STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of:	
BORIS GRAYVER AND BORA-BORA-BUKOVINA, INC. (T/A BAGELS FOR YOU),	
Petitioners,	DOCKET NO. PR 11-257
To Review Under Section 101 of the Labor Law: An Order to Comply with Article 19, and an Order Under Article 19 of the Labor Law, both dated June 10, 2011,	RESOLUTION OF DECISION
- against -	
THE COMMISSIONER OF LABOR,	
Respondent.	

APPEARANCES

Maria Novack, Esq. (Louis Klieger of counsel), for petitioners.

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

WITNESSES

Boris Grayver, Sherzod Gulamov, Anna Smirnova, and Efrain Cortes for petitioners.

Rosalba Galindo and Marie-Elena Fazzio, Labor Standards Investigator, for respondent.

WHEREAS:

On August 8, 2011, petitioners Boris Grayver and Bora-Bora-Bukovina, Inc (T/A Bagels For You) filed a petition with the Industrial Board of Appeals (Board) seeking review of two orders issued against them by the Commissioner of Labor (Commissioner) on June 10, 2011. The Commissioner filed his answer on October 7, 2011.

Upon notice to the parties, hearings were held on June 17 and 18, 2014 in New York, New York before Board member and designated hearing officer J. Christopher Meagher, Esq. Each party was afforded a full opportunity to present documentary evidence, examine and cross-examine witnesses, and make statements relevant to the issues.

The first order (wage order) directs petitioners to comply with Article 19 of the Labor Law and pay $27,120.00 in minimum wages due and owing to claimant employee Rosalba Galindo for the period from July 15, 2005 to November 15, 2009, interest continuing at the rate of 16% calculated to the date of the order in the amount of $8,500.08, liquidated damages in the amount of $6,780.00, and a civil penalty in the amount of $27,120.00, for a total amount due of $69,520.08.

The Commissioner made an application at the conclusion of the hearing to amend the wage order based on revised wage calculations eliminating Sunday hours. The underpayment is now $18,984.00. We grant the application accordingly.

The second order (penalty order) under Article 19 of the Labor Law assesses petitioners a civil penalty of $1,000.00 for failure to maintain and/or furnish true and accurate payroll records for the period from July 15, 2005 to November 15, 2009.

As clarified at hearing, the petition alleges that the business was owned and operated at all relevant times by petitioner's friend, Boris Chikivchuk. Petitioner helped his friend out by performing errands for the restaurant but did not assume ownership and management of the business until after Chikivchuk died on October 12, 2010, by which time claimant was no longer employed. Petitioner asserts that: (1) he was not an "employer" responsible for any back wages during the period of the claim, and; (2) the underpayment calculated by the Commissioner is in error because claimant did not work over 40 hours per week.

SUMMARY OF EVIDENCE

Petitioner Boris Grayver owns and operates a bagel shop known as Bagels For You located on Queens Boulevard in Forest Hills, New York. The business was registered as an active corporation with the Department of State on May 26, 2005 under the name Bora-Bora-Bukovina, Inc., with no registered agent, officers, or shareholders listed.

On December 17, 2009, claimant Rosalba Galindo filed a claim for unpaid minimum wages with the Department of Labor (DOL) stating that she was employed by petitioner as a cashier at the bagel shop from July 15, 2005 to November 15, 2009 and was not paid overtime for the hours she worked over 40 per week.

Claimant listed petitioner as the responsible person of the firm and the person who hired and supervised her. The claim form stated that she worked from 7:00 a.m. to 4:00 p.m. four days per week (Sunday, Wednesday, Thursday, and Friday), 7:00 a.m. to 5:00 p.m. one day per week (Saturday), and 7:00 a.m. to 7:00 p.m. two days per week (Monday and Tuesday). Claimant stated that she was paid $8.00 per hour for all hours worked, received $30.00 per week in tips, and did not receive wage statements or a meal period.

Testimony of Claimant Rosalba Galindo

Claimant Rosalba Galindo testified that in July 2005 she was searching for work and was referred by an employment agency to the bagel shop for a position. She met with petitioner at the shop, where he interviewed and hired her to work in the front of the restaurant as a cashier and to assist customers by preparing bagels and sandwiches. Petitioner spent two hours with the claimant interviewing her for the job, showing her the restaurant, and explaining the duties she would perform. He directed her to report to work the next morning at 7:00 a.m., July 15, 2009.

Claimant testified that she reported to work at 7:00 a.m. the next morning, where petitioner and Anna Smirnova showed her how to do the work and take care of customers. She started that day and worked under petitioner's direction and supervision from July 15, 2005 to November 15, 2009. Petitioner assigned her the tasks she was to perform, supervised her work, scheduled her hours, and paid her at the rate of $8.00 per hour. He discouraged her from taking sick days and did not allow her to take any vacation. Petitioner further told her to keep a record of the hours she worked and she provided him with a time sheet every Saturday. Petitioner advised her that he would pay her every week. He paid her at the end of the day on Saturday after he returned from making deliveries. Claimant recalled at hearing, without reference to a specific time frame, that petitioner paid her half in cash and half by check. She advised DOL during its investigation that petitioner did not start doing so until 2009. Prior to that time she was paid in cash. Petitioner did not provide her a wage statement.

Claimant authenticated her claim form and testified that the hours stated were accurate. She recalled that she normally worked six days per week, Monday to Saturday, and that petitioner changed her schedule almost every day and told her to work several nights a week until 7:00 p.m., and "sometimes" on Sundays.[1] Claimant described in detail how she helped a co-worker open the store each morning and close it at night when assigned to do so. Petitioner's partner, Boris Chikivchuk, cooked the bagels each morning and left before 7:00 a.m. to attend to another business he owned. Claimant then arrived at 7:00 a.m. and helped a co-worker open the restaurant. The co-worker in 2005 was Anna Smirnova. From 2006 to 2009, it was Ivan Beloya. On nights when petitioner assigned her to stay until 7:00 p.m., claimant did the work necessary to close up the front of the restaurant and a co-worker named Ruben did the work to close up the kitchen.

Claimant testified that it was her understanding that Chikivchuk was petitioner's partner. During the time period that claimant was employed, petitioner was the person in charge, managed the store on a day-to-day basis, and hired and fired employees. Chikivchuk left the restaurant every morning before it opened. When he returned in the afternoons he went into his office and worked on the computer. Claimant denied that Chikivchuk cleaned up the restaurant at the end of the day and let all the employees leave.

DOL's Investigation

Labor Standards Investigator Marie-Elena Fazzio testified that she conducted the investigation that resulted in the orders under review. Various documents and reports from the investigative file were submitted into evidence, including Fazzio's final report summarizing the investigation and a contact log recorded by the investigators on a daily basis. Fazzio testified that

[1] Claimant is Spanish speaking and said she was assisted in filling out the claim form by her sister and a DOL investigator who conducted the interview.

prior to visiting the employer's business establishment she performed a computer background investigation called an Accurint Search that identified petitioner as President of the corporation.

