STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of:	:	
YOUNG HEE OH a/k/a YOUNG H. OH, AND CHEONG HAE CORP. (T/A CHEONG HAE RESTAURANT),	:	
Petitioners,	:	DOCKET NO. PR 11-017
To Review Under Section 101 of the Labor Law: Two Orders to Comply with Article 19 of the Labor Law, both dated December 20, 2010,	:	RESOLUTION OF DECISION
- against -	:	
THE COMMISSIONER OF LABOR,	:	
Respondent.	:	

APPEARANCES

Vishnick McGovern Milizio LLP (E.J. Thorsen and Andrew A. Kimler, of counsel), for the Petitioners.

Pico Ben-Amotz, General Counsel, NYS Department of Labor (Jeffrey G. Shapiro of counsel), for the Respondent.

WITNESSES

Young Hee Oh, Justin Kang, and Senior Labor Standards Investigator Rashid Allen, for Petitioners.

WHEREAS:

On January 19, 2011, petitioners Young Hee Oh and Cheong Hae Corp. filed a petition to review two orders that the Commissioner of Labor (Commissioner or DOL) issued against them on December 20, 2010. The respondent filed its answer on March 30, 2011.

The first order under review is an order to comply with Article 19 of the New York Labor Law (wage order) and directs petitioners to pay $311,678.78 in unpaid wages owed to

112 employees for work performed during the overall period April 5, 2003 to April 4, 2009, with interest at the rate of 16% calculated to the date of the order at $213,345.84, 25% liquidated damages in the amount of $77,919.88, and a 200% civil penalty of $623,357.56 for a total due of $1,226,302.06. The Schedule attached to the Wage Order indicates the employees to whom wages are due, including 52 for whom full names are given and 60 listed only by first or last name.

The second order issued under Article 19 (penalty order) directs petitioners to pay $2,000.00 in civil penalties based on (1) the failure to keep and/or furnish the requisite payroll records, for the same period covered by the Wage Order ($1,000), and (2) the failure to provide wage statements to employees with every payment of wages, for the period December 1, 2002 through April 4, 2009 ($1,000).

The petition challenges the wage order by alleging that it is based upon false allegations and inaccurate data, and that the computations in the order are inconsistent with the records DOL provided to petitioners. The petition also alleges that some of the individuals named in the order either (1) never worked for petitioners; (2) worked for a shorter period of time; (3) did not work the amount of hours reflected in the order; or (4) were owners of the business. The petition also contests both the imposition of a 200% civil penalty in the wage order, and the record keeping violations in the penalty order.

Upon notice to the parties, a hearing was held on May 16, 2013, in Hicksville, New York before Jean Grumet, Esq., Member of the Board and the designated Hearing Officer in this proceeding. The petitioner filed a post-hearing brief on May 23, 2013 and the Respondent filed a reply brief on May 31, 2013. 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.

MOTION TO DISMISS

At the conclusion of petitioners' case-in-chief, respondent moved to dismiss the petition on the ground that petitioners failed to establish a prima facie case or meet their burden of proof. The hearing officer reserved judgment on the motion, and asked the respondent to proceed putting in his case. The respondent instead rested and submitted no further evidence. We deny the motion to dismiss because the petitioners raised issues of fact at the hearing, which the Board must resolve in determining whether to affirm, modify or revoke the orders.

SUMMARY OF EVIDENCE

Testimony of Petitioner Young Hee Oh

Young Hee Oh (Oh) is the owner and sole shareholder of Cheong Hae Corp., which operates Cheong Hae Jin, a restaurant in Flushing, New York. When the restaurant started business in 2002, it was open 24 hours per day; during the relevant period, it was open from 12 p.m. to 12 a.m., except for a fifteen-month period from May 2007 to August 2008 when the restaurant was open from 5:00 p.m. until 12 a.m. During 2002, petitioners employed fifteen to twenty employees; since then the workforce has remained at ten to fifteen employees. Oh's

duties were hiring and firing employees, keeping records of employees' wages, ordering supplies, and going to the store to pick them up. Petitioners' employees include cooks, cook helpers, waiters and waitresses. Oh's sister is the cashier. Because there has been a problem with employees punching their own cards, Oh asked her sister to help employees punch their timecards. Oh also admitted that the time clock was broken and that she kept no written records when employees did not punch in or punched in incorrectly. Although petitioners brought some time cards for the years 2006, 2007 and 2008 to the hearing, they declined to enter them into the record because, according to Oh, the time cards' years were "kind of mixed up," there are some missing time cards for 2007 and 2008, and employees made mistakes when they punched the clock.

Oh determined employees' wages based on the employees' timecards and the minimum wage. Oh received daily information about how much each waiter received in tips and determined a daily wage for each of the waitstaff by 'combin[ing] the tip each employee receive[d], making sure each employee [got] minimum wage for the hours they work[ed] on a specific day."

Oh was notified of the DOL's investigation in this matter in January 2009, when she received a call from her sister telling her that DOL investigators were at the restaurant. A few weeks after the initial visit, DOL investigators returned while Oh was in the restaurant, and they requested payroll records. Oh told them that petitioners' accountant, Justin Kang, had all the records because she gave them to him in connection with the investigation. During the DOL's revisit, the investigators also interviewed petitioners' employees.

