

Definition of "Employee" Under the Labor Law

Under Article 6 of the Labor Law, "employer" is defined as "any person, corporation, limited liability company, or association employing any individual in any occupation, industry, trade, business or service" (Labor Law § 190[3]). "Employed" is defined as "permitted or suffered to work" (*Id.* § 2[7]). The Federal Fair Labor Standards Act (FLSA) also defines "employ" to include "suffer or permit to work" (29 USC § 203[g]).

The similarity of language in state and federal law is because Congress adopted the definition of "employ" from state child labor laws to protect employees who might have been otherwise unprotected at common law (*Rutherford Food Corp. v McComb*, 331 US 722, 728 and n.7 [1947]). Because the statutory language is identical, the Labor Law and the FLSA follow the same test to determine the existence of an employment relationship (*Ansoumana v Gristede's Operating Corp.*, 255 FSupp2d 184 [SDNY 2003]).

To determine whether an individual is an "employee" covered by the Labor Law "the ultimate concern is whether, as a matter of economic reality the workers depend upon someone else's business for the opportunity to render service or are in business for themselves" (*Brock v Superior Care Inc*, 840 F2d 1054, 1059 [2nd Cir 1988]). The factors to be considered in assessing such "economic reality" include; (1) the degree of control exercised by the employer over the workers; (2) the workers' opportunity for profit or loss; (3) the degree of skill and independent initiative required to perform the work; (4) the permanence or duration of the working relationship; and, (5) the extent to which the work is an integral part of the employer's business (*Id* at 1058-1059). No one factor is dispositive (*Id.* at 1059); *Matter of Tomasz Wojtowicz*, PR 10-102 [June 12, 2013]).

In applying these factors, the reviewing court is to be mindful that "the remedial nature of the statute . . . warrants an expansive interpretation of its provisions so they will have the widest possible impact in the national economy" (*Herman v RSR Security Services, Ltd.*, 172 F3d 132, 139 [2d Cir 1999]). In discussing the broad definition of "employ" set forth in the FLSA the Supreme Court has observed "[a] broader or more comprehensive coverage of employees . . . would be difficult to frame" (*United States v Rosenwasser*, 323 US 360, 362 [1945]).

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 65.30 (12 NYCRR § 65.39).

A. Claimants Dagata and Dunston Were Employees Under the Labor Law

We find that claimants Dagata and Dunston were petitioner's employees and not independent contractors as a "matter of economic reality" under the applicable five-part test.

The degree of control that petitioner exerted over Dagata and Dunston was pervasive and evidences their status as employees and not independent contractors (*Brock v Superior Care Inc.* at 1060 [employer's setting and control of wages and review of work performance are indicia of supervision and control consistent with employment]); *Matter of Double R. Entertainment*, PR 08-156 [June 7, 2011] [degree of control exercised by nightclub over dancers' work evidences employment relationship, not contractor status]). In addition to filling out a standard application for employment with petitioner, Dagata and Dunston were required to initial and or sign an agreement that detailed petitioner's expansive control over their work and the limitations on any independent initiative to perform their responsibilities.

These details included a requirement to report to job sites on or before the required reporting time, to serve a 90-day probationary period, to call (or not call) petitioner's office to report their presence on the job at specific times, and to report their specific hours and days of work. They had to be available for work on Saturdays and Sundays for extended hours, and

were required to wear company uniforms at all times. The agreement required them to follow specific information and guidelines regarding their work that they were to perform, to carry 21 specific tools or equipment to each job site, and to refrain from taking unscheduled time off without approval. Under the agreement, they were also required to keep in close range of petitioner every 20 minutes when out of cell phone or beeper range and they had to respond to petitioner's calls within 5 minutes. One element of the agreement required applicants to understand that their "salary" would be reduced if they failed to give a reason for failing to complete a job. Finally, the agreement required Dagata and Dunston to agree to "push [themselves] in order to achieve results and positive production on jobs."

Dagata and Dunston had no opportunity for profit or loss as they only received an hourly rate for the hours that they worked, rates and hours that were set by the petitioner. Unlike independent contractors, they did not set a price for a specific job and they had no investment in petitioner's business (*Brock v Mr. W. Fireworks, Inc.*, 814 F2d 1042, 1051 [5th Cir 1987]).

The job applications they were required to sign were applications that specified that they were "at will" employees, not independent contractors. The 90-day probationary period, coupled with the application for employment, establishes that their relationship with the petitioner was not intended to be short term, but rather one, assuming a successful probationary period, that would be continuous and long term. Moreover, Dagata and Dunston were reprimanded for misconduct, actions not associated with independent contractor status. Finally, their work was an integral part of petitioners business, as they were responsible for the installation and maintenance of fire alarm systems, which was the very nature of petitioner's business.

