



order) finds that petitioners violated the Labor Law by (1) failing to keep and/or furnish true and accurate payroll records for each employee; (2) failing to provide each employee with complete wage statements; and (3) failing to conspicuously post a schedule for all minors employed, and directs payment of \$500.00 for each of these violations, for a total of \$1,500.00. During the hearing, the parties settled the penalty order by stipulation on the record, and the petitioners withdrew that part of their petition that contested the penalty order.

The petition alleges that the wage and penalty orders are invalid or unreasonable, stating that: “[t]eaching hours are from 5 to 6:45 pm”; claimant “lied about the hours & days he worked to his mother & father” and never complained about his wages prior to his dismissal; and petitioners are unable to prove that they maintained wage statements because claimant stole their computer. The petition also contested the imposition of civil penalties and liquidated damages. Respondent filed an answer on May 4, 2011. Upon notice to the parties, hearings were held on May 21, 2014, November 24, 2014 and January 8, 2015, in Hicksville, New York before Administrative Law Judge Jean Grumet, the Board’s designated Hearing Officer in this proceeding. Respondent filed a post-hearing brief on March 13, 2015. Petitioner did not file a post-hearing brief. 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.

## **BACKGROUND AND CLAIM**

On October 30, 2007, claimant’s mother filed a claim for unpaid wages stating that claimant was owed wages totaling \$2,388.77 for the period August 1, 2006 to October 4, 2006. Attachments to the claim included a typewritten bill on the letterhead of claimant’s father which listed 22 dates in August and 3 dates in September and hours allegedly worked on each of those dates, for which claimant asserted he was not paid. On September 25, 2008, claimant’s mother wrote to the DOL listing an additional 21 dates in September and 3 in October 2006 and hours allegedly worked by claimant on each of those dates. The letter stated that while “[w]e did not file” for these hours originally “since he did receive a paycheck that covered most of these hours,” if payments made by Zenker Corp. to claimant in September and October 2006 “were for August, then these hours were not paid for.”

## **SUMMARY OF EVIDENCE**

### Petitioners’ Evidence

#### *Testimony of Petitioner Santamaria*

Santamaria has owned and operated Zenker Corp., a karate school in Smithtown, New York since 1979, and has been affiliated with the school since 1964. Claimant, a student at the karate school since 1998, was hired in 2005 as a part-time teacher for children’s classes. At the beginning of summer 2006 he was paid \$10.00 per hour, and during “the last week of July going into August,” Santamaria agreed with both claimant and another high school student teaching the children’s classes that they would be paid \$15.00 per hour for 15 hours’ work per week. The high school student worked and was paid for the same number of hours as claimant.

Santamaria testified that in August and September 2006, claimant worked as an instructor three hours each on Monday, Tuesday, Wednesday, Thursday and Saturday morning for a total of 15 hours per week. At the third day of the hearing, Santamaria entered into the record a school calendar for August 2006 and weekly newsletters for the weeks of August 7, 14, 21, and 28, 2006, which Santamaria stated she had recently found on an old laptop in the basement. Based on these documents, she testified that during August 2006, claimant taught classes at 5:00 p.m. and 6:00 p.m. Monday through Thursday, and taught an extra class on Monday from 6:45 to 7:30 p.m., but did not work Saturdays, for a total of three hours on Monday and two hours on each of Tuesday through Thursday. In addition to the August calendar and weekly newsletters, Santamaria entered into the record a chart she created from the calendar and newsletters showing the classes taught by each instructor on a daily and hourly basis during the month of August 2006.

During August 2006, another instructor named Troy Bouton alone taught the Smithtown recreation classes held during the day at the school. Karate school classes began at 5:00 p.m. because children attended other full day camp programs and were not available to attend classes any earlier. During August 2006, there were no classes at the karate school on Fridays, and Bouton, Santamaria, and another instructor named Ralph Bertelle taught the Saturday morning classes. Claimant had no involvement in camps run by Bouton on August 8 and August 14-18, 2006. The school was closed on August 16, 2006 for a beach workout and barbeque at a local beach, and again on August 17, 2006, when Bouton and Santamaria took the campers to a museum.

Santamaria testified that in September 2006, claimant's 6:45 p.m. class was moved from Monday to Wednesday. On Friday nights from 7:00-8:00 p.m. starting in September, claimant was a member of a demonstration team in which students and instructors would get together to work out and plan for the black belt graduation. There was no instructor, and no one was paid for participating on the team.