Oh testified that the following 76 individuals were never employed by Petitioners:

Agencia	Ismael	Rodrigues	Kim, Hae
Alajandro	Jairo	Rogelio	Kim, Han
Alvaro	Joel	Tony	Kim, Hang Joong
Angel	Juan 2	Torres	Kim, Man Joong
Antoni	Juan 3	Vicente	Kim, Suk
Carlos	Julia	Baek, Seung Yeol	Kim, Woo Gon
Carreon	Julio	Chang, Gook Sung	Lee, Gun
Chano	Ladencio	Chang, Hee Woong	Lee, Kang Chul
Chox	Luis	Choe, Dap Soo	Lim, Chan Ho
Concepcion	Manual	Choe, Gun	Oh, Young Na
Cortes	Miguel 2	Choe, Myung Kil	Park, Jun Hyung
Eduardo	Miguel 3	Choe, Suk Bong	Park, Jung Sook (partner)
Erik	Miguel 4	Chun, Chae Hyung	Sanchez, Osvaldo
Francisco 2	Miguel 5	Chung, Dong	Shim, Sung Young
Fesis	Modina	Chung, Il Kwon	Son, Joon Hwi
Gonzalo	Patricio	Chung, Il Kwon	Suh, Jeong Ho
Herberto	Regulo	Go, Nam Guhl	Sul, Sung Young
Ignacio	Rigobert	Huh, Choong Wong	Tacurz, Manuel
Ines	Roban	Kim, Chun Bae	Woo, Yoon In

Hae Jung Park was a chef and besides cooking, his other duties were to order supplies and ingredients. He worked for petitioners from April 2002 until August 2008, when he left to work as a cruise chef. Jung Sook Park was a "partner," not an employee.

On cross-examination, Oh testified that in compiling the names of 76 individuals who were not employees, she relied on her memory, not on any records. Shown five weeks of time cards for "Vicente[1]," "Vincente" and "Vincento," indicating that with little exception, he worked twelve hour shifts, Oh agreed they were petitioners' cards, but could not tell what year the card was from; and that while she had pinpointed non-employees for the DOL investigator from a list in 2009, at the time of the hearing her memory might "not be 100 percent correct."

Oh also testified on cross-examination that employees sometimes incorrectly punched time cards, and she repeatedly told them to do it properly. She was not sure when she first discussed this problem with employees. Employees did not punch out at lunch, "when they leave after work late at night, and sometimes they don't punch in when they start working." Oh did not write down their hours when this occurred, but nevertheless knew which employees worked and how much to pay them. Employees were paid in cash on a weekly basis. Tipped employees received a wage of $5.00, $6.00 or $7.00 per hour in addition to customer tips, with particular employees' wages set based on their level of experience. She testified that in 2007 when the minimum wage was $7.15 per hour, all employees received at least that amount if tips were included.

Testimony of Justin Kang, CPA

Kang, a certified public accountant, has been petitioners' accountant since they started their business, and was involved in more than 50 DOL investigations involving other clients. After receiving an April 23, 2009 recapitulation sheet from DOL, he voiced two concerns to Labor Standards Investigator Young Choe (LSI Choe): "First, incorrect working hours. My client, they didn't open for lunch hours, for a period of time. I'm not sure how long it was" the second concern was petitioner's inability to verify employees listed only by first names.

On cross-examination, Kang testified that the DOL gave petitioners a February 5, 2009 "Notice of Revisit" requesting that payroll records be made available for inspection, including "time cards, payroll register, bank statements, cancelled checks, cashbooks, employee full name, address, positions and employment dates and quarterly report (NYS-45)." Asked whether he ever advised petitioners of New York regulations requiring employers to keep payroll records, he testified he always educates employers to keep correct payroll records and has additionally held seminars for the Korean community and the state and federal DOL "to educate the employers to keep the correct payroll records." When Kang asked petitioners for the requested records, petitioners "brought me whatever they had," including "a lot of time cards," although "some periods were missing." Petitioners also provided some "payroll calculations, not for the entire period," and a list of employees. Kang provided that list to the DOL and later, to petitioners' counsel. Kang no longer has the list.

[1] Vicente was listed on the wage order as being owed $1,079.70 for the period 11/11/06 to 12/30/06.

Testimony of Senior Labor Standards Investigator Rashid Allen

Petitioners also called DOL Senior Labor Standards Investigator Rashid Allen (SLSI Allen) as a witness to authenticate a second DOL "Recapitulation Sheet-Preliminary Report," dated 8/11/2009, showing that the total amount of wages owed to 112 employees was $311,678.78, the same amount later stated in the wage order.

Employee Complaints and Interviews

Three employee complaints and interview sheets from the DOL's February 5, 2009 visit to the restaurant were stipulated into the record. All three claimants stated that they were paid weekly, in cash. Hae-Jun Park's (Park) January 7, 2009 sworn complaint stated that he was employed as a cook from April 2002 until July 27, 2008, when he quit because of "long hours;" he worked fifteen hours per day (8 am to 11 pm) six days per week, was paid $1500.00 per week, and was provided with two free meals per day.

