STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of:	
MARC A. CHIFFERT AND AEC ENGINEERING DESIGN & CONSTRUCTION SERVICES, PLLC,	
Petitioners,	
	DOCKET NO. PR 10-348
To Review Under Section 101 of the Labor Law: Two Orders to Comply with Article 6 and an Order Under Article 6 and 19 of the Labor Law, all dated October 12, 2010,	RESOLUTION OF DECISION
- against -	
THE COMMISSIONER OF LABOR,	
Respondent.	

APPEARANCES

Marc A. Chiffert, petitioner pro se and for AEC Engineering Design & Construction Services.

Pico Ben-Amotz, Acting Counsel, NYS Department of Labor (Jeffrey G. Shapiro, of counsel), for respondent.

WITNESSES

Marc A. Chiffert, for Petitioners.

Francesca Daquet and J.C. Dacier, Labor Standards Investigator, for Respondent.

WHEREAS:

On November 10, 2010, Petitioners Marc A. Chiffert (Chiffert) and AEC Engineering Design & Construction Services, PLLC (AEC) filed a petition with the New York State Industrial Board of Appeals (Board) pursuant to Labor Law § 101 and Part 66 of the Board's Rules of Procedure and Practice (Board Rules) (12 NYCRR Part 66), seeking review of three Orders that the Commissioner of Labor (Commissioner, Respondent or DOL) issued to them on October 12, 2010. An amended Petition was filed on December 23, 2010. Respondent filed an Answer on February 22, 2011.

The Commissioner's orders under review include two Orders to Comply with Article 6 and an Order to Comply with Articles 6 and 19 of the New York State Labor Law. The first order under Article 6 (Wage Order) finds that Petitioners failed to pay wages to Francesca Daquet (Claimant) and demands payment of $508.50 in wages, interest at the rate of 16% calculated to the date of the order in the amount of $174.98, and a civil penalty in the amount of $508.50, for a total amount due of $1,191.98. The second order under Article 6 (Supplemental Wage Order) finds that Petitioners failed to pay travel expenses to Claimant and demands payment of $280.00 in supplemental wages (travel expenses), interest at the rate of 16% calculated to the date of the order in the amount of $96.35, and a civil penalty in the amount of $280.00, for a total amount due of $656.35. The order under Articles 6 and 19 (Penalty Order), imposes a $250.00 penalty for violating Labor Law Article 6 (§ 195[5]) by failing to notify employees in writing or to post notices of hours and/or fringe benefits policy, and a $250.00 penalty for violating Labor Law Article 19 (§ 661) as supplemented by the Minimum Wage Order for Miscellaneous Industries and Occupations (Minimum Wage Order) (12 NYCRR 142-2.6) by failing to keep and/or furnish true and accurate payroll records for each employee, for a total amount due of $500.00.

The Petition alleges that Claimant was paid wages as agreed; that she did not earn and was not entitled to supplemental benefits; that she wrongly claims Petitioners agreed to pay travel expenses, although Petitioner may have discussed supplemental benefits (including medical insurance and travel allowance) after four months of employment at Claimant's job interview; that Claimant did not work four months and did not qualify for supplemental benefits; that she voluntarily and unilaterally left the job without any notice or warning to Petitioner; and that she is not entitled to additional compensation of any kind. Upon notice to the parties, a hearing was held on January 9, 2013 in Hicksville, New York before Jean Grumet, Esq., Member of the Board and the designated Hearing Officer in this matter. Each party was afforded a full opportunity to present documentary evidence, examine and cross-examine witnesses, and raise relevant arguments.