Santamaria's husband was friendly with claimant's father. Claimant's mother, who worked in her husband's office, did not want to leave claimant at home during the day, and was unable to leave work at 4:00 p.m. to drive him to the karate school. As a favor to claimant's father, during August 2006, claimant was dropped off at the school by his parents at 9:00 a.m., where he waited outside until Santamaria arrived at 10:00 a.m. "He would either play video games or watch television or his friends would come over and they would sit and talk." Claimant never performed, was allowed to perform or was paid for any work, other than teaching his classes, and there was never an agreement that he would perform or be paid for odd jobs. Santamaria has other people do any such work, including Art McCannell, who has done all of the painting at the karate school for the past 50 years. Santamaria testified that she would never leave claimant alone in the 8,600 square foot karate school, which is valued at over \$1,000,000.00, and that she never gave him a copy of the keys to the building.

Sometime during the first week of October 2006, claimant had an altercation with a male karate school student about claimant's girlfriend, a 13-year-old karate school student. Santamaria sent claimant and the other student home before claimant's first class that day. At a meeting with claimant and his parents, a day or two after this incident, Santamaria told claimant, then 17, that he could not return to the karate school unless he ended his relationship with the 13-year-old student within 30 days.

According to Santamaria, employees filled time cards on a daily basis, which were kept in a clear plastic container at the front desk. Santamaria collected the time cards at the end of the month for payroll, and then stored them in a box in the school's basement. After DOL investigator Donna Griffith-Jones visited the karate school on June 12, 2008 and requested time records for 2005-2006, Santamaria went to the basement the following day to retrieve the box and found it had disappeared. Santamaria testified, and police records from the DOL's investigative file that were entered into the record without objection from DOL confirm, that on October 21, 2008 claimant was arrested and charged with stealing various items from the karate school (including the laptop computer that was on Santamaria's desk and a camera) based on video surveillance that showed him entering the building and removing property on the nights of August 12, 2008 and September 10, 2008; Santamaria had also reported break-ins and thefts to the police in March and April 2008, which she testified sparked her installation of the video camera. Santamaria believes claimant stole the box containing the time records prior to her installation of the video camera.

Santamaria offered in evidence four checks issued for payment to claimant for work during the relevant period, which were endorsed "for deposit only" and cashed by claimant, and which she testified she obtained from her bank. These records show the following payments to claimant and corresponding notations:

<u>Check Date</u>	<u>Check Amount</u>	<u>Check Register Entry</u>
9/15/06	\$370.22	[claimant] for 8/1 - 8/15 2006 payroll
9/15/06	\$370.22	[claimant] for 8/15 - 8/31 2006 payroll
10/4/06	\$370.22	[claimant] for 9/1 - 9/15 06
10/5/06	\$370.22	[claimant] for 9/15 - 9/30 06

The check register pages also show one 9/15/06 and two 10/5/06 \$370.22 checks to the other high school student who taught the children's classes.

Santamaria testified that the \$370.22 checks were for gross wages of \$450.00 for 30 hours' work at \$15.00 per hour. While she sometimes paid wages late due to lack of funds, claimant was ultimately paid in full for all hours worked. He never worked more than three hours in a day, and on some days for which he claimed payment, he did not work at all. For example, the typewritten "bill" attached to the September 30, 2007 claim listed "9/17/06 BlackBeltWorkOUT 11AM-2PM" as one of the post-August dates which "were not compensated for either," yet the black belt workout class was not taught by claimant but by Bertelle.

*Testimony of Troy Bouton, David Korcz and Ralph Bertelle*

Bouton, the school's program director, worked full-time at the school during the relevant time period, on weekdays usually beginning about 10:00 a.m. with office work, including "a short meeting around 4:30" for afternoon instructors who taught 45-minute classes at 5:00 and 6:00 p.m., and ending with a class Bouton taught until 7:00 p.m. Bouton also taught classes on Saturday mornings. From August 14 to 18, 2006, Bouton also ran a karate school camp. Claimant did not work at this camp. Bouton filled in time cards when he started and stopped work each day, which Santamaria collected at the end of the week. Bouton knew claimant as a

part-time teacher of children's classes who sometimes also attended adult classes taught by Bertelle, but only as a student. Claimant's only work at the school was teaching, or participating in teaching, 45-minute 5:00 and 6:00 p.m. classes, which he did Monday through Thursday, not working more than three hours a day. Claimant worked the same hours as the other high school student who taught the children's classes. Bouton, whose office was centrally located in the karate school, with a door he kept open, never saw claimant performing any work other than teaching classes. There were a few days, probably no more than five, when Bouton saw claimant in the parking lot when Bouton arrived at work. Santamaria told Bouton that claimant's "parents really don't want him home by himself, so we are going to help him out."