Eulalia Cando's April 7, 2009 sworn complaint stated that she was hired in 2003 to work in the kitchen preparing food and was paid $270 per week for a six-day, 66-hour work week. Cando received $20 per week raises in June and December 2003, June and December 2004, and May and December 2005, a $10 raise in September 2006 and a $20 raise in May 2007, bringing her salary to $420; in November 2008 her work week was cut to five days and her salary lowered to $350. On January 25, 2009 that salary was cut by 10%; the "ER told EE that business was slow." At the time Cando quit on April 15, 2009, she was working five days per week, 12 hours per day with an hour off for lunch. Her final weekly salary was $315. Cando was provided with one free meal per day.

Jacinto Munos' April 7, 2009 sworn complaint stated that he was hired as an assistant cook on March 17, 2003 and was supervised by the "head chef." At the time of Munos' April 7, 2010 claim, he was working six days per week, 12 hours per day with an hour off for meals, and was paid $500.00 per week. According to the claim, Munos' weekly salary was $350 in 2003, $400 in 2004, $450 in 2005, $500 in 2006 and $550 in 2008 for a six-day, 12-hours-per-day work week, always without any overtime premium. On January 25, 2009, his salary was lowered to $500.00 per week because business was slow. Munos was provided with one free meal per day.

Interview sheets from the DOL's February 5, 2009 visit to the restaurant record additional statements taken from workers by DOL investigators. Jose Jeremias stated that he was hired as a sushi chef in the summer of 2006, worked a six-day, 12-hours-per-day work week with one half-hour meal break, and was paid $360 per week, formerly $400, but the employer deducted 10% "because it's not busy." Jeremias was provided with one free meal per day, and was also paid $40 in tips every Sunday.

Jose Reyes stated that he was hired as a cook in April 2008, was supervised by the chef, worked a five-day, 12-hours-per-day work week with a half-hour meal break, and was paid $350 per week. Reyes had earned $450 for six days of work until December 2008, when his hours and wages were reduced. He was provided with two free meals per day.

Oswaldo Sanchez stated that he was employed for six months as a dishwasher working a five-day, 12-hours-per-day work week with two 15- or 20-minute breaks, and was paid $290.00 per week. During the first four months of his employment, he earned $350 per week for a six-day, 12-hours-per-day work week. He was provided with two free meals per day. He was hired and supervised by the chef.

The three signed interview sheets above were additionally signed by the DOL investigator who conducted the interview. A record of an interview with Munos, not signed by him, included information largely consistent with his later April claim form. At the time of the February interview, however, he was only working a five-day (rather than six-day) 12-hours-per-day work week, and was paid $460. Munos' interview indicated that he received two free daily meals and was supervised by the chef.

Other Documentary Evidence Entered into the Record by Stipulation

Portions of the DOL investigatory file were entered into evidence by stipulation. Among these exhibits is a one page "sample payroll" for the week 7/8-7/14 prepared by Hae Jung Park, listing the names of fifteen employees and the wages paid to each during that week.[2] As discussed below, on February 10, 2010, Park provided the DOL with payroll records for five and a half years of the six year relevant period. It is undisputed that Park's weekly payroll records for the five and a half year period were provided to petitioners.

The DOL's Narrative Report, prepared by LSI Choe, states that he and three other investigators visited petitioners' restaurant on February 5, 2009 and spoke with Oh's younger sister, Jihyun Kim (Kim) and interviewed some of petitioners' employees. During the visit, LSI Choe asked Kim for time records and she stated that Oh keeps records off premises. Kim stated that waitstaff were paid according to a daily rate ranging from $40-45 to $65 per day; she did not know how much kitchen staff was paid. Kim stated that tips were pooled at the end of the night and distributed among the waitstaff, and that sushi bar workers pooled their tips separately. Credit card tips were paid out each night. Time cards were not kept because the machine was broken. During this visit, LSI Choe also spoke with Oh over the phone, who stated that the restaurant employed about 10 employees. When told that there were at least 15 employees visible, Oh responded that the others were family members. LSI Choe asked if the investigators could review payroll records, but Oh stated that people did not know where the records were kept. When asked if she could explain to Kim or someone else where they could find the records, Oh stated that the records were kept off premises.

On February 10, 2009, Hae Jun Park came to the DOL's office to provide a copy of five and a half years of payroll records. Park stated that he paid the kitchen staff, and that Oh should have the original copies of the records he provided, because he submitted them to her after paying employees. On February 18, 2009, LSI Choe had a telephone conversation with Oh who stated that petitioners' payroll records were at her accountant's office. LSI Choe then called accountant Kang, who stated that payroll records do not exist, but that he had petitioners' time cards.

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[2] While the sample payroll does not indicate the year, it appears that this payroll record was for the week of July 8 through July 14, 2007. "Jose Jererala" is listed as a "new employee" and the wage order lists "Jose Jeremiah" as beginning work the week of 7/14/07. Oh testified that Jose Jeremiah was Petitioners' employee.