At the hearing, Chiffert sought to amend the Amended Petition to contest the Orders' findings that he was individually deemed an employer. Chiffert claimed he had failed to raise the issue in the Petition (or, indeed, at any time before the hearing) because "[t]here was no reason for me to believe that I personally had any relationship to the alleged debt." However, Labor Standards Investigator Annemarie Culberson's May 27, 2009 letter to Chiffert informing him that an Order to Comply would issue, expressly stated that "all owners, officers and agents are personally liable for the payment of employee's wages," and each of the orders under review was addressed to "Marc A. Chiffert *and* AEC Engineering Design & Construction Services PLLC." Labor Law § 101[2] states that any objections to an order of the Commissioner not raised in a petition to the Board shall be deemed waived. We find that under these circumstances, Petitioner had notice of his potential individual liability and was obligated either to raise the issue in the Petition or have it deemed waived.

We also note that even if the issue of individual liability had not been waived, the evidence fully supports finding Chiffert an employer. Under the Labor Law, an individual may be found personally liable for unpaid wages if he or she is deemed an "employer." "Employer" as used in Article 6 of the Labor Law means "any person, corporation or association employing any individual in any occupation, trade, business or service" (Labor Law § 190[3]). "Employed" means permitted or suffered to work" (Labor Law § 2[7]). The

federal Fair Labor Standards Act (FLSA), like the New York Labor defines 'employ" to include "suffer or permit to work" (29 USC § 203 [g]) , and "the test for determining whether an entity or person is an 'employer' under the New York Labor Law is the same test... [used] for analyzing employer status under the [federal] Fair Labor Standards Act." (*Chu Chung v. New Silver Palace Rest., Inc.*, 272 FSupp 2d 314, 319 n6 [SDNY 2003]). The Board has found individual corporate owners and officers to be employers if they possess the requisite authority over employees (*See, e.g., Matter of Robert Reitman and B. Reitman Blacktop, Inc.*, PR 10-075 [September 10, 2012]; *Matter of David Fenske [T/A AMP Tech and Design, Inc.]*, PR 07-031 [Dec. 14, 2011]; *Matter of Robert H. Minkel and Millwork Distributors, Inc.*, PR 08-158 [Jan. 27, 2010]).

In *Herman v RSR Sec. Servs. Ltd., (*172 F3d 132, 139 [2d Cir 1999]), the U.S. Court of Appeals for the Second Circuit stated that the test used for determining employer status by explaining that:

> "Because the statute defines employer in such broad terms, it offers little guidance on whether a given individual is or is not an employer. In answering that question, the overarching concern is whether the alleged employer possessed the power to control the workers in question... with an eye to the 'economic reality' presented by the facts of each case.... Under the 'economic reality' test, the relevant factors include 'whether the alleged employer (1) had the power to hire and fire 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 this 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 citations omitted]).

In the instant case, Chiffert hired Claimant, set her schedule and conditions of employment, determined the rate of payment, maintained her attendance sheet, called in her rate and hours to the payroll company, and exercised sufficient control over the Claimant to be liable as an employer under this standard.

SUMMARY OF THE EVIDENCE

Testimony of Petitioner, Marc A. Chiffert

Chiffert is managing partner of AEC, a small consulting engineering firm employing three or four employees. Most of Petitioners' business is conducted from their New York City office; they also have an office in a small pool house behind a residence in Southampton New York. Chiffert hired Claimant in August 2008[1] to work as a bookkeeper in the Southampton office to work a 35 hour/five day week at an annual salary of

[1] Unless otherwise specified, all dates stated below were also in 2008.

$32,400.00. Petitioners did not maintain records showing Claimant's daily or weekly hours. An "attendance sheet" in the form of a calendar was entered into the record which had August 6, 8, 11 and 12 checked, and August 18 checked and then crossed off. Chiffert testified that these were the dates that Claimant worked. He could not recall when this attendance sheet was created, but he had some communication with Claimant on each of these dates. Claimant quit on August 12. Chiffert testified that: "She claimed she came to the office later and she worked, but I was not aware of it." Claimant returned the keys to the office to him on August 18.

Relying on documents provided by Claimant during the investigation, Chiffert testified Claimant worked 7 ½ hours on August 8; 2 ¼ hours on August 9 ("even though we don't count quarter hours – we don't count 15 minutes"); 6 ¾ hours on August 11 ("That is what she has. I have 6 ½") and on August 12 "6 ½ hours or as she claims 6 ¾." He did not have a record of how many hours Claimant worked on August 6. While cross-examining Claimant during Respondent's case, Chiffert contended that the two hours Claimant worked on August 9 were for training, and as such were unpaid because "it was not a requirement of the work."