Bertelle, the head instructor at the karate school, testified that in August and September 2006 he taught Monday through Thursday from 6:45 p.m. to 9:30 p.m. and Saturday from 8:45 a.m. to 1:00 p.m., in addition to eight black belt workouts that he taught on eight different Sundays including the one on September 17, 2006 in which claimant was a student, not a teacher or assistant. Bertelle is the only instructor who teaches the black belt classes. Bertelle testified that claimant was never working during the days and times when Bertelle was at the school, except for one class on Mondays at 6:45 p.m. Korcz, the school's outside accountant and also a student there for many years, testified that in September 2006 he was a student in the black belt workout class taught by Bertelle; claimant was not an instructor in that class.

### Respondent's Evidence

#### *Testimony of Claimant*

Claimant testified that after many years as a student, he became a karate school employee "around the fall" of 2005 after completing a 100 hour unpaid internship. Claimant's wage was \$15.00 per hour and his work initially was "mainly" running classes, including "sometimes" teaching adults as well as children.

During the summer of 2006, claimant worked more hours because he was not in school and had more free time. "I would come in in the mornings, and I would do a whole array of things ranging from fixing air conditioners and heating units, building shelving units" once spackling ceiling molding, – things "I wasn't experienced in, but I was doing." According to claimant, "I was the only one coming in doing these kinds of jobs." Santamaria "didn't want to have a high payroll during the summer. She picked me, I was going to be the one to do all the multiple different jobs." Only if there was a big job, such as building "a huge shelf unit," would an individual by the name Shaun Gross help him. Claimant does not remember if he was still doing odd jobs in addition to teaching in September or October 2006, but stated, "I might have been." Claimant never saw Bouton during the day, and believes that Bouton started working at the karate school as a paid employee in September 2006, but could have been there two months before claimant's employment ended.

Claimant testified that during August 2006, "I probably started teaching around 2 something, maybe 3. Everything before that would be like building shelving units, fixing air conditioning units." At another point, he testified that he no longer recalls the times of classes he taught, but "I feel like I started much earlier" than 5:00 p.m., and that he is claiming unpaid time for a combination of odd jobs as well as teaching. Claimant did not teach on Saturdays during August 2006, and only occasionally helped out with parties on Saturdays during that month.

While claimant does not recall his specific hours, if his claim reflects hours “I definitely worked them.” Claimant took, but never assisted in teaching Bertelle’s classes, and does not recall who taught the specific black belt workout class included in the bill attached to the claim.

Claimant testified that during August 2006, he kept a contemporaneous written record of the hours he worked. While he no longer has his handwritten notes, his mother typed them on claimant’s father’s stationery and attached them to a November 1, 2006 letter to petitioners’ then attorney. The typewritten list, which is an attachment to his claim, indicates that claimant worked the following hours in August 2006:

<b>Days</b>	<b>Dates</b>	<b>Hours</b>
Tues - Friday	8/1 – 8/4/06	10:00 a.m. – 6:45 p.m.
Saturday	8/5/06	8:00 a.m. – 11:00 a.m. & 5:00 – 7:00 p.m.
Monday	8/7/06	10:00 a.m. – 7:30 p.m.
Tues – Thurs	8/8 – 8/10/06	10:00 a.m. – 6:45 p.m.
Friday	8/11/06	10:00 a.m. – 6:00 p.m.
Saturday	8/12/06	8:00 a.m. – 11:00 a.m.
Monday	8/14/06	10:00 a.m. – 7:30 p.m.
Tuesday	8/15/06	10:00 a.m. – 6:45 p.m.
Weds - Thurs	8/16- 8/17/06	3:00 – 6:45 p.m.
Friday	8/18/06	10:00 a.m. – 6:00 p.m.
Saturday	8/19/06	8:00 a.m. – 11:00 a.m.
Thursday	8/24/06	4:00 p.m. – 6:45 p.m.
Monday	8/28/05	10:00 a.m. – 7:30 p.m.
Tuesday	8/29/06	10:00 a.m. – 6:45 p.m.
Weds - Thurs	8/30 – 8/31/06	4:00 p.m. – 6:45 p.m.
Sunday	9/17/06	11:00 a.m. – 2:00 p.m. (Black Belt Workout)
Tuesday	10/3/06	4:00 p.m. – 6:45 p.m.
Wednesday	10/4/06	4:00 p.m. – 7:30 p.m.