According to the Narrative Report, underpayments reflected in the DOL's April 23, 2009 preliminary recapitulation sheet were computed based on the payroll records provided by Park, who kept the payroll records for the kitchen, and told LSI Choe that that all employees worked 12 hours per day, 6 days a week. LSI Choe determined that the EE's were paid a daily rate based on a weekly salary – for example, if the agreed-on rate for a six-day week was $600, an employee who worked only five days in a week would receive $500. Some employees' names, not clear in the records kept by Park, were clarified and confirmed in April 2009 by claimants Jacinto Munos and Eulalia Rosa Cando.

On April 24, 2009, LSI Choe met with Oh and Kang at Kang's office, served a notice of violation and provided the preliminary recapitulation sheet for underpayments of $581,857.80. On June 25, 2009 LSI Choe notified Park that his name was not on the recap sheet because based on his interview, he was a manager. On July 3, 2009, SLSI Allen again met with Oh, a representative from accountant Kang's office and another employer agent. The Narrative Report concludes with an August 11, 2009 entry stating that LSI Choe readjusted the underpayment computation to account for eight months in 2007 when the restaurant did only evening business, by reducing daily hours worked for employees from twelve to eight. LSI Choe also recomputed claimant Jacinto Munos' wages, as it was determined that he did have managerial duties. For unknown workers, the hours in the August 2009 recapitulation sheet were reduced to ten hours shifts with a one-hour break, as opposed to twelve-hour shifts as had been in the original calculation.

Petitioners entered into evidence a document entitled "Background Information – Imposition of Civil Penalty" completed by SLSI Allen on January 22, 2010. In the section "good faith of the employer" Allen checked boxes stating "promises future compliance" and "not familiar with the law." In the section "gravity of monetary violations, Allen indicated that there were thirteen employees owed less than $100; thirty employees owed $100-$500; eighteen employees owed over $500-$1000; and fifty two employees owed over $1000. With regard to underpayments throughout the relevant period, Allen indicated that the lowest hourly wage was $4.54 and the lowest overtime wage rate was also $4.54. He indicated that petitioners provided inadequate records which impeded the investigation and that wage statements were inadequate. Allen indicated that there was no prior history of past violations, and recommended that a 200% penalty be assessed.

A January 22, 2010 entry in the Contact Log states that while former LSI Choe's original Excel file used to estimate underpayments was missing,

> "analysis of the available information indicates the computations were performed using the payroll records provided by the former manager, Hae Jun Park. Although the records do not consist of daily time records, they do indicate daily rates and the amount of days per week each employee worked in the indicated week endings. The available information from the employees that were willing to provide statements to the DOL indicates that they worked an average of 11 hours per day and were paid a flat set weekly salary. The employer was did [sic] not provide any information to contest the information provided by the claimants. The Korean language employees other than Hae Jun Park refused to cooperate with the investigation. However, information from

> the Spanish speaking employees...and Hae Jung Park indicates that they worked the same amount of hours per day and per week as the Spanish speaking employees and were equally underpaid. There is no available information to indicate that the computations were performed incorrectly. An Order to Comply will be processed as the employer never agreed to a resolution of the case and simply stated that they were broke."

Petitioners also offered in evidence an August 17, 2011 letter from respondent's counsel to petitioners' counsel, stating that the DOL's original underpayment calculation was not available because LSI Choe, who was no longer working for DOL, encrypted that portion of the computerized case file, and when contacted, was unable to remember the password that he used to gain access to the Excel spreadsheet. Because the DOL's IT unit was unable to 'crack' the encryption, respondent's counsel instructed the DOL to recalculate the wages owed using the same data used by the former investigator.

In a follow-up September 6, 2011 email, DOL counsel supplied reconstructed calculations by which the respondent arrived at the underpayments of wages set forth in the wage order. While the wage order found a total of $311,678.78 due and owing, the revised calculations show a total of $311,721.00, a difference of $42.22. Enclosed with the e-mail was the reconstructed Excel spreadsheet showing week-by-week calculations of amounts due individual employees based on stated daily hours worked, weekly salary and meal credits.

STANDARD OF REVIEW AND BURDEN OF PROOF

When a petition is filed, the Board reviews whether an order issued by the Commissioner is "valid and reasonable." Labor Law § 101[1]. A petition must state "in what respects [the order on review] is claimed to be invalid or unreasonable," and any objections not raised shall be deemed waived. *Id* § 101[2]. The Labor Law provides that an order of the Commissioner shall be presumed valid. *Id* § 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. *Id.* § 101[3]. Pursuant to Board Rules of Procedure and Practice § 65.30 [12 NYCRR § 65.30]: "The burden of proof of every allegation in a proceeding shall be upon the person asserting it." Therefore, the burden is on the petitioners to prove by a preponderance of the evidence that the orders are not valid or reasonable. *See,* State Administrative Procedures Act § 306; *Matter of Angello 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]. For the reasons state below, we deny the respondent's motion to dismiss; we find that the petitioners failed to meet their burden of proving that 38 of the individuals listed on the wage order were paid minimum wages and overtime earned during the relevant period and we affirm, as modified, the wage order as to those 38 employees; we revoke the wage order as to 74 individuals that the petitioner denied employing; we modify the wage order to credit the petitioners' unrebutted testimony that the

restaurant operated for eight hours rather than twelve hours during the months of January through August 2008; we find that the 17 admitted employees who were listed on the wage order by first name were not unidentified employees; we modify the 200% penalty in the wage order; and we affirm the penalty order, liquidated damages and interest in full.

