STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of: ASHRAF ELGHARIB AND CD BROADWAY FOOD CORP. (T/A ASSOCIATED SUPERMARKET), Petitioners, To Review Under Section 101 of the Labor Law: Two Orders to Comply with Article 6 of the Labor Law, an Order to Comply with Article 19 of the Labor Law, and an Order Under Articles 6, 7, and 19 of the Labor Law, all dated January 24, 2011, - against - THE COMMISSIONER OF LABOR, Respondent.	DOCKET NO. PR 11-086 RESOLUTION OF DECISION

APPEARANCES

Edwards Angell Palmer & Dodge LLP (Rory J. McEvoy and Julie L. Sauer of counsel), for petitioners.

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

WITNESSES

Hector Jimemec, Jonnie Moronta, Ramanos Chidraoui, Ashraf Elgharib, for petitioners.

Pedro Rodriguez, Raul Vasquez, Lucia Fidema Melgarejo, Irineo Lopez, Diomede Ynoa, Berta Gonzalez, Valentin Enriquez, and Nancy Gao, Supervising Labor Standards Investigator, for respondent.

WHEREAS:

The petition in this matter was filed with the Industrial Board of Appeals (Board) on March 24, 2011, and seeks review of four orders issued by the Commissioner of Labor (Commissioner or respondent) against petitioners Ashraf Elgharib and CD Broadway Food Corp. (T/A Associated Supermarket) on January 24, 2011. The respondent filed an answer on June 2, 2011.

Upon notice to the parties a hearing was held in this matter on August 14 and 15, 2013, in New York, New York, before Anne P. Stevason, then Chairperson of the Board, and the designated Hearing Officer in this proceeding. Each party was afforded a full opportunity to present documentary evidence, to examine and cross-examine witnesses, make statements relevant to the issues, and file legal briefs.

The first order to comply with Article 6 (wage order) under review directs compliance with Article 6 and payment to the Commissioner for wages due and owing to three known claimants in the amount of $6,076.23 for the time period from June 3, 2006 to June 5, 2010, with interest continuing thereon at the rate of 16% calculated to the date of the order, in the amount of $497.94, and assesses a civil penalty in the amount of $6,076.23 and liquidated damages in the amount of $389.66, for a total amount due of $13,040.06.

The second order to comply with Article 6 (unlawful deductions order) under review directs compliance with Article 6 and payment to the Commissioner for unlawful deductions made from the wages of seven known and six unknown claimants in the amount of $1,040.00 for the time period from June 5, 2004 to September 25, 2010, with interest continuing thereon at the rate of 16% calculated to the date of the order, in the amount of $96.88, and assesses a civil penalty in the amount of $1,040.00, for a total amount due of $2,176.88.

The order to comply with Article 19 (minimum wage order) under review directs compliance with Article 19 and payment to the Commissioner for minimum wages due and owing to twelve known and six unknown claimants in the amount of $1,230,222.23 for the time period from June 5, 2004 to September 25, 2010, with interest continuing thereon at the rate of 16% calculated to the date of the order, in the amount of $153,716.82, and assesses a civil penalty in the amount of $1,230,222.23 and liquidated damages in the amount of $307,555.59, for a total amount due of $2,921,716.87.

The order under Articles 6, 7, and 19 (penalty order) assesses a $1,000.00 civil penalty against the petitioners for violating Labor Law § 193 by making prohibited deductions from the wages of employees from on or about June 5, 2004 through September 18, 2010; a $1,000.00 civil penalty for violating Labor Law § 661 and 12 NYCRR § 142-2.6 by failing to keep and/or furnish true and accurate payroll records for each employee from on or about June 5, 2004 through September 18, 2010; a $10,000.00 civil penalty for violating Labor Law § 215 by discharging Diomede Ynoa on or about July 17, 2010, after being apprised that claims/complaints had been lodged with the respondent; and a $1,000.00 civil penalty for violating Labor Law § 661 and 12 NYCRR § 142-2.7 by failing to give each employee a complete wage statement with each payment of wages from on or about June 5, 2004 through September 18, 2010.