Petitioner argues that Dagata and Dunston were issued 1099 forms as independent contractors and signed W-9 forms indicating that they were not subject to tax withholding. However, "an employer's self-serving label of workers as independent contractors is not controlling" (*Brock v Superior Care, Inc.*, at 1059 [quoting *Real v Driscoll Strawberry Associates, Inc.* 603 F2d 748, 755 [9th Cir 1979]).

Based on the totality of circumstances, we find that claimants Dagata and Dunston were as "a matter of economic reality" dependent on the petitioner's business to render service and that an employment relationship existed between the claimants and the petitioner. Petitioner is thereby liable for any wages owed to these "employees" under the Labor Law.

B. The Wage Order Is Affirmed but Modified as to the Amount of Wages Owed

In the absence of accurate records required by the Labor Law, the Commissioner may draw reasonable inferences and calculate unpaid wages based on the "best available evidence" drawn from employee statements or other evidence, even though the results may be approximate (*Matter of Mid-Hudson Pam Corp. v Hartnett*, 156 AD2d 818, 820-21 [3d Dept. 1989]; *Ramirez v Commissioner of Labor*, 110 AD3d 901 [2d Dept. 2013]).

In a proceeding challenging such determination, the employer must come forward with evidence of the "precise" amount of work performed or with evidence to negate the reasonableness of the inferences to be drawn from the employees' evidence (*Anderson v Mt. Clemens Pottery*, 328 U.S. 680, 688 [1949]; *Mid-Hudson Pam Corp.* at 821). Given the interrelatedness of wages and hours, the same burden shifting applies to wages and requires the employer to likewise prove the "precise wages" paid or negate the inferences drawn from

the employee's statements (*Doo Nam Yang v ACBL Corp.*, 427 FSupp2d 327, 332 [SDNY 2006]; *Matter of Gattegno*, PR 09-032 [December 15, 2010]). Labor Law § 196-a provides that where an employer fails "to keep adequate records, ... the employer in violation shall bear the burden of proving that the complaining employee was paid wages, benefits and wage supplements."

The Court in *Mt. Clemens Pottery* further described the nature of evidence the employer must provide to meet its burden to establish the "precise" amount of work performed: "Unless the employer can provide *accurate estimates* [of hours worked], it is the duty of the trier of facts to draw whatever reasonable inferences can be drawn from the employees' evidence as to the amount of time spent in these activities in excess of the productive working time" (*Id.* at 693 [emphasis added]; *Matter of Mohammed Aldeen, et al*, PR 07-093 [May 20, 2009] [employer burden to provide "accurate estimate" of hours worked to overcome approximation drawn by Commissioner], *aff'd. sub nom, Matter of Aldeen v Industrial Board of Appeals*, 82 AD3d 1220 [2d Dept. 2011]).

The evidence submitted by petitioner at hearing failed to establish an "accurate estimate" of the hours worked by the claimants or the "precise wages" paid for those hours, or to negate the inferences drawn from their written claims, in several respects. We affirm the wage order but modify the wages owed in the fashion described below:

Dagata's Claim

Dagata claimed gross wages in the amount of $3,600 based on 89 hours of work at the rate of $30 per hour for the pay period ending October 21, 2009, plus $500 incentive pay, for a total of $4,100 gross wages due and owing. Claimant stated that he was paid $1,650 for his work and was owed a balance of $2,450 in unpaid wages for the period of his claim.

Petitioner submitted a timesheet for Dagata for the week ending October 21, 2009 reflecting 89 hours worked and a series of five checks. The last check submitted in the amount of $1,650 with the notation "11/02" exactly equals that claimed by Dagata as the payment he received. None of the earlier checks may be credited, as the notation dates predate the end of the pay period. The check for $153 with the notation "11/02" states that is payment for expenses owed, not services performed.

While petitioner established an accurate estimate of the hours worked by the claimant, it failed to prove that it paid him the precise wages owed for that work. The Minimum Wage Order for Miscellaneous Industries provides that an employer shall pay a non-residential employee for overtime at a wage rate of one and one-half times the employee's regular rate for hours worked over 40 in a week, subject to any applicable exemptions (12 NYCRR § 142-2.2). Dagata's 89 hours worked at the straight time rate of $30 per hour, plus $45 for overtime, equals $3,405. We do not credit claimant with a $500 incentive, as Lloyd testified without rebuttal that he was not entitled to any bonus or incentive pay. Subtracting the $1,650 Dagata was paid from the $3,405 wages owed results in an underpayment of $1,755.

Dagata's total underpayment is therefore $1,755. We modify the wage order accordingly.