An Employer's Obligation to Maintain Records

An employer's obligation to keep adequate employment records is found in Labor Law § 661 as well as in the New York Code of Rules and Regulations (NYCRR). At relevant times, Title 12 of the NYCRR, § 137-2.1[3] provided, in pertinent 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;...
> (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...."
> . . .
> "(e) Employers...shall make such records...available upon request of the commissioner at the place of employment."

§ 137-2.2 further provided:

> "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 and the amount of wages paid to its employees, and to provide employees with a wage statement every time they are paid. This required recordkeeping provides proof to the employer, the employee, and the Commissioner that the employee has been properly paid.

Petitioners Failed to Maintain Required Records and the Penalty Order is Affirmed

It is undisputed that petitioners did not provide DOL with requested payroll records or provide wage statements to employees. Kang, Oh's accountant throughout the relevant period, testified that he advised clients to keep records and held seminars in conjunction with the state and federal DOL for that purpose. Yet despite the advice of her accountant and her testimony that keeping records of employees' wages was one of her duties as a restaurant owner, Oh

[3] The regulations applicable to this matter were found in the Minimum Wage Order for the Restaurant Industry codified at 12 NYCRR Part 137 (repealed effective January 1, 2011 and replaced by the Wage Order for the Hospitality Industry, 12 NYCRR Part 146).

admitted that she kept no records of wages paid to employees at any point during the six-year relevant period. The only records Petitioners' claim to have maintained, some employee time cards for the years 2006, 2007 and 2008, were concededly incomplete, unreliable, replete with error and so disorganized and confusing that Oh could not even tell which years they referred to, and declined to move them into the record. In addition to Petitioners' general failure to maintain required payroll records for all employees, the failure to maintain required records for tipped waitstaff (as discussed below) is also noted. We find that the petitioners presented no evidence that they complied with statutory and regulatory recordkeeping requirements with respect to any employee, and affirm the penalty order.

The Wages Order is Affirmed With Respect to the 36 Employees Petitioners Admitted Were Employees

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 legally required records, the petitioners, therefore, have the burden of showing that the minimum wage order is invalid or unreasonable by a preponderance of the evidence of the specific hours that the employees worked and that they were paid for those hours, or other evidence that shows the Commissioner's findings to be invalid or unreasonable. *In the Matter of Ram Hotels, Inc.* Board Docket No. PR 08-078 [October 11, 2011].

In *Anderson v Mt. Clemens Pottery Co.*, 328 US 680, 687-88 [1949], superseded on other grounds by statute, the U.S. Supreme Court opined that a 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. New York courts, following *Mt. Clemens Pottery Co.* have consistently held that when incomplete or unreliable wage and hour records are available, DOL is "entitle[d] to make just and reasonable inferences and use other evidence to establish the amount of underpayments, even though the results may be approximate." *Hy-Tech Coatings v New York State Dept. of Labor,* 226 AD2d 378, [1st Dept 1996], *citing Mid-Hudson Pam Corp. v Hartnett*, 156 AD2d 818, 821 [3d Dept 1989] ; *see also Matter of Bae v Industrial Board of Appeals*, 104 AD3d 571 [1st Dept 2013]; *Matter of Ramirez v Commissioner of Labor*, 110 AD3d 901 [2d Dept 2013]. Wages may be found due even if based on an estimate of hours. *Reich v Southern New England Telecommunications Corp.,* 121 F.3d 58, 70 [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").

In the instant case, we find that the petitioners failed to keep records that could have established with clarity and precision the specific wage rates, hours worked, and actual receipt of wages for each of the 36 admitted employees listed below:

Alberto	Jose David	Choe, Jae Ho	Kim, In Hyun
Antonio	Juan	Chun, Chong Ho	Lee, Jeong Ho
Camerino	Manuel	Chung, Byung Ok	Lee, Sang Hoon
Casimiro	Miguel	Ha, Sam Bong	Moon, Woon Hak
David	Oscar	Jeremia, Jose	Munos, Jacinto
Elmer	Ricardo	Kang, Inho	Nam, Ok Soo
Francisco	Segundo	Kang, Seong Dae	Nam, Young Gul
Gabino	Ahn, Jin Wook	Kim, Choon, Kwon	Park, Jung Ae
Jose 1	Cando, Eulalia Rosa	Kim, Hang Joong	Reyes, Jose