The petitioners allege the orders are invalid for the following reasons: the Department of Labor (DOL) failed to set forth any evidence that the six unidentified individuals ever worked for the petitioners; DOL failed to provide a reasonable explanation of how their unpaid wages were calculated; the orders were inaccurate in that they provided for wages for individuals for periods that those individuals did not work for petitioners; all individuals that were owed wages by petitioners were paid those wages; the workers who were alleged to have been employed [as baggers] by petitioners were in fact never employed by petitioners and therefore petitioners possess no records of their employment; the Commissioner's orders are inconsistent; the

Commissioner improperly imposed liquidated damages upon the petitioners; the civil penalties assessed were excessive, unreasonable and improper; and the Commissioner failed and refused to timely comply with a Freedom of Information Law request.

EVIDENCE

A. Petitioners' Evidence

Petitioner Ashraf Elgharib testified that he is the owner of Associated Supermarket, which employed 20 to 24 workers between 2004 and 2010, and operates five check-out lines. Elgharib stated that when an employee is hired, they must complete a W-4 form. Elgharib testified that Associated has no employees whose job consists solely of bagging groceries. Elgharib explained that Associated has one employee to make deliveries, and that such deliveries are made by van. Elgharib admitted that he did not keep accurate records of his employees.

Hector Jimemec testified that during the relevant time period he was the "front manager" at Associated Supermarket, and that his duties included supervising the cashiers. He worked Sunday through Thursday from 10:00 a.m. to 6:00 p.m. He explained that the supermarket's employees worked in groceries, dairy, produce, meat, security, or as cashiers. Jimemec testified that he knew all the cashiers as well as Associated's other employees. Jimemec testified that he did not know Berta Gonzalez and that she was never employed by the petitioners. Jimemec testified that Pedro Rodriguez and Diomede Ynoa sold "poison for cockroaches" outside the store and had a "little cart and when the customers came outside, they asked them if they could take groceries for them." Jimemec explained that he did not ask them to make deliveries for Associated's customers and did not provide them with a cart. Jimemec further explained that Rodriguez and Ynoa did not bag groceries inside Associated. Additionally, Jimemec testified that Ynoa is absent from the United States for six months every year.

Jimemec testified that Lucia Melgarejo was a customer and did not work at Associated, and that she is the "god mother of [Jimemec's] friend." According to Jimemec, Melgarejo told him she made a claim against Associated because another claimant, Irineo Lopez, "called her and said that they were going to get a lot of money that way."

Jimemec testified that Raul Vasquez is the "cousin of one of [Jimemec's] friends." Jimemec testified that Vasquez never worked at Associated and that Vasquez was not in the United States prior to 2011.

Jimemec testified that Valentin Montes (a/k/a Enriquez) worked at Associated for "some weeks" in 2010 "fix[ing] up cartons in the basement." Montes was fired because "he didn't know his job, he can't hear." Jimemec also testified that Irineo Lopez worked at the supermarket for a few weeks in 2010, and was terminated because "he wanted to fight with the co-manager."

Jimemec testified that Rene Rojas worked at Associated as a security guard. According to Jimemec, Rojas left employment at Associated in 2001.

Jonnie Moronta testified that he is the grocery manager at Associated, and held that position during the time period covered by the orders. He works Monday through Saturday from

7:00 a.m. to 3:00 p.m. supervising the grocery department. Moronta testified that he does not know Joaquin Marin or Franco Uraga, and that neither of them worked in the grocery department during the relevant time period. Moronta testified that Valentin Montes and Irineo Lopez only worked at Associated for a few weeks.

Ramanos Chidraoui testified that he is an accountant who owns an accounting firm that provided accounting services to the petitioners from 2004 to 2010. Chidraoui testified that he prepared weekly payroll, and quarterly and annual taxes for the petitioners based on information provided by Elgharib. Chidraoui testified that he is familiar with New York wage and hour laws and recordkeeping requirements, and advised Elgharib that he was required to maintain daily records. Chidraoui never asked Elgharib to see the daily records, and never saw any reports containing daily hours worked by the petitioners' employees. Chidraoui testified that Elgharib provided him with the total hours worked for the employees, and he calculated the wages based on the information provided.