Claimant testified that his work hours during the school year were 4:00 p.m. to 7:30 p.m., as was also stated in the claim his mother filed on his behalf:

“I usually do about three classes, so the first class is probably . . . five to six year olds, so that would be 4:00 to 4:45. The next class would be seven to eight year olds, that would be like 5:00 to 5:45, and then there would be another class. So I am usually running about three classes or so, they usually run back to back, usually ranging from around 45 minutes, a little bit longer.”

Claimant offered into evidence a handwritten list of hours he worked in September and October 2006 (which he testified was kept contemporaneously) indicating that he worked the following hours:

<b>Days</b>	<b>Dates</b>	<b>Hours</b>
Friday	9/1/06	10:00 a.m. – 7:00 p.m.
Monday	9/4/06	10:00 a.m. – 7:00 p.m. (Labor Day)
Tuesday	9/5/06	10:00 a.m. – 7:00 p.m.
Wed – Thurs	9/6 – 9/7/06	3:00 p.m. – 9:00 p.m.
Friday	9/8/06	4:00 p.m. – 7:00 p.m.
Mon – Thurs	9/11 – 9/14/06	3:00 p.m. – 9:00 p.m.
Friday	9/15/06	4:00 p.m. – 7:00 p.m.
Mon – Thurs	9/18 – 9/21/06	3:00 p.m. – 9:00 p.m.
Friday	9/22/06	4:00 p.m. – 7:00 p.m.
Mon – Thurs	9/25 – 9/28/06	3:00 p.m. – 9:00 p.m.
Friday	9/29/06	4:00 p.m. – 7:00 p.m.
Mon - Tues	10/2 – 10/3/06	3:00 p.m. – 9:00 p.m.
Wednesday	10/4/06	3:00 p.m. – 6:30 p.m.

Claimant testified his mother later retyped this list and sent it to DOL during the investigation. The retyped version includes an additional six hours for a Black Belt WorkOUT on September 23 from 10:00 a.m. to 5:00 p.m. that did not appear on his handwritten notes. Neither the handwritten nor retyped list of September and October hours includes the September 17 three-hour Black Belt WorkOUT listed in the August bill. While the August bill did not indicate that claimant worked on October 2, both the handwritten and the retyped September-October bills list him working 6 hours on October 2 from 3:00 p.m. to 9:00 p.m. With regard to October 3, the August bill lists claimant working 2.75 hours from 4:00 p.m. to 6:45 p.m. but the September and October handwritten and retyped lists indicate that he worked 6 hours from 3:00 p.m. to 9:00 p.m. With regard to October 4, the August bill lists claimant working 3.5 hours from 4:00 p.m. to 7:30 p.m. while the September-October handwritten and retyped lists indicate that he worked from 3:00 p.m. to 6:30 p.m. When asked about these discrepancies during cross-examination, claimant could not remember why they occurred.

During the first day of hearing, claimant recalled filling out time cards when he started and left work each day. The time cards were kept “in an instructor area when you entered the school” and claimant believes someone took the time cards at the end of each week. Claimant kept his own record of his hours to make sure he was properly paid. At another point during the first day of hearing, he was asked by DOL counsel how Santamaria kept track of his time. Claimant testified each instructor had a time card where they would input their hours when they arrived and when they left the karate school. During the second day of hearing, claimant testified he “[p]robably” listed hours he spent working on odd jobs on the daily time cards he filled in for Santamaria, and “usually” filled in the handwritten record he kept for himself either each day he worked or the next day.

On the third day of hearing, claimant was asked again if he listed hours spent on odd jobs on the daily time cards he filled in for Santamaria, and testified: “to be honest, I don’t remember time cards. I don’t even think we had. I remember I kept my own records.” On cross-examination during the third day of hearing, claimant reiterated that he did not remember Santamaria having time cards:

“Q: And the only time card that you are aware of that was ever kept was that handwritten note that you made?”

A: I don’t remember any from her side. I just remember doing this because I remember there was some kind of discrepancy.

Q: So in order to get paid for the time you would get paid for, who compiled the records for your hours?

A: I don’t remember. I remember Mrs. Santamaria had all the records.”

When claimant received the two September 15, 2006 checks each for \$370.22 for his work in August 2006, he told Santamaria that “I don’t think these are right, and that’s when I was told that I’ll look into it, the money might be tight right now, we’ll figure it out.” Although he was often paid as much as a month late, claimant could not recall any other time when he was not ultimately paid in full.

Claimant testified that he was told not to come back to work “in the middle of one of the days,” he believes October 4, 2006, and met with Santamaria and his parents two or three days later.