Although calling in payroll was supposed to be part of Claimant's job responsibilities, Chiffert called in the payroll for the period August 1-15 to Petitioners' payroll company on August 15. The Payroll Journal report indicates that a check was issued on 8/18/08 for $218.21 regular earnings and gross pay and a "rate" of $15.58, (the equivalent of 14 hours or two days, based on an annual salary of $32,400.00 and a 40 hour week). Chiffert testified that the payroll company calculated the hourly rate from the annual rate he supplied, and that Claimant was paid for 14 hours "because we weren't sure of the hours.... the payroll had to be prepared in a timely fashion so we put it in for two days," expecting to make any necessary adjustment later. The time called into payroll "was not for any specific days." A copy of a check stub dated August 18 with Chiffert's handwritten notes "2 days" was entered into the record.

On September 30, Chiffert wrote to Claimant after receiving several calls from her requesting a check, stating that on August 12, Claimant called an AEC employee named Gina, and told her that she was quitting. "You then came to the office on Thursday, August 14th, without calling anyone. You claimed that you left at 3pm that day, but I have no idea what you did at the office." In this letter, Chiffert said that he had "ordered the payroll company to cut you a check at the next payroll for an additional two days to help you out. Please fax this letter back and we will mail you the check."

Claimant responded on October 4 denying that she ever "spoke to Gina or anyone else as far as if and when I was going to quit," and stating that she came to work on August 14 at 9:30 but left at 2:55. "Gina called my house around 3:45 pm and I explained that I had a migraine and needed to leave. I also worked on organizing the payroll sheets into the book that day FYI..." Claimant's letter further stated:

> "I am owed for total of five (5) days not two (2) as you are trying to negotiate. 8/9, 9:15-11:30, 8/11, 9:10-4:30, 8/12, 9:15-4:30, 8/14, 9:10-2:55, 8/18, 9:30-5:00...

In her October 4th letter to Chiffert, Claimant stated that their agreement included:

> "1) Hours were 9:30 am – 4:30 pm with ½ lunch
> "2) Salary was to be $18.00 per h.
> "3) Travel expense was to be $40.00 per day to be in **cash**."

This letter also said: "I believe you still have the notes you made on my mapquest or my resume regarding the above agreement. Please send me a copy if you find any discrepancies."

On October 18, Chiffert wrote to Claimant offering "an additional two days as full final and complete settlement" and "out of compassion for you and for peace of mind." His letter again stated that Claimant quit on August 12 and "then came to the office on two occasions without calling anyone. You claimed that you left at 3pm on one of those days, but I have no idea what you did at the office." Chiffert stated:

> "We had ordered the payroll company to cut you a check for an additional two days, but the check somehow got misplaced. I re-ordered another one. Please sign this letter.... I will then express mail you a check for two days... provided I receive this letter back signed by Friday October 24..."

Chiffert testified that check number 10175 in the amount of $242.00 was prepared by the payroll company, and "we wrote the check on 9-11 and it is possible that we did mail it in October."

Testimony of Francesca Daquet

Claimant, Francesca Daquet testified that when Chiffert hired her as a bookkeeper, the agreement was that she would be paid $18.00 per hour and work from 9:30 to 4:30 with a half hour lunch, and travel expenses for commuting from her Farmingville home to Southampton would be reimbursed at $40.00 per week in cash. She worked from August 6 to August 18. Claimant testified that she called in "every morning" when starting work, as she was required to do, with the exception of August 14 when she forgot, and that she was never told to call in her hours. On August 9, she was asked to come in and do some training with Chiffert and his assistant, Liz, who was also in the Southampton office. Claimant worked a full day on August 18 with Chiffert in the office, and at the end of the day, she announced that she was quitting and returned the keys. Claimant received a check on August 18 for 2 days worked during the payroll period August 1-15. There were no hours on the stub, and she assumed that she was paid for August 6 and 8, the first two days of her employment. This check was the only check she ever received from Petitioners, and to date she has never been paid for the remaining days that she worked. Claimant denied that she called Gina on August 12 and told her that she was quitting and reiterated that she quit on August 18 when Chiffert was in the office and that she worked from 9:30 a.m. to 5:00 p.m. that day.