Dunston's Claim

Dunston claimed unpaid wages of $2,630 for five pay periods ending between October 28, 2009 and November 25, 2009. Petitioner submitted timesheets covering four pay periods that in some cases show he worked more hours, and in some cases less, than those stated on his claim. We find the timesheets submitted establish an accurate estimate of the hours worked by the claimant for those weeks. Petitioner did not submit a timesheet for the week ending October 28, 2010 and failed to overcome the approximation of hours for that week drawn from claimant's written claim.

Petitioner submitted copies of four checks issued claimant for his services with the company. While the backs of the checks showing Dunston's endorsement were not submitted, when asked how DOL would know they were cashed by the claimant, Lloyd testified that the bank provided the dates the checks were cashed on the company's account statements. This evidence suggests a reasonable inference that each of the checks drawn to claimant's order were presented and negotiated by Mark Dunston as payee on the respective dates noted under each check.

Dunston listed three payments received for the payroll weeks during the period of his claim and stated that he was not paid for the last two weeks. He added that he had requested his "last check" from "Mary" on November 23 and 26, 2009 and that "she said she didn't know when they would have a check for me." Dunston's claim was filed on November 30, 2009. Petitioner submitted a copy of a check in the amount of $1,432.50 and, as Lloyd testified, a bank statement with a notation that suggests the check was cashed by Mark Dunston as payee three days later, on December 2, 2009. Claimant did not testify at hearing to rebut petitioner's evidence that he had cashed the check. In the circumstances of this case, we find the evidence negates any inference that Dunston did not receive his "last check" and that it should be credited to the period of his claim.

Petitioner's checks do not break down the amounts apportioned to services and expenses. Where greater than the amount stated by claimant, with the exception of the "last check," we credit the amount received as wages stated in his claim. His underpayment is calculated as follows:

Wk Ending	Hrs	Rate	Reg Wages	O/T Rate	O/T Hrs	O/T Wages	Total Wages Earned	Wages Paid	Wages Owed
10/28/09	57.5	$15	$600	$22.50	17.5	$393.75	$ 993.75	$ 700	$293.75
11/4/09	79	$15	$600	$22.50	39	$877.50	$1,477.50	$1,100	$377.50
11/11/09	71	$15	$600	$22.50	31	$697.50	$1,297.50	$1,000	$297.50
11/18/09	79	$15	$600	$22.50	39	$877.50	$1,477.50		
11/25/09	16.5	$15	$247.50	$22.50	0	$0	$ 247.50	$1,432.50 (2 wks)	$292.50 (2 wks)
								Total Owed	$1,261.25

Based on the above, Dunston is owed a total underpayment of $1,261.25. We modify the wage order accordingly.

Davis' Claim

Davis claimed unpaid wages in the amount of $2,460 based on 39 hours of work at $40 an hour for the week ending May 12, 2010 and 22.5 hours for the week ending May 19, 2010. However, his timesheet shows he worked 32.25 hours for the period ending on May 12th. His timesheet for the week ending May 19 accurately reflects the 22.5 hours claimed. Petitioner submitted copies of wage statements and checks with Davis' endorsements showing that he was paid gross wages for the hours submitted on both timesheets.

However, Lloyd testified that Davis' wage statement for the pay period ending on May 19 reflects a deduction of $530 for parking tickets and tow charges. Labor Law § 193 (1) (b) prohibits an employer from deducting monies from the wages of an employee except "as required by law" or as "expressly authorized in writing" and for the "benefit of the employee." The statute, moreover, specifies the deductions that an employee may authorize: "payments for insurance premiums, pension or health and welfare benefits, contributions to charitable organizations, payments for United State bonds, payments for dues and assessments to a labor organization, and similar payments for the benefit of the employee."[1] The regulations of the Commissioner of Labor also prohibit deductions for spoilage or breakage, cash shortages or losses, or fines or penalties for misconduct committed by the employee (12 NYCRR § 142-2.10).

The deductions made to Davis' paycheck were contrary to Labor Law § 193 and must be credited to the claimant, resulting in an underpayment of $530. We modify the wage order accordingly.

C. The Supplemental Wage Order Is Affirmed

Petitioner submitted expense statements submitted by Davis for $65.50. Other than general testimony that all expenses were paid to the claimants, petitioner did not submit evidence showing that the particular expenses incurred by Davis were in fact paid.

Labor Law § 191(1) defines "wages" as including "wage supplements" defined in Labor Law § 198-c. The latter statute provides that wage supplements include "reimbursement for expenses" where an employer is party to an agreement to pay them to its employees.

The Board finds that the petitioner failed to meet its burden to show that the Commissioner's supplemental wage order requiring it to pay Davis unpaid expenses in the amount of $65.50 was invalid or unreasonable.