B. Respondent's Evidence

Seven claimants filed claims with DOL alleging they were employed by the petitioners and not properly paid for work performed. Six claimants (Pedro Rodriguez, Diomede Ynoa, Irineo Lopez, Berta Gonzales, Raul Vazquez, and Lucia Fidema Melgarejo) testified that they worked as baggers for the petitioners and made deliveries. The baggers all testified the petitioners did not pay them wages, and they worked only for tips from the petitioners' customers, while working 45 to 94 ½ hours per week. Rene Rojas is the only claimant who did not testify. His claim form states that he worked as security for the petitioners for 66 hours per week at $6.75 an hour for the period November 15, 2004 to December 31, 2006 and $7.15 an hour for the period January 1, 2007 to December 31, 2008, with no overtime pay. Several other workers were interviewed by DOL investigators at the store. Joaquin Marin informed DOL investigators he stocked shelves for 54 hours a week at $500.00 a week. His interview form is blank where a meal break should be indicated. Franco Uraga informed DOL investigators he worked 60 hours a week as a "grocer" for $500.00 a week. His interview form is also blank where a meal break should be indicated.

Supervising Labor Standards Investigator Nancy Gao testified that at the time of the respondent's investigation of the petitioners, she was a Senior Labor Standards Investigator (SLSI) assigned to the investigation. She testified that she was present at the initial visit to the store to interview workers, and that an investigator no longer working in the Division of Labor Standards, Tiffany Infantes, conducted the investigation. Infantes determined the amount of wages due to the claimants based on the claim forms and interviews and prepared a "recap sheet" showing her findings in the form of a spreadsheet containing, among other things, the hours each claimant alleged he or she worked per week, the wages paid, and the wages owed. Tip credits and spread of hours wages were included where applicable. Gao testified that she supervised and reviewed the calculations made by Infantes.

Gao testified that she recommended imposition of a 100% civil penalty in this case because:

> "the employer knows about the requirements that the individual has to be paid time and a half; employer has to get some

> documents to the investigator showing that the overtime was paid at time [and] a half. However, there were many people being paid set salary and no overtime compensation, there were also baggers who were receiving nothing except tips from customers. Considering that the employer knew about the Labor Law requirement and he still did not take proper action to pay the workers, we feel that 100% civil penalty is needed."

Gao also testified that the respondent also considered the size of the business and the good faith of the employer when determining the penalty assessed to the petitioners. Additionally with respect to the calculations of wages for the unknown baggers, Gao testified:

> "We decided that we should compute the underpayment for six unknown individuals and we are referring to six unknown baggers [included in the minimum wage order] because on initial field visit we see baggers working and the investigator observed there were at least ten baggers who were waiting outside the store waiting to be interviewed. We have statements from baggers . . . that at least 13 baggers working over there so . . . we concluded that at least 10 baggers working on the premises excluding the [four] baggers that we interviewed, there were 6 baggers working there so that's how we computed the underpayment for the 6 unknown baggers . . . . Based on information from the unknown [sic.] baggers, they said there were at least 13 baggers working there and have been working there for about the same time period as they are so we computed for the 6 unknown baggers for about three years and the information, we use the number of hours for [known] employees and the tips that they received and add the average to compute the underpayment to the unknown baggers."

Gao further testified and records indicate that surveillance of the store was conducted by the respondent on September 11, 2010 at around 2:30 p.m. At that time, three baggers were working at the store.

Pedro Rodriguez testified that he was hired in 2007 by petitioners' manager, Hector Jimemec, and delivered groceries purchased by the petitioners' customers, cleaned, and brought things up from the basement. He further testified regarding wages that "[t]hey never paid us; it was through tips that peoples paid us." Additionally, Rodriguez testified that he was required to purchase a cart from petitioners for $80.00 to make deliveries. Rodriguez stated that he worked from 6:00 a.m. until 8:00 p.m. seven days a week, with "maybe nine or ten" days off per year.

Raul Vasquez testified that he worked for the petitioners from June 2, 2009 to August 8, 2013. He found the job through a cousin and was told to start work by Hector Jimemec. He testified that his work consisted of packing and delivering groceries with a cart that he had to purchase from petitioners. Jimemec gave him instructions such as to "pack and take the deliveries." Vasquez testified there were times when he did not want to take a delivery for a certain customer, who, for example, was known not to give tips, but was told to make the

delivery anyway by Jimemec and petitioner Elgharib. Vasquez testified that he worked only for tips and was paid no wages by the petitioners.