According to claimant, he was charged with breaking and entering the karate school, took a plea disposition as a result of which he or his parents paid restitution, was put on probation for “like a year or something,” performed community service for more than 100 hours, and obtained sealing of his record based on youthful offender status, but never actually broke into the school or stole property. “I actually had a key that was given to me by Ms. Santamaria and I had gear and equipment that was not from the school . . . so I was coming in to get it. I unlocked the door, got my equipment, and locked the door.”

#### *Testimony of Claimant’s Mother*

Claimant’s mother, as well as claimant, took classes at the school, where, as a student, she “was present most of the time.” Claimant’s employment ended sometime “after the beginning of September and . . . before the Jewish holidays,” when Santamaria asked claimant’s mother “to check out why my son had an altercation with another young man.” The day after Santamaria spoke with claimant’s mother, Santamaria met with claimant and both of his parents, and asked claimant not to discuss what was mentioned during their meeting, and not to have any relationship with the girl. Santamaria gave claimant a week or ten days to consider his decision, and “they never spoke again.”

Soon after this meeting, claimant’s mother telephoned Santamaria to “inform her I would no longer be coming back because of the treatment to my son and I expected her to reimburse him for all the funds that he had worked hard for her, painting and all the other things he had done.” Claimant’s mother “always knew there were outstanding wages,” because in the past Santamaria had often said she did not have enough money to pay wages on time but would “pay him everything eventually.” Claimant’s mother advised her son to hold onto his check stubs “so he can check them to see later on because I didn’t trust her.” She also advised him to keep track

of the hours he worked; "I would say sit down on Sunday and he would sit down and he would write September and he would keep track." She also testified that claimant's practice, at her direction, was to write down the hours he worked "within a couple of days." She saw claimant's handwritten record of his work hours for August 2006, but does not know where it is now.

Within a week of claimant's discharge, "we sat down and we wrote up all the hours that he had worked . . . because we figured this way if she started to send checks in we can check it off accordingly." On October 19, 2006, petitioners' then attorney James McElhone sent claimant and his mother letters threatening to sue them for, among other things, harassing school students and families and soliciting karate school students to attend other karate schools. Claimant's mother testified that when she showed her then attorney, Robert A. Braun, the October 19, 2006 letters, Braun "told me what to do," including preparing the typewritten bill on claimant's father's stationery, which Braun enclosed with his November 1, 2006 letter denying the allegations and stating that claimant is entitled to unpaid wages for a total of 159.25 hours. Claimant originally wrote out his hours for the November 1, 2006 bill, but claimant's mother "told him that . . . nobody could read your handwriting" and typed the bill, which states that claimant was not paid for 22 days in August, September 17, and October 3 and 4, 2006.

Claimant's mother testified that Braun also told her to file the claim with the DOL. She, not her son, filled out and signed the October 30, 2007 claim "because he was still a minor, I didn't know if he could,"<sup>2</sup> but claimant "sat with me while I filled it out." On September 25, 2008, claimant's mother sent DOL a letter listing claimant's hours for an additional 21 days in September and October 2, 3 and 4, 2006 after "[claimant] handwrote his hours in response to what Donna [Griffith-Jones, a DOL investigator] had asked for." The handwritten list of hours for September and October 2006 identified by claimant was "the slop he gave me and I decided to put it into typing so people could read it."

#### *Testimony of Supervising Labor Standards Investigator Frank King*

At the time of the investigation, Supervising Labor Standards Investigator Frank King (SLSI King), was a Senior Labor Standards Investigator in the DOL's Garden City office who oversaw the investigation in this matter. On June 12, 2008, Labor Standards Investigator Griffith-Jones visited the karate school and met with Santamaria and requested that she produce payroll records. Santamaria was given a Notice of Revisit stating that LSI Griffith-Jones would return on June 19, 2008, and that petitioners make available for inspection payroll records of employees' hours worked and wages received, including daily start/stop times, total weekly hours, and amounts paid for the period January 1, 2005 to December 31, 2006. Because petitioners did not provide the requested payroll records, on December 8, 2008, DOL issued petitioners with a Notice of Labor Law Violation which included a Recapitulation Sheet-Preliminary Report finding that petitioners owed claimant \$2,988.75 in unpaid wages and overtime. A chart attached to the Recapitulation Sheet indicates that claimant worked 33 hours, 46.25 hours, 35.25 hours, 5.75 hours, 22.75 hours, and 6.25 hours for the weeks ending August 4, August 11, August 18, August 25, September 1, and October 6, respectively. This document indicates that no wages were paid during any of the six weeks listed, and that claimant was owed a total of \$2,285.63 in wages, was paid \$1,800.00 and a balance of \$485.63 remained. When asked where the \$1,800.00 amount came from, SLSI King stated: "my guess is this amount was

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<sup>2</sup> Claimant was 18 years old when his mother filed the claim.

disclosed to the investigator by the employer in regards to what has been paid and satisfied.” According to SLSI King, an additional \$600.00 was added to the \$2,285.63 to account for 100 hours that claimant worked prior to his becoming a paid employee. This amount was based on the minimum wage of \$6.00 per hour for 100 hours of work.