Oh, who testified that "keeping records of employees' wages" was one of her job duties, provided neither lawfully required payroll records nor a reasonable approximation of the wages owed and hours worked by petitioners' employees. Indeed, not a scintilla of evidence was presented by petitioners to show the wages owed to or hours worked by any employee during the entire six-year relevant period. When given the opportunity to have the Board's certified translator translate time cards Oh brought to the hearing for what she claimed were the years 2006-2008, Oh declined and did not offer them into evidence. Nor was there evidence that time cards were maintained for the periods 2003-2005 or for 2009. Oh variously testified that the time clock was broken; that her sister (rather than the employees themselves) punched employee time cards; that employees did not punch time cards properly; and that time cards were missing for periods in 2007 and 2008. When shown five weeks of petitioners' time cards for an employee she claimed was never employed, Oh could not identify what year it was from. Yet Oh incredibly testified that she determined employee wages based on their timecards, while also admitting that she kept no other written records of employee hours for the six year relevant period. Petitioners provided no evidence concerning how or by whom employees were paid, or who kept records if, as she claimed, Park's responsibilities did not include that.

Oh provided no testimony or documentary evidence whatsoever as to the wage rates, work hours or actual payments to any of the workers she acknowledged employing during the relevant period. She testified that the restaurant employed cooks, cooks helpers, waiters and waitresses, and that in the case of waitstaff, employees, at some unspecified time, earned $5.00, $6.00 or $7.00 per hour, depending on experience, yet she never specified which employees held these positions, who the experienced employees were, how much any employee earned, or the daily or weekly hours worked by any employee.

While Oh insisted that she always paid minimum wage for all hours worked, petitioners provided no testimony or evidence as to how many hours each employee worked per day or per week, or whether employees were paid overtime. Section 137.1-3 of the implementing regulations for the restaurant industry in effect during the relevant period [12 NYCRR §137-1.3] provided: "An employer shall pay an employee for overtime at a wage of 1 ½ times the employee's regular rate for hours worked in excess of 40 hours in one workweek." The only testimony about employee hours provided by Oh was that from May 2007 to August 2008, the restaurant was not open for lunch, and petitioners argued that the employee hours in the DOL's calculation of daily hours should be reduced from 12 to 8 for that time period based on Oh's

testimony. Additionally, all of the claims and interview statements indicate that employees worked 12 hour shifts five or six days per week. Even assuming that we were to accept Oh's testimony that employees were paid minimum wage for all hours worked, which we do not, Oh still did not meet her burden of proving that employees were paid overtime, and her general and conclusory testimony that all employees were always paid the minimum wage is also not credited.

With respect to tipped employees, Oh claimed it was proper to pay a wage below the general statutory minimum because she received daily information about how much in tips each employee received and used this information to set wages at a level where, when tips were included, "each employee get[s] minimum wage for the hours they work on a specific day" and petitioners would be entitled to a "tip credit." Yet Oh presented no testimony as to how she allegedly received daily information about tips, and made no claim that records of such tips were kept, much less furnished to employees. In such circumstances, the burden of proof was on petitioners to show that the employees received sufficient tips to entitle them to classify the employees as food service workers, and claim a tip allowance. 12 NYCRR 137-3.4 [c] [2009]. It was reasonable for the Commissioner not to calculate wages at the lower restaurant service wage where there are no records of the amount of tips received by the employees. *Keynan and A&O Associates,* PR 10-335 [October 2, 2013]; 12 NYCRR 137-3.4 [c] [2009]; *See also Bakerman. Inc. v Roberts*, 98 AD2d 965 [4th Dept 1983]; *Padilla v Manlapaz*, 643 F Supp 2d 302, 310 [EDNY 2009].

Given the lack of specificity and the inconsistencies in her testimony, we find that Oh's testimony that the 36 employees she acknowledged employing were properly paid was simply too general and conclusory to overcome the presumption favoring the Commissioner's order and meet petitioners' burden. "Petitioner cannot shift its burden to DOL with arguments, conjecture or incomplete, general and conclusory testimony." *Matter of Angela Jay Masonry & Concrete, Inc.,* PR 06-073 [September 24, 2008] p.5. In the absence of contemporaneous payroll records, an accurate estimate of the hours worked and wages paid to employees, or other credible evidence showing the Commissioner's estimates, even if imprecise, to be invalid or unreasonable, it was Petitioners' burden to submit sufficient affirmative evidence to negate the Commissioner's determination of wages owed. *Matter of Ram Hotels, Inc.,* PR 08-078 [October 1, 2011]. Petitioners failed to meet this burden.

In the present case, the DOL calculated unpaid wages due based on employee interviews and claims, and information supplied to DOL by claimant Park, who stated to DOL that he was a former manager, maintained payroll records for the kitchen staff, personally paid the kitchen employees, and gave the original copy of the payroll records to Oh. This is a reasonable basis for the calculation since petitioners failed to proffer any evidence of the specific hours and wages earned by any employees. We give no credence to Oh's testimony that Park was merely a chef whose only other responsibility was to order supplies and ingredients. Indeed, most of the claimants and interviewees listed the head chef as their supervisor; he was not included in the wage order because he was found to be a manager, and most significantly, he was the only person who provided contemporaneous records of wages paid to employees.