Lucia Fidema Melgarejo testified that she was hired in 2006 by Hector Jimemec to work at petitioners' store. Melgarejo testified that she packed groceries and worked for "just tips." She worked six days a week, sometimes seven, from 7:30 a.m. to 7:00 or 7:30 p.m. She testified that there were 15 "packers" working at the store everyday that she worked between 2006 and 2010. Melgarejo testified that she, along with other baggers. were interviewed by a DOL investigator and then fired the next day. She was eventually re-hired.

Irineo Lopez testified that he was hired by Hector Jimemec to work as a grocery bagger and delivery person, and that Jimemec also gave him instructions such as where to bring bags for packing, to clean the floor, and to sweep outside so the store would not get a citation from Sanitation. Lopez testified he was not paid by petitioners but rather worked for tips from customers and made the deliveries using a cart that he was required to purchase from petitioners for $80.00 which he did not get back when he stopped working there.

Diomede Ynoa testified that Ashraf Elgharib's brother hired him to work as a grocery bagger and delivery person. He worked only for tips from customers and the petitioners never paid him wages. He further testified he worked for petitioners for four years making deliveries. Ynoa testified that after DOL came to the supermarket he and a number of others who made deliveries were told by the petitioners they could not work there any longer and there was "no more work."

Berta Gonzalez testified that Hector Jimemec hired her to work as a grocery bagger and delivery person. Gonzalez testified she was not paid by petitioners but rather worked for tips from customers and would make about 170 deliveries per week.

Valentin Enriquez signed a complaint alleging that he worked 14 hours per day (6:00 a.m.-8:00 p.m.), 7 days per week, each and every week, with no breaks, and no time off. The complaint further alleges Enriquez was not paid by the petitioners from 2008 to July 24, 2010, but rather worked for tips from customers. The record also contains copies of pay stubs from Associated to Enriquez reflecting pay of $5.50 per hour for 30 hours of work from July 25, 2010 to July 31, 2010 and pay of $5.85 per hour for 30 hours of work from August 1, 2010 to August 28, 2010 and $5.85 per hour for 15 hours of work from August 29, 2010 to September 4, 2010. Enriquez, however, testified that he never made a complaint to DOL, that he had never seen the 'Minimum Wage/ Overtime Complaint' form he allegedly signed on September 29, 2010, and that he never went to DOL to provide information about the petitioners, although he remembers going somewhere but not telling the people he spoke with anything. Finally, Enriquez testified that he worked for petitioners in 2011-12, for a period not covered by the orders.

ANALYSIS

The Board makes the following findings of fact and conclusions of law pursuant to the provisions of Board Rules of Procedure and Practice (Rules) 65.39 (12 NYCRR § 65.39):

A. Burden of Proof

The petitioners' burden of proof in this matter was to establish by a preponderance of the evidence that the orders issued by the Commissioner are invalid or unreasonable (State Administrative Procedure Act § 306 [1]; Labor Law §§ 101, 103; 12 NYCRR § 65.30).

B. Employer Status

The petitioners argue that not all of the claimants were employees of the petitioners and those that were worked for the petitioners for a shorter period of time than claimed. The term "employer," as used in Articles 6 and 19 of the Labor Law, in relevant part, is defined as, "any individual, [legal entity] or organized group of persons acting as an employer" (Labor Law § 651 [6]; *see also* Labor Law § 190 [3]). The Labor Law defines an "employee" as "any individual employed or permitted to work by an employer in any occupation" (Labor Law § 651 [5]; *see also* Labor Law § 190 [2]). In determining whether the claimants, who alleged to have bagged groceries and made deliveries for petitioners, were actually employees, it is necessary to determine if the claimants were actually employed by the petitioners. Labor Law § 2 [7] defines "employed" as an individual who is "permitted or suffered to work." The federal Fair Labor Standards Act like the Labor Law, defines "employ" to include "suffer or permit to work" (29 USC § 203 [g]).