Claimant filed a claim for unpaid wages on September 24, claiming that she was not paid for work she performed August 9, 11, 12, 14, and 18. Claimant testified that when she

filed her wage claim, although the check stub did not indicate the two days for which she was paid wages, she assumed that the two days were August 6 and 8, so she did not include those days in her wage claim. The Wage Claim stated that Claimant worked the following days for the following hours: August 6: 9:30 to 3:30, August 8: 9:25 to 5:00, August 9: 9:15 to 11:30, August 11: 9:15 to 4:30, August 12: 9:15 to 4:30, August 18: 9:30 to 5:00. For August 14, the Wage Claim recorded: "9:15 - 4:15 - left 1 hr early 5 ½." Claimant testified that she was not paid a total of 28 hours worked during the period of her claim.

Also on September 24, Claimant filed a claim for unpaid wage supplements claiming that she was owed "travel expenses @ $40 per day," for a total of $280.00. The Supplement Claim stated that when Claimant requested payment of her expenses on August 18, Chiffert refused, giving as the reason that "He doesn't know what I did." At the hearing, she testified that this travel expense – which she stated was to be "$40 per week," not per day – was for gas for her commute from her Farmingville home.

Testimony of Senior Labor Standards Investigator J.C. Dacier

Senior Labor Standards Investigator J.C. Dacier testified concerning the contents of the DOL's investigative file. The case was investigated by Annemarie Culberson, and Dacier had no personal knowledge of the case other than what was in the file. Various documents related to the DOL's investigation were entered into evidence pursuant to the State Administrative Procedure Act.

On January 12, 2009, Respondent sent AEC a notice of the claims and requested payment within ten days or a full statement of its disagreement, including "any payroll record, policy, contract, etc. to substantiate your position." Chiffert responded on January 17, 2009: "our records show that Mrs. Daquet's wages have been paid in full, and that no monies are owed." He also requested clarification of the claim; Respondent's case log records a February 20, 2009 phone call during which Culberson explained the claim and Chiffert said he would "research and get back w/in 2 weeks." On May 27, 2009 Culberson wrote to Chiffert at AEC stating that he had not followed up and failure to do so within two weeks could lead to "issuance of an Order to Comply (interest and penalties).... Please also be aware that all owners, officers and agents are personally liable for the payment of employee's wages."

On August 7, 2009 Culberson wrote to Chiffert to notify him that "to date we have received nothing" and to advise "that I would be requesting that an Order to Comply (explained in my letter of May 27, 2009) be issued." Chiffert responded on August 10, 2009, enclosing copies of two Payroll Journal Reports (Payroll Journals) issued by AEC's payroll company, for the two-week periods ending 8/15/08 and 8/31/08. The 8/15/08 Payroll Journal is the same one discussed above in Chiffert's testimony. The 8/31/08 Payroll Journal reflects a check issued to Claimant 8/29/08, does not record a rate, and reflects regular earnings and gross pay of $1350.83 (a figure not explained through testimony or otherwise).

Respondent's case log records that on July 9, 2010 Culberson called Claimant who said she received only one check, whereupon Culberson wrote to Chiffert stating that absent proof within two weeks of payment of the $1350.83, an Order to Comply would be issued.

On July 16, 2010, Chiffert responded to Culberson's July 9th letter stating that, "We have already previously sent all the required documentation to close this case... I need to retrieve the records from storage that you are requesting. I will provide the records you have asked for, but ask that you extend the return time to the DOL to August 15th."