In *Mid-Hudson Pam Corp,* the DOL used evidence including partial payroll records, employee complaints and interviews with some employees to compile a list of 43 people believed to have worked on a project, schedules of the days and hours these people worked, and

a methodology to determine how much compensation was due those workers and how much they were underpaid. Although the petitioners claimed "the re-creation of their records to compute underpayments was arbitrary and speculative," the *Mid-Hudson Pam* court, citing *Anderson v Mt. Clemens Pottery Co.*, 328 US 680, 687-89 [1949] found that the incompleteness of the petitioners' own records "entitled the Commissioner to make just and reasonable inferences in awarding damages to employees even while the results may be approximate." 156 AD2d at 820. Similarly, *Garcia v Heady* upheld affirmance of an order to comply where a "petitioner failed to maintain records of the hours claimants worked and/or provide them with wage stubs, thus compelling DOL to employ an alternate analysis to ascertain the number of hours that claimants worked and, in turn, imposing upon petitioner the burden of demonstrating the unreasonableness of DOL's calculations." *See also Matter of Bae v IBA*, 104 AD3d 571 [1st Dept 2013]; *Matter of Ramirez v Commissioner*, 110 AD3d 901 [2d Dept 2013]; *Matter of Mohammed Aldeen*, PR 07-093 [May 20, 2009], *aff'd sub nom., Matter of Aldeen v Industrial Appeals Bd.*, 82 AD3d 1220 [2d Dept 2011]; *Matter of Ram Hotels, Inc.*, PR 08-078 [October 12, 2011].

We have carefully examined the DOL's order and find that while there may be minor discrepancies, the DOL's approach was reasonable, particularly since petitioners provided no alternative accounting of employee's actual earnings for the entire six year relevant period. We find that the wage order reflects a reasonable approximation of the hours worked by and payments made to employees, and that it was reasonable and valid for the Commissioner to rely on such an approximation to calculate underpayments and wages due, even if possibly over-inclusive. To fault the order for possible imprecision, when caused by petitioners' failure to keep and furnish legally required records for a full six year period would reward the employer for its unlawful conduct. *Anderson v Mt. Clemens Pottery Co.*, 328 US 680, 687-88 [1949]. Accordingly, petitioners' challenge to the wage order's finding of wages due to the 36 admitted employees is denied.

The Wages Order is Affirmed With Respect to Vicente and Oswaldo Sanchez

We find that petitioners failed to meet their burden with respect to an additional two employees, Vicente and Oswaldo Sanchez. Oh testified that she did not employ an employee named Vicente, listed on the wage order as having worked for six weeks from November 18 to December 30, 2006. On cross-examination, Oh again stated that Vicente was not an employee, but when shown five weeks worth of time cards bearing Vicente's name, she identified them as Petitioners' time cards, said she could not tell from the cards what year they were from, and acknowledged she could not be sure her memory was accurate. Likewise, Oh denied that Oswaldo Sanchez, listed in the wage order as having worked for eight months, was an employee. Sanchez, however, was interviewed by a DOL investigator while working at the restaurant on February 5, 2009, and signed the interview form completed by the investigator during the DOL's visit.

The Respondents Failed to Rebut Petitioners' Testimony that 74 Individuals Listed on the Wage Order Were Not Employees, and the Wage Order is Revoked as to These Individuals

Oh testified that she did not employ 76 individuals named in the wage order. We find that, with the exception of Vicente and Oswaldo Sanchez, petitioners set forth a prima facie case with regard to these 74 individuals. When a petitioner has set forth a prima facie case and met its burden of going forward, the evidence shifts to the respondent to rebut the petitioners' testimony

and establish that the order is reasonable. *Matter of Richard Delledone,* Docket No. PR 08-145, page 4 [July 22, 2009]. Here, the DOL had the burden of proving that the 74 individuals Oh denied employing were petitioners' employees. We find that the respondent, in resting its case and putting in no evidence, did not produce evidence sufficient to rebut petitioners' testimony with regard to the employment status of these 74 individuals. Respondent did not call Park, LSI Choe, SLSI Allen or any employee to testify that any of these 74 workers were, in fact, employed by petitioners. We therefore find that respondents failed to meet their burden of proving that these 74 individuals were petitioners' employees, and we revoke the Wage Order with respect to these 74 individuals.

The Wage Order Is Modified to Reduce Employee Hours to 8 Per Day for the Period May 2007 – August 2008, When the Restaurant Was Closed For Lunch

Oh testified that from May 2007 to August 2008, the restaurant was open only from 5:00 p.m. to midnight, and employees could not possibly have worked 12-hour days like those assumed in the wage order. She also testified that she so informed both Investigator Choe and Senior Labor Standards Investigator Allen when she met with each of them in 2009. Allen was present at the hearing and did not dispute that testimony, and it is evident the shorter hours were discussed since the last entry in Choe's Narrative Report states that the DOL adjusted its underpayment computation "to account for 8 months in 2007 when Cheong Hae Jin only did evening business, reducing daily hours worked to 8 hours." In this respect, as well as with regard to people whose employment status Oh denied, petitioners' testimony is unrebutted. We therefore conclude that employees should be deemed to have worked no more than eight hours per day during May 2007 to August 2008, and we so modify the wage order and remand it to the DOL to recalculate the wages due accordingly.