The test for determining whether an entity or person is an employer under the Labor Law is the same test used for analyzing employer status under the Fair Labor Standards Act (*Matter of Angel Moina et al.* Docket No. PR-10-069 [July 25, 2013], citing *Chu Chung v. The New Silver Palace Rest., Inc.*, 272 F Supp. 2d 314, 319 [SDNY 2003]). The test used for determining an employer's status under the Fair Labor Standards Act, is clearly set forth in *Herman v. RSR Sec. Services Ltd.*, 172 F3d 132, 139 [2d Cir. 1999]. There the Court held:

> "Because the statute defines employer in such broad terms, it offers little guidance on whether a given individual is or is not an employer. In answering that question, the overarching concern is whether the alleged employer possessed the power to control the workers in question with an eye to the 'economic reality' presented by the facts of each case. Under the 'economic reality' test, the relevant factors include whether the alleged employer (1) had the power to hire and fire employees, (2) supervised and controlled employee work schedules or conditions of employment (3) determined the rate and method of payment and (4) maintained employment records" (internal quotations and citations omitted). When applying this test 'no one of the four factors standing alone is dispositive. Instead the 'economic reality' test encompasses the totality of the circumstances, no one of which is exclusive'" (Id. *see also Matter of Moina, Supra*).

The testimony at the hearing clearly indicates that petitioners not only permitted the claimants to make deliveries for customers, but also promoted and utilized it as an added service of their business. Additionally, the claimants were not only making deliveries, but were also

being used by petitioners to bag their customers' groceries, to sweep and clean the premises, and to perform other jobs around the store like bringing bags up from the basement.

In applying the "economic reality" test to the record before us, there is little question that the claimants who bagged groceries and made deliveries for petitioners were their employees. The claimants were hired by, supervised, directed and controlled by the petitioners. Specifically, front manager Hector Jimemec and owner Ashraf Elgharib not only interviewed the claimants to determine if they would be hired to make deliveries for petitioners, but regularly gave them direction and instructions on what to do and how to do it. While petitioners did not actually pay the claimants, although they were legally required to do, they did decide and determine who would be allowed to act as bagger/delivery persons and that the claimants would not be paid wages and work only for tips. Based upon the work performed by the claimants as baggers and delivery persons, inside and outside of the business premises, the degree of supervision exercised over the individuals by petitioners' management and supervisors, and the degree of benefit which inured to petitioners due to the work performed by the claimants, there is no question that petitioners not only permitted the claimants to work at the market but hired, promoted and benefited from their work. Therefore, applying the "economic reality" test, the petitioners were the claimants' employers within the meaning of the Labor Law. We do not credit the testimony of Jimemec and Elgharib that they neither hired nor supervised the claimants.

C. Minimum Wage Order

Article 19 of the Labor Law, entitled "Minimum Wage Act" sets forth the minimum wage that every employer must pay each of its non-exempt employees for each hour of work (Labor Law § 652 [1]). The applicable minimum wage rates during the time period covered by the minimum wage order were $5.15 per hour from June 5, 2004 to December 31, 2004, $6.00 per hour in 2005, $6.75 per hour in 2006, $7.15 per hour from January 1, 2007 to July 23, 2009, and $7.25 per hour from July 24, 2009 to September 25, 2010 (12 NYCRR § 142-2.1 [a]). Additionally, an employer must pay a non-residential employee time and a half of their regular hourly rate for every hour worked over 40 in a week (12 NYCRR § 142-2.2), and one hour's pay at the basic minimum hourly wage rate for any day in which the spread of hours exceeds 10 hours (12 NYCRR § 142-2.4 [a]).

The New York Labor Law and related regulations (12 NYCRR § 142-2.6) provide that every employer is required to maintain weekly payroll records for each employee that include, *inter alia*, the wage rate, number of hours worked daily and weekly, the amount of gross wages, deductions from gross wages, and allowances, if any, claimed from the minimum wage.

The minimum wage order finds that the petitioners failed to pay 18 employees wages owed for various periods of time they were employed by petitioners from June 5, 2004 to September 25, 2010.

In the absence of sufficient payroll records, petitioners then bear the burden of proving that the disputed wages were paid (Labor Law § 196-a; *Angello v Natl. Fin. Corp.*, 1 AD3d 818, 821 [3d Dep't 1989]; *Heady v Garcia*, 46 AD3d 1088 [3d Dept 2007]). As the Appellate Division stated in *Matter of Mid Hudson Pam Corp v Hartnett,* 156 AD2d 818, 821 (3d Dept 1989), "[w]hen an employer fails to keep accurate records as required by statute, the commissioner is permitted to calculate back wages due to employees by using the best available

evidence and to shift the burden of negating the reasonableness of the Commissioner's calculation to the employer" (*see also Matter of Bae v Industrial Board of Appeals*, 104 AD3d 571 [1st Dept 2013], *cert denied* 2013 NY Slip Op 76385 [2013]). Therefore, the petitioners 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.* Docket No. PR 08-078 [October 11, 2011]). Where 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.*; *see also Matter of Bae v Industrial Board of Appeals*, 104 AD3d 571).