Respondent's case log records that on August 17, 2010 Culberson, having been advised of a "[n]eed to refigure her claim," called Claimant "and went over the whole claim with her. Wage amount comes out to $508.50 and supplement remains $280.00 Total due is $788.50. Called Er [employer] to make him aware of change of amount and left message to call me." Chiffert responded on August 23, 2010:

> "The check in the amount of $1350.83 was a mistake on the part of the payroll company and that check was voided. We are enclosing a copy of the voided check.
>
> "The supplements that Ms. Daquet claims for travel expenses are unjustified. I never agreed to pay travel expenses. I did discuss with Ms. Daquet the possibility that at a later date I would be open to paying a travel allowance, just as after four months of employment she would have been entitled to medical insurance."

Chiffert enclosed a voided check dated 8/29/08, with no further explanation.

On July 9, 2010, Culberson filled out a "Background Information – Imposition of Civil Penalty" form recommending that AEC be assessed a 100% civil penalty, taking into consideration its size, good faith, and the violations discovered, including that the employer was "[n]ot generally cooperative," wrote to claimant saying he would pay, and produced records purporting to show a check which Claimant denied receiving. Senior Labor Standard Investigator Dacier testified that the 100% penalty was appropriate, based upon Petitioners promise to resolve the claims and their failure to follow up, which demonstrated a lack of cooperation.

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]), and that an order of the Commissioner shall be presumed valid (§ 103[1]). A petition challenging the validity or reasonableness of an order issued by the Commissioner must state "in what respects [the order under 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 order is invalid or unreasonable (Board Rule 65.30, 12 NYCRR § 65.30) ("The burden of proof of every allegation in a proceeding shall be upon the party asserting it"); State Administrative Procedure Act § 306; *Angello v. Nat'l Fin. Corp.*, 1 AD3d 850, 854 [3d Dep't 2003]). It is therefore Petitioners' burden to prove, by a preponderance of the evidence, that the Orders under review are invalid or unreasonable.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Board makes the following findings of fact and conclusions of law pursuant to Board Rule 65.39 (12 NYCRR § 65.39). We find that the Petitioners failed to meet their burden of proving that Claimant was paid all wages and travel expenses. We affirm the Wage Order, Supplemental Wage Order, and Penalty Order as modified below.

Recordkeeping Requirements

Article 19 of the Labor Law requires employers to maintain payroll records and furnish them to the Commissioner on demand (Labor Law § 661). The Commissioner's regulations implementing Article 19 provide, in relevant part, at 12 NYCRR § 142-2.6:

> "(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, including the time of arrival and departure for each employee working a split shift or spread of hours exceeding 10;
> "(5) when a piece-rate method of payment is used, the number of units produced daily and weekly;
> "(6) the amount of gross wages;
> "(7) deductions from gross wages;
> "(8) allowances, if any, claimed as part of the minimum wage."

Petitioners provided no records of Claimant's daily and weekly hours; such records were not kept and Chiffert testified that because Claimant had just been hired, record-keeping procedures had not yet been set. Although Chiffert (while acknowledging it was he who dealt with the payroll company) argued that keeping payroll records was part of Claimant's function as bookkeeper, the statute and implementing regulation place responsibility to see that records are kept on the employer.

Burden of Proof in the Absence of Adequate Employer Records

An employer's failure to keep adequate records does not bar employees from filing wage complaints. Where employee complaints demonstrate a violation of the Labor Law, DOL must credit the complaint's assertions and relevant employee statements and calculate wages due based on the information the employee has provided. The employer then bears the burden of proving that the disputed wages were paid. Labor Law § 196-a provides that employers who keep inadequate records "shall bear the burden of proving that the complaining employee was paid wages, benefits, and wage supplements" (*Angello v Natl. Fin. Corp.*, 1 AD3d 850 [3d Dept 2003]).

In *Anderson v Mt. Clements Pottery Co.*, (328 U.S. 680, 687-688 [1949]), superseded on other grounds by statute, the U.S. Supreme Court 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."