D. 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 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 § 14-A sets the "maximum rate of interest" at "sixteen percent per centum per annum."

[1] The statute was amended effective November 6, 2012 to add additional permitted deductions. Our decision is governed by the statute extant at the time of the Commissioner's order.

We find that the computations made by the Commissioner in assessing interest in the wage order are valid and reasonable in all respects. The order is modified as to the total amount of wages owed and the interest shall be reduced proportionally.

E. The Civil Penalties in the Wage and Wage Supplements Orders Are Affirmed

In support of the 200% civil penalties assessed in the wage and wage supplements orders, DOL submitted a report stating that the "Employer has a history of not paying employees their wages. The last 2 claims are going to judgment. My recommendation is the maximum allowed by law." The report referenced the dates and nature of each of the prior violations.

Labor Law § 218 provides that where an employer "has previously been found in violation of the wage provisions" of Articles 6 or 19 of the Labor Law, or where the present violation is willful or egregious, the Commissioner "shall" direct payment of a civil penalty in an amount equal to double the amount found to be due.

Petitioner did not submit any evidence challenging the determination assessing a mandatory double penalty based on its prior violations of Article 6, despite being apprised of the dates and nature of each alleged violation. We find petitioner failed to meet its burden of proof and the considerations the Commissioner is required to make in connection with his assessment of the double penalty are valid and reasonable in all respects.

F. The Civil Penalties for Failure to "Maintain" Required Payroll Records Are Affirmed but Modified as to the Total Penalty Due

In support of the penalties assessed in the penalty order, DOL submitted a second report that recommended a penalty of $3,000 for violation of Labor Law § 661 for the period October 15, 2009 to May 14, 2010 because the "Employer did not provide us with all of the payroll and time records we requested."

We revoke that portion of the penalty order for failure to "furnish" payroll records, as the Board has held that collection letters to an employer, such as those issued petitioner in this case, stating that DOL would "appreciate" a statement of reasons why it disagrees with the claim and it should "substantiate" its position with "any payroll record[s]" are insufficient to support a penalty for failure to provide records (*Matter of Mercendetti*, PR 07-104 [2009] [failure to provide records "in support of the defense of a claim" is not the basis for a penalty for a failure to provide records, because such letters are not a demand]).

However, the records submitted by petitioner at hearing for two of the three claimants fail to meet the requirements of the Labor Law in several respects. With the exception of the two checks issued Davis, none of the proffered checks that were issued Dagata and Dunston include gross wages, net wages, deductions, social security number, or wage rates. Petitioner thereby failed to "maintain" payroll records required by 12 NYCRR § 142-2.6 regarding their employment during the period of their claims.

We find that the considerations to be made by the Commissioner in connection with his assessment of the civil penalty regarding these two claimants are valid and reasonable in all respects. The maximum penalty set by Labor Law § 218 for a first time non-wage violation is $1,000. DOL did not specify in its report that the penalties were based on any

all respects. The maximum penalty set by Labor Law § 218 for a first time non-wage violation is $1,000. DOL did not specify in its report that the penalties were based on any prior records violations. The penalty for Dagata and Dunston is affirmed but that portion applicable to Davis is revoked. Therefore, the total civil penalty is modified to $2,000.

G. The Civil Penalty For Failure to Post Notice of Petitioner's Fringe Benefits Policy Is Revoked

Labor Law § 195(5) provides that every employer shall "[n]otify his employees in writing or by publicly posting the employer's policy on sick leave, vacation, personal leave, holidays and hours." The statute does not cover an employer's policy concerning reimbursement of "expenses".

The Commissioner's determination finding that petitioner failed to furnish a copy of its policy concerning expense reimbursement regarding Davis' claim is revoked.

NOW, THEREFORE IT IS HEREBY RESOLVED THAT:

1. The wage order is affirmed but modified to direct payment of $1,755 to claimant Dagata, $1,261.25 to claimant Dunston, and $530 to claimant Davis, for a total amount due and owing of $3,546.25, with the interest and civil penalty in the order to be reduced proportionally; and

2. The supplemental wage order is affirmed; and

3. Count 1 of the penalty order for failure to maintain payroll records is affirmed but modified to a total penalty of $2,000, and count 2 of the order for failure to post notice of a fringe benefit policy is revoked; and

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

Vilda Vera Mayuga, Chairperson

J. Christopher Meagher, Member

LaMarr J. Jackson, Member

Michael A. Arcuri, Member

Absent
Frances P. Abriola, Member

Date and signed in the Office
of the Industrial Board of Appeals
at Albany, New York on
August 7, 2014.