The 16 Admitted Employees Named in the Wage Order by First Name and Vicente Were Not Unidentified or Unknown Employees

Petitioners also relied at the hearing on *Matter of Anthony Boumoussa and Bay Parkway Super Clean Car Wash, Inc.,* PR 09-058 [February 7, 2011], which, they argued, held it unreasonable to credit hours worked by unidentified employees.[4] In the present case, Oh admitted that 16 of the individuals listed on the wage order by first name were employees during the relevant period. Since Oh has admitted employing them, they are no longer "unidentified" or "unknown." The Board also finds that Vicente, whose time cards Oh identified, was likewise not "unknown" or "unidentified."

The Calculations in the "Reconstructed" Excel Spreadsheet Were Not Key Evidence

In their closing statement and post-hearing brief, petitioners stressed that the DOL's inability to access LSI Choe's August 2009 Excel spreadsheet, on which the wage order was based, led the DOL, in 2011, to perform "reconstructed calculations" based on the same data and to arrive at a slightly different numerical result ($311,721.00 rather than $311,678.78, a difference of $42.22 or 0.01%). In their post-hearing brief, petitioners described the original calculation as "key evidence" loss of which prevented petitioners from proving their claim and

[4] *Boumassa* actually affirmed an order including wages owed to unidentified or unknown workers so as to account for the total number of employees observed.

should give rise to an adverse inference that those calculations would not have supported DOL's defense that the wage order was reasonable and valid, and for that reason, the wage order should be set aside.

We do not find that the reconstructed calculations were "key evidence" or that their loss deprived the Petitioners from proving their claim. Petitioners could have proved their claim had they kept lawfully required payroll records during the six-year relevant period. The loss of the Excel spreadsheet was harmless error and does not give rise to an adverse inference. *See: Guillermo M. Ramirez and Julio C. Ventura and Memo Apparel, Inc.,* PR 09-354 [July 26, 2011] *affd* 110 AD3d 901, 972 NYS2d 696 [2d Dept 2013].

The Civil Penalties in the Wage Order Are Modified

The Order assesses civil penalties in the amount of 200% of the wages ordered to be paid. Labor Law § 218[1] provides, in relevant part:

> "In addition to directing payment of wages ... found to be due, such order, if issued to an employer who previously has been found in violation of those provisions, 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....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.

Petitioners entered into evidence the Background Information – Imposition of Civil Penalty form in which SLSI Rashid Allen recommended a 200% civil penalty. This form states that the lack of documents impeded the investigation, and notes with respect to the gravity of the violation that over 100 employees were underpaid with more than half of them owed over $1,000 each. However, the form does not specifically explain why Allen recommended a 200% penalty, which under Labor Law § 218 is assessed when a petitioner has had a previous violation or has acted in a willful or egregious manner. Neither condition has been established here. Although SLSI Rashid Allen was present at the hearing, he was not called to testify about the particular factors considered by the DOL in assessing the 200% penalty. Under these circumstances, the Board finds that the assessment of the maximum civil penalty of 200% is not reasonable and we modify the penalty to 100% of the wages due as modified herein. *Cf: National Credit Systems, Inc.,* PR 08-117 [July 28, 2010].

Liquidated Damages

The Wage Order includes liquidated damages in the amount of 25% of the wages owed. Labor Law § 663 (2) as it read when the wage order was issued[5] provided in relevant part that:

> "On behalf of any employee paid less than the wage to which the employee is entitled under the provisions of this article, the commissioner may bring any legal action necessary, including administrative action, to collect such claim, and the employer shall be required to pay the costs, and unless the employer proves a good faith basis to believe that its underpayment was in compliance with the law, an additional amount as liquidated damages equal to twenty-five percent of the total of such underpayments found to be due the employee.."

In the present case, the Petitioners produced no evidence of, and certainly did not prove, a good faith belief that their wage and hour practices were in compliance with the law. Petitioners' accountant, Kang, testified that he advised clients to maintain payroll records and held seminars in conjunction with the New York and federal DOL's for that purpose. Despite their accountant's advice, petitioners maintained no payroll records for a full six years. Accordingly, we affirm the imposition of liquidated damages.

Interest is due

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." We therefore affirm the rate of interest imposed in the Wage Order. Of course, the amount of interest assessed will be reduced based on the reduction in the amount of wages found due.

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[5] Labor Law 663 (2) was amended effective April 9, 2011 to increase the amount of liquidated damages to 100%.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT

1. The Wage Order is modified as set forth above, and remanded to the DOL to recalculate wages, liquidated damages, interest, and penalties as outlined in this decision, and as so modified, is affirmed; and

2. The Penalty Order is affirmed; and

3. The Petition is otherwise denied.

J. Christopher Meagher, Member

Jean Grumet, Member

LaMarr J. Jackson, Member

Jeffrey R. Cassidy, Member

Dated and signed in the Office
of the Industrial Board of Appeals
at New York, New York, on
May 22, 2014.