SLSI King testified that petitioners contended that the claimant stole records from her premises, and that she had no way of successfully contesting these allegations. Santamaria did, however, provide copies of cancelled checks and some quarterly payroll records to DOL. Daily and weekly hours were not kept by petitioners, and some wage statements indicated a \$15.00 per hour wage rate, and some reflected no wage rate. The DOL suspended the investigation due to the ongoing criminal matter, and subsequently resumed the investigation after documentation was received that the criminal matter was resolved.

SLSI King recommended a 50% civil penalty based on the size of the firm, the fact that there were no prior violations, and the fact that the records provided by petitioners were not sufficient to refute the claim.

### **STANDARD OF REVIEW AND BURDEN OF PROOF**

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

A petition filed with the Board that challenges the validity or reasonableness of an order issued by the Commissioner must state “in what respects [the order on review] is claimed to be invalid or unreasonable” (Labor Law § 101 [2]). The petitioner has the burden at the hearing of proving that the Commissioner’s order under review is invalid or unreasonable (Board Rules of Procedure and Practice [Board Rule] 65.30 at 12 NYCRR 65.30 [“The burden of proof of every allegation in a proceeding shall be upon the person asserting it”]; State Administrative Procedure Act § 306; *Matter of Angello v Natl. Fin. Corp.*, 1 AD 3d 850, 854 [3d Dept 2003]). It is therefore petitioners’ burden to prove by a preponderance of the evidence that the wages awarded in the order under review are not due and owing. It is also petitioners’ burden to prove by a preponderance of evidence that the civil penalties ordered were invalid or unreasonable.

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

The Board makes the following findings of fact and conclusions of law pursuant to the provisions of Board Rule 65.39 (12 NYCRR 65.39). We find that the petitioner met her burden of proof to show that claimant is owed no money for the period August 1 through September 30, 2006, and we affirm the wage order only insofar as to nine hours claimant worked from October 2-4, 2006. We modify the order and reduce the wages owed accordingly to \$135.00.

### Burden of Proof in the Absence of Adequate Employer Records

An employer's obligation to keep records is found in Labor Law §§ 195 and 661 and the Minimum Wage Order for Miscellaneous Industries and Occupations (12 NYCRR Part 142). 12 NYCRR 142-2.6 provides that an employer must maintain and preserve for a period of six years, weekly payroll records showing, among other things, the employee's wage rate, daily and weekly hours worked, gross wages, deductions, any allowances claimed as part of the minimum wage, and net wages. Upon request of the Commissioner, the employer is required to make the records available at the place of employment. This required recordkeeping provides proof to the employer, the employee, and the Commissioner that the employee has been properly paid.

Petitioners argued that their failure to produce records should be excused because claimant stole the box containing time cards. While we credit Santamaria's testimony that she maintained time cards, the fact that claimant was videotaped taking boxes from the school in August and September 2008, and that she reported two earlier break-ins to the police, does not conclusively prove that claimant also stole a box of documents which Santamaria stated she found missing from the school basement two months earlier, in June 2008. Santamaria's testimony that when she could not find the box at the karate school, "I thought I had it at home" and unsuccessfully looked there, suggests that she herself was not sure either. We find no basis to depart from the rule that when an employer lacks required records "its failure in providing that information, regardless of the reason therefor, should not shift the burden to the employees" (*Matter of Angello v Natl. Fin. Corp.*, 1 AD 3d 850, 854 [3d Dept 2003]).