Citing to *Anderson v Mt. Clemens,* the Appellate Division in *Mid-Hudson Pam Corp. v Hartnett, (*156 AD2d 818, 821 [3d Dept 1989]) agreed:

> "The public policy of providing protection to workers is embodied in the statute which is remedial and militates against creating an impossible hurdle for the employee.... Were we to hold otherwise, we would in effect award petitioners a premium for their failure to keep proper records and comply with the statute. That result should not pertain here."

The Board follows the precedent set in *Mid-Hudson Pam Corp.* that where required records are unavailable, DOL may use "the best available evidence" to estimate back wages due and "shift the burden of negating the reasonableness of the Commissioner's calculations to the employer," with "the amount and extent of underpayment... a matter of just and reasonable inference;" (*Matter of Abdul Wahid*, PR 08-005 [Nov. 17, 2009]; *Matter of Dueck Sun Kim Youn*, PR 08-172 [Mar. 24, 2010]).

Petitioners Failed to Meet Their Burden of Proof that Claimant was Not Owed Wages

In the absence of contemporaneous payroll records required by the Labor Law, Petitioners have the burden of proving the an order is invalid or unreasonable by a preponderance of the evidence of the specific hours that the Claimant worked and that she was paid for those hours, or other evidence that shows the Commissioner's finding to be invalid or unreasonable. We find that the Petitioners here have not met their burden. Petitioners' contention that Claimant must have exaggerated her hours or did not work on August 14 or 18 is simply speculation and not evidence. While Petitioner testified that he considered Claimant's reports of her hours inflated and that she did not accomplish enough to justify payment for those hours, he acknowledged that he had not yet established a record-keeping system. As the Board stated in *Matter of Donald F. Farr, Jr. (d/b/a Don Farr Contractors Co.), (*PR 05-082 [October 14, 2007]):

> "Having testified that he did not keep records, but relied on [claimants'] own records of their time worked, Petitioner can not now reject their records. Furthermore, Petitioner's opinion that Claimants took an unreasonably long time to perform their work, in

> the face of his conceded reliance on their time records and his absence from their work sites and consequent lack of personal knowledge of their time worked is insufficient to meet his burden and shift the burden of going forward to the Commissioner."

It is undisputed that Claimant worked on August 6, 8, 11, and 12. Petitioners' record evidence shows that Claimant was paid only for 14 hours for her work during those four days at a wage rate of $15.58 based on a 40 hour, rather than a 35 hour week. We credit Claimant's testimony and find that her agreed upon wage rate was $18.00 per hour and that she was paid only one check in the amount of $218.21 for 14 hours of work. Claimant worked a total of 24 ½ hours during this four day period and should have been paid $441.00 rather than the $218.21 paid to her on August 18, 2008. We find that she is still owed $222.79 for these four days. While Chiffert asserted for the first time at the hearing (after a lengthy investigation) that a check in the amount of $242.00 may have been prepared by the payroll company, there is no evidence in the form of a cancelled check or bank statement to confirm that such a check was ever tendered to the Claimant.

Chiffert admitted that Claimant worked 2 ¼ hours on Saturday, August 9. When Claimant corroborated his testimony that she worked that day and added, "I was asked to come in to do some training," however, Chiffert stated that "[y]ou came to work for two hours so I could show you on a Saturday where things were" and stated that he considered her training time to be unpaid. We disagree. "The Board has held that time spent in orientation and training at the employer's behest is compensable time under the Labor Law." (*Matter of John E. Jeffers and JJ Maddens, Inc.*, PR 09-187 [March 29, 2012], *citing, Matter of Van Patten Enterprises, Inc.*, PR 08-090 [July 22, 2009]). We find Claimant is owed $40.50 for her work on August 9.