The petitioners allege that no testimony was offered at the hearing, with respect to Jose Gonzalez and Roman Valencia, to establish a basis for the Commissioner's calculation of amounts due and owing to them by the petitioners. As discussed above, it is petitioners' burden to prove, by a preponderance of the evidence, the allegations in the petition claiming that the Commissioner's calculation of wages owed to the claimants is invalid or unreasonable. Although the petitioners do not concede the amounts owed or that there was any violation of the Labor Law, due to the *de minimis* nature of these claims, the petitioners do not contest the respondent's findings with respect to Jose Gonzalez and Roman Valencia.

While the hours alleged to have been worked by the remaining claimants are in some cases remarkable, in the absence of adequate payroll records, as discussed above, the Commissioner may rely on the best available evidence to establish underpayments. In this case, the employees' claim forms and statements to DOL investigators adequately support the respondent's findings, particularly where the claimants' testimony at hearing was consistent with those findings. It was clear from the credible testimony offered by the claimants and SLSI Gao that respondent had correctly utilized the best evidence available to determine the underpayments. The petitioners for their part were unable to prove, by a preponderance of the evidence, that the claimants did not work the number of days and the hours alleged, with the exception of Valentin Enriquez.

Enriquez testified that he did not remember making a complaint to DOL, and further testified that he had never seen the 'Minimum Wage/ Overtime Complaint' form he allegedly signed. Additionally, Enriquez testified that he never went to DOL to provide information about the petitioners. Finally, he testified he worked for the petitioners at a time period not relevant to the orders on appeal. Based on Enriquez's own testimony and denial that he worked for petitioners during the relevant period, the wage order is revoked with respect to him.

The minimum wage order also finds that petitioners owe wages to six unidentified baggers, which the petition contests. In *Matter of Anthony Boumoussa et al.*, Docket No. PR 09-058 (February 7, 2011) (*See also Angel Moina et al.*, PR 10-069), the Board modified an order which included wages owed to unidentified workers. DOL included a number of unidentified employees on the audit to account for the total number of employees observed at the time of inspection and to complete the time period. The Board based its finding on *Reich v Petroleum Sales, Inc.*, 20 F3d 654 (6th Cir 1994), where the court held that it could award damages to unidentified employees under the Fair Labor Standards Act as long as the existence, work hours

and wages of these employees is established by a preponderance of the evidence. While the respondent in this case may have established the likely existence of unidentified workers, he has not proven the number of such workers, or their work hours or their periods of employment and wages by a preponderance of the evidence (*See e.g. Marshall v Hope Garcia Lancarte Inc.*, 632 F2d 1196, 1198-99 [5th Cir 1980]). There is simply not sufficient information in the record (either testimonial or documentary) showing how the respondent came to the conclusion that there were six unidentified workers. Indeed, even DOL's own surveillance failed to observe enough baggers working inside the store to support the inclusion of six unidentified employees. Since the respondent did not meet his burden to establish the existence, work hours and wages of the six unidentified employees, we modify the order to remove them. Accordingly, the minimum wage order is modified disallowing the award to the six unknown baggers and reduced accordingly.

Liquidated damages

Labor Law § 663 (2) provided at the time the minimum wage order was issued that unless the employer proves a good faith basis to believe its underpayment was in compliance with the law, the respondent may collect liquidated damages for the claimants equal to 25 % of the underpayments found due.[1] The petitioners have not shown a good faith basis to believe the underpayments were in compliance with the law. Therefore, the imposition of liquidated damages is reasonable, but must be recalculated consistent with this decision.

Civil Penalty

Labor Law § 218 requires the Commissioner to assess a civil penalty in cases where he finds that an employer has violated a provision of Article 19. The minimum wage order assesses a 100% civil penalty. The petitioners presented no evidence to demonstrate that the penalty was unreasonable. Therefore, the civil penalty of 100% is affirmed, but reduced consistent with our decision.