### The Petitioner Met Her Burden of Proof

Petitioners' failure to provide required payroll records placed on them the burden of showing the Commissioner's wage order to be invalid or unreasonable through proof of the specific hours that claimant worked and that he was properly paid for these hours, or other evidence that shows the Commissioner's findings to be invalid or unreasonable (*Matter of Julianne W. Beckerman*, PR 14-088 [June 10, 2015]; *Matter of Ram Hotels, Inc.*, PR 08-078 [October 11, 2011]; *Matter of Kong Ming Lee, Fee Yin Lee and Blue Butterfly Fashion, Inc.*, PR 10-293, p 15-16 [April 10, 2014]). The respondent argues that having failed to provide adequate payroll records, petitioners did not meet their burden of proving the daily and weekly hours worked by claimant during relevant period, and therefore, the only information that could be used to determine the number of hours per week was the information provided by claimant and his mother. We do not agree. We find that although Santamaria did not maintain legally required records, she met her burden – to show that claimant was paid for all hours worked in August and September 2006-- through other evidence – including the credible and consistent testimony of Santamaria and Bouton regarding claimant's duties, hours of work, and wages, the August 2006 calendar and newsletters, and Santamaria's reconstruction of hours – which we find to be the best available evidence in this case (*See Matter of Julianne W. Beckerman*, PR 14-088 [July 22, 2015]; *Matter of Marvin Milich*, PR 10-145 [June 12, 2013]; *Matter of Pamela Blum*, PR 08-111 [December 14, 2009]). We give no credence to claimant's shifting, contradictory, and evasive accounts of his hours and duties, and find that the record contains no credible evidence that he ever worked more than the 15 hours per week that Santamaria credibly testified he was paid.

We find however, that there is no evidence in the record that claimant was paid for his work in October 2006, nor did Santamaria provide evidence of the hours that he worked then.

She testified that claimant was suspended during the first week of October, but could not remember the date and did not have any records or cancelled checks for this time period. Claimant testified that his last day of work was Wednesday, when he taught his demo class.<sup>3</sup> We find that claimant worked three hours each day from October 2-4, 2006, and we modify the wages owed to \$135.00 (9 hours x \$15.00 = \$135.00).

#### Claimant was Not Credible

Claimant's contention that he was, essentially, a full-time handyman during August 2006 is implausible. Other than claimant's own testimony, there is no evidence that he ever performed any non-teaching work for the karate school. No witness, including Bouton who worked full-time, recalled seeing claimant perform such work even once. On the contrary, the claim filed listed claimant's "normal payday" as "4 pm – 7:30 pm." While claimant testified this could have referred to his pre-summer hours, the claim was for the period starting August 1. The attachment to the claim and his mother's September 25, 2008 letter to DOL during the investigation, indicate that claimant began work at 10:00 a.m. on fourteen days during August 2006 - August 1, 2, 3, 4, 7, 8, 9, 10, 11, 14, 15, 18, 28, and 29, and three days during September 2006 - September 1, 4, and 5. Thus, the overwhelming bulk of unpaid hours claimed during August and the first week of September 2006 pertain to "odd jobs" allegedly performed by claimant, not to teaching time, which he testified he did in the afternoons.

We do not credit claimant's testimony that as an unskilled and admittedly inexperienced 17 year old teenager, he was hired to perform repairs on heating and air conditioning units, build large shelving units, spackle moldings, or paint an 8,600 square foot building valued over one million dollars. We credit Santamaria and Bouton's testimony that claimant never performed work other than teaching at the karate school.

We find that claimant gave shifting and inconsistent accounts of his August teaching hours, initially testifying that he "probably started teaching around 2 something, maybe 3. Everything before that would be like building shelving units, fixing air conditioning units," then later testifying that he no longer recalled the times of classes but "I feel like I started much earlier than 5." We credit Santamaria's testimony that in August 2006, claimant's first class began at 5:00 p.m., and he taught three classes on Monday, and two classes on Tuesday, Wednesday and Thursday respectively.

While claimant testified that he did not teach on Saturdays during August 2006, the attachment to his claim form indicates that he worked from 8:00 a.m. to 11:00 a.m. on Saturdays August 5, 12, and 19, and an additional two hours on August 5. This inconsistency further undermines claimant's credibility. We credit Santamaria and Bouton's testimony, the August 2006 karate school calendar and newsletters, and Santamaria's reconstruction of the hours worked by her employees during August 2006.

Claimant, likewise, gave shifting and inconsistent accounts of the hours that he worked during the school year. While his claim stated his normal hours were 4:00 p.m. to 7:30 p.m., claimant initially testified "[m]y class that I was taking ended usually around 7:30 or so, so it was 2:30 to 7:30 when it was a school day, give or take." He subsequently testified that he taught

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<sup>3</sup> We take notice that October 4, 2006 was a Wednesday.

three 45-minute classes back to back on Mondays through Fridays from 4:00 p.m. to 7:30 p.m., and generally did not work Saturdays. Yet the handwritten list of September and October hours that he entered into evidence at the hearing, as well as the list of hours in claimant's mother's September 28, 2008 letter to DOL, indicate that beginning Wednesday, September 6, claimant worked six hours per day Mondays through Thursdays from 3:00 p.m. to 9:00 p.m., and three hours on Fridays. When asked if those were actually his hours, he testified, "If I wrote it, I must have worked it." At no point in his testimony, however, did he testify that he ever worked past 7:30 p.m. Claimant's shifting, inconsistent and contradictory accounts of his work hours undermine his credibility.