Likewise, Petitioner stated that although Claimant reported her hours in quarter hour increments that "we don't count quarter hours." We do not agree. 29 CFR § 785.47 (2012) states in part:

> "An employer may not arbitrarily fail to count as hours worked any part, however small, of the employees fixed or regular working time or practically ascertainable period of time he is regularly required to spend on duties assigned to him. *See...Hawkins v. EI du Pont de Nemours & Co.*, Cases, para 69,094 (ED Va 1955) (holding 10 minutes a day is not *de minimus).*"

Petitioners did not prove that Claimant quit on August 12 as Chiffert claimed. Claimant denied it; Gina, who Chiffert claimed took Claimant's call, did not testify; no record supported Chiffert's claim; and even Chiffert's own correspondence recognizes Claimant continued to come to work after (according to Chiffert) quitting. We find that Petitioners' failure to keep records of Claimant's hours as required, coupled with his acknowledgment that Claimant did, in fact, return to work after August 12, and his failure to call corroborating witnesses supports accepting Claimant's statement that she worked 5 ½ hours on August 14 and seven on August 18. Had Petitioners, here, kept records as required, there might have been a more accurate account of the hours, but mere imprecision about the hours or doubt of her productivity is not a basis to deny a claim. If a worker is not

productive the employer's legal recourse is to retrain, admonish, discipline or fire him or her, not to withhold payment for hours worked. (*See* Labor Law § 193). Thus, that Chiffert "wonder[s] what you did" at work after August 12 does not mean Petitioners could refuse to pay her for her work. Claimant is owed $225.00 for her work for these two days.

The Supplemental Wage Order Is Affirmed as Modified

Claimant testified that when she was hired, Chiffert agreed that AEC would pay $40 per week for her commuting costs. Chiffert denied this (while acknowledging having discussed with Claimant the possibility of providing a travel allowance at a later date) in the Petition and in his August 23, 2010 letter to Respondent, but said nothing about the travel expense issue at the hearing, leaving Claimant's testimony on the point uncontroverted. We therefore credit that testimony. Since Labor Law § 198-c (2) defines the "benefits or wage supplements" which an employer that has promised them must pay to include "reimbursement for expenses," we find it was reasonable and valid to require payment of promised reimbursement for Claimant's commuting expenses.

However, while the Supplement Claim and the Supplemental Wage Order stated that Petitioners promised $40 per day, Claimant's testimony at the hearing was that they promised $40 per week. Furthermore, there is no evidence that Claimant had reimbursable commuting costs except on days when she came to work, of which there were seven, not ten, during the two-week period at issue. The Supplemental Wage Order is therefore modified to reduce the amount found due from $280.00 to $56.00, and as so modified, affirmed.

Civil Penalties and Interest

Senior Labor Standards Investigator J.C. Dacier credibly testified about the factors that were considered by the DOL in the assessment of the 100% civil penalty in the Wage Order and the Wage Supplement Order, including the Petitioners' promise to resolve the claims and failure to follow up which demonstrated a lack of cooperation. We find that the considerations to be made by the Commissioner in assessing the 100% penalties in the Wage Order and the Wage Supplement Order to be reasonable in all respects.

The Petitioners did not claim at the hearing that they complied with Labor Law § 195(5), Labor Law § 661 and the Miscellaneous Wage Order (12 NYCRR § 142-2.6) by providing required written notification of hours and fringe benefit policies or by maintaining required payroll records; accordingly, therefore, the Penalty Order is affirmed.

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

/ / / / /

/ /

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The amount of wages found due and owing in the Wage Order is reduced from $504.50 to $488.29, and the Wage Order is affirmed as modified;
2. The amount of supplements found due and owing in the Supplemental Wage Order is reduced from $280.00 to $56.00, and the Supplemental Wage Order is affirmed as modified;
3. The Penalty Order is affirmed in its entirety;
4. Respondent is directed to recalculate the interest and penalty awarded in the Wage Order and Supplemental Wage Order consistent with this decision; and
5. Except to the extent stated above, the Petition is denied.

Anne P. Stevason, Chairperson

J. Christopher Meagher, Member

Jean Grumet, Member

LaMarr J. Jackson, Member

Absent

Jeffrey R. Cassidy, Member

Dated and signed in the Office
of the Industrial Board of Appeals
at New York, New York, on
March 20, 2013.