Interest

Labor Law § 219 (1) provides that when the Commissioner determines that wages are due, then the order directing payment shall include "interest at the rate of interest then in effect as prescribed by the superintendent of financial services 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 per centum per annum." Therefore, the sixteen percent interest per annum assessed is affirmed, but reduced consistent with our decision.

D. Wage Order

The respondent found that the petitioners failed to pay wages to three known claimants -- Sarah Gil, Irineo Lopez, and Diomede Ynoa -- in the amount of $6,076.23 for the time period from June 3, 2006 to June 5, 2010. Labor Law § 191 (1) (a) requires an employer to pay manual

[1] Amended effective April 9, 2011 to increase the amount of liquidated damages from 25% to 100%.

workers their wages weekly, and no later than seven days after the end of the week in which the wages were earned.

The petitioners allege that no testimony was offered at the hearing, with respect to Sarah Gil, to establish a basis for the Commissioner's calculation of amounts due and owing to her by the petitioners. As discussed above, it is petitioners' burden to prove, by a preponderance of the evidence, the allegations in the petition claiming that the Commissioner's calculation of wages owed to the claimants is invalid or unreasonable. That burden was not met by the petitioners. Although the petitioners do not concede that there was any violation of the Labor Law, due to the *de minimis* nature of Gil's claim, the petitioners do not contest the respondent's findings of the amount owed to Sarah Gil. Accordingly, the wage order is affirmed for Gil. Additionally, the petitioners, who had the burden of proof, presented no evidence that the unpaid wages were not owed to Lopez and Ynoa. Therefore, the wage order is affirmed with respect to all three claimants.

Liquidated damages

Labor Law § 198 provided at the time the wage order was issued that unless the employer proves a good faith basis to believe its underpayment was in compliance with the law, the respondent may collect liquidated damages for the claimants equal to 25% of the underpayments found due.[2] The petitioners have not shown a good faith basis to believe the underpayments were in compliance with the law. Therefore, the imposition of liquidated damages is reasonable and affirmed.

Civil Penalty

Labor Law § 218 requires the Commissioner to assess a civil penalty in cases where he finds that an employer has violated a provision of Article 6. The wage order assesses a 100% civil penalty. The petitioners presented no evidence to demonstrate that the penalty was unreasonable. Therefore, the civil penalty of 100% is affirmed.

Interest

Labor Law § 219 (1) provides that when the Commissioner determines that wages are due, then the order directing payment shall include "interest at the rate of interest then in effect as prescribed by the superintendent of financial services 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 per centum per annum." Therefore, the sixteen percent interest per annum assessed is affirmed.

E. Unlawful Deductions Order

The unlawful deductions order finds that the petitioners made unlawful deductions from the wages of seven known and six unknown claimants in the amount of $1,040.00 from June 5, 2004 to September 25, 2010. Labor Law § 193 (1) prohibits employers from making any deduction from the wages of an employee, except deductions that are made in accordance with

[2] *Id.*

the provisions of any law, rule or regulation or are authorized in writing by the employee and are for the benefit of the employee, and are limited to payments for insurance premiums, pension or health and welfare benefits, contributions to charitable organizations, payments for United States bonds, payments for dues or assessments to a labor organization, and similar payments for the benefit of the employee. Labor Law § 193 (2) prohibits employers from requiring any employee to make any payment by separate transaction unless such payment is permitted as a lawful deduction from wages.

DOL interviewed several claimants who alleged that the petitioners required them to pay $80.00 to purchase a cart to use to make deliveries. This was confirmed by the claimants' testimony at hearing and never rebutted by the petitioners. Purchasing a cart in order to make deliveries is not a deduction allowed by statute, nor can it be made by separate transaction. Therefore, we find the respondent's determination that petitioners violated Labor Law § 193 by requiring employees to purchase a cart reasonable and affirm the unlawful deductions order with respect to all but one of the named claimants, and, as discussed above, revoke it with respect to the unidentified employees as well as Valentin Enriquez.