Both claimant's handwritten list of September hours and his mother's September 25, 2008 letter to DOL indicate that claimant worked on Fridays from 4:00 p.m. to 7:00 p.m., but not on Saturdays during the school year. Santamaria, on the other hand consistently testified that during the school year, claimant did not work on Friday nights, but did work from 8:00 a.m. to 11:00 a.m. on Saturdays. While it is not clear from the record whether the claimant actually worked the three hours on Friday night or Saturday morning, we credit Santamaria's testimony that claimant worked three hours per day, five days per week (Monday through Thursday and either Friday or Saturday), and was paid for a total of 15 hours per week during the school year.

Claimant's and his mother's contention that hours listed in the attachment to the claim and in her subsequent September 25, 2008 letter to DOL derive from a contemporaneous record of hours which claimant kept during his employment has no credibility. No such contemporaneous record was produced at the hearing. Claimant's mother testified that she saw such a record for August 2006 but does not know where it is now, but also that "we wrote up all the hours" shortly *after* claimant was fired. Similarly, the handwritten list of hours worked in September and October 2006 which claimant implied was a contemporaneous record was in reality apparently created later: claimant's mother described it as what he "handwrote . . . in response to" a DOL investigator's request in 2008.

The conclusion that claimant did not keep a contemporaneous record of hours is buttressed by the fact that the two lists of hours claimant's mother provided to the DOL, contradict each other. A three-hour September 17, 2006 Black Belt WorkOUT appears on the letter attached to the claim form but not in her 2008 letter to DOL. October 2, 2006 appears in the second letter but not in the letter attached to the claim, and the two list different hours for October 3 and October 4, 2006. Likewise, claimant's handwritten notes do not contain an entry for a seven-hour Black Belt WorkOUT September 23, 2006. We credit the testimony of several witnesses that Black Belt WorkOUTs were taught by Bertelle, not claimant.

Claimant's credibility is further undermined by his shifting testimony concerning petitioners' time cards, as well as his vagueness about and professed inability to recall even basic details of his claim. Claimant testified at the first hearing that he recalled filling out time cards "in an instructor area where you entered the school" and that someone took them every week; at the second hearing that he "[p]robably" listed hours he spent on "odd jobs" on the cards; and at the third that "to be honest, I don't remember time cards. I don't even think we had. I remember I kept my own records."

We give no credence to claimant's testimony that Santamaria provided him with a key to the karate school, and that he entered the building in 2008 merely to retrieve his own property

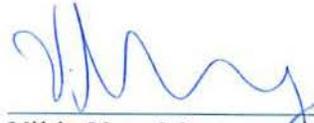
and did nothing wrong. We credit Santamaria's testimony that she did not give claimant a key to the building, which is corroborated by her and Bouton's testimony that claimant was dropped off in the morning and had to wait outside the karate school for Santamaria to arrive and let him in.

The Civil Penalty in the Wage Order is Affirmed

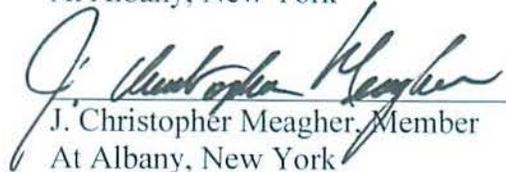
The wage order assesses a 50% civil penalty against the petitioners. The Board finds that the considerations the Commissioner was required to make in connection with the imposition of the civil penalty were reasonable and valid in all respects.

**NOW THEREFORE, IT IS HEREBY RESOLVED THAT:**

1. The wage order is modified to reduce the wages owed to \$135.00; the DOL is directed to recalculate the civil penalty and interest owed; and as so modified, the order is affirmed; and
2. The petition for review is granted to the extent set forth above, and is otherwise denied.



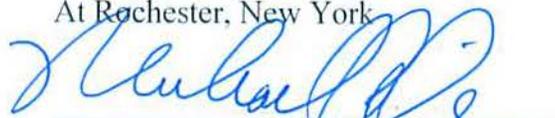
Vilda Vera Mayuga, Chairperson  
At Albany, New York



J. Christopher Meagher, Member  
At Albany, New York

Absent

LaMarr J. Jackson, Member  
At Rochester, New York



Michael A. Arcuri, Member  
At Albany, New York

Dated and signed by the Members  
of the Industrial Board of Appeals  
on October 28, 2015.