Civil Penalty

Labor Law § 218 requires the Commissioner to assess a civil penalty in cases where he finds that an employer has violated a provision of Article 6. The unlawful deductions order assesses a 100% civil penalty. The petitioners presented no evidence to demonstrate that the penalty was unreasonable. Therefore, the civil penalty of 100% is affirmed, but reduced according to our decision.

Interest

Labor Law § 219 (1) provides that when the Commissioner determines that wages are due, then the order directing payment shall include "interest at the rate of interest then in effect as prescribed by the superintendent of financial services 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 per centum per annum." Therefore, the sixteen percent interest per annum assessed is affirmed, but recalculated consistent with our decision.

F. Penalty Order

Illegal deductions

The penalty order finds that petitioners required employees to purchase carts for $80.00 to use to make deliveries. As discussed above, we find that the petitioners violated Labor Law § 193 which prohibits employees from making prohibited deductions from their employees' wages or requiring payments by separate transaction that would not be allowed as deductions. Accordingly, the $1,000.00 civil penalty for violating Labor Law § 193 is affirmed.

Failure to furnish payroll records

The penalty order finds that petitioners violated Labor Law § 661 and 12 NYCRR § 142-2.6 by failing to furnish payroll records to DOL upon request. The petitioners provided no evidence that they provided the requested records. Accordingly the $1,000.00 civil penalty for failing to furnish payroll records is affirmed.

Retaliation

The penalty order finds that petitioners violated Labor Law § 215 by discharging Diomede Ynoa on or about July 17, 2010, after being apprised that claims/complaints had been lodged with the respondent and imposed a $10,000.00 civil penalty. At the time the penalty order was issued, Labor Law § 215 (1) (a) provided that:

> "No employer or his or her agent, or the officer or agent of any corporation, partnership, or limited liability company shall discharge, penalize, or in any other manner discriminate or retaliate against any employee (i) because such employee has made a complaint to his or her employer, or to the commissioner or his or her authorized representative, that the employer has violated any provision of this chapter, or (ii) because such employee has caused to be instituted a proceeding under or related to this chapter, or (iii) because such employee has provided information to the commissioner or his or her authorized representative, or (iv) because such employee has testified or is about to testify in an investigation or proceeding under this chapter, or (v) because such employee has otherwise exercised rights protected under this chapter, or (vi) because the employer has received an adverse determination from the commissioner involving the employee."

Labor Law § 215 (1) (b) provided the Commissioner could impose a civil penalty between $1,000.00 and $10,000.00 against employers who retaliated against their employees for making Labor Law complaints.

In order to state a claim for retaliation under Labor Law § 215, the record must show the claimant's participation in a protected activity known to the employer, an employment action disadvantaging the claimant, and a causal connection between the adverse employment action (*Salazar v Bowne Realty Associates*, 796 FSupp 2d 378, 384 [EDNY 2011]). The petitioners alleged that they did not employ Ynoa, and therefore could not have retaliated against him. However, as discussed above, we find that the petitioners employed Ynoa. The petitioners presented no evidence to contradict Ynoa's testimony that he was terminated after speaking to DOL investigators. We find that on the record before us, the respondent's determination was reasonable where Ynoa engaged in a protected activity known to the petitioners by speaking to DOL investigators, was terminated, which is an adverse action, and that his engagement in such protected activity caused the adverse action.

Failure to provide wage statements

Finally, the penalty order finds that the petitioners failed to give and furnish to each employee a complete wage statement with every payment of wages from June 5, 2004 to September 18, 2010 in violation of Labor Law § 661 and 12 NYCRR § 142-2.7. The petitioners produced no evidence to show that wage statements were provided with every payment of wages. Therefore, the $1,000.00 civil penalty for failing to provide wage statements is reasonable.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The minimum wage order is modified and the respondent is directed to issue and serve an amended minimum wage order consistent with this decision;

2. The wage order is affirmed; and

3. The unlawful deductions order is modified and the respondent is directed to issue and serve an amended unlawful deductions order consistent with this decision; and

4. The penalty order is affirmed; and

5. The petition is granted in part and denied in part.

Vilda Vera Mayuga, Chairperson

Absent
J. Christopher Meagher, Member

LaMarr J. Jackson, Member

Michael A. Arcuri, Member

Frances P. Abriola, Member

Dated and signed in the Office
of the Industrial Board of Appeals
at New York, New York, on
December 17, 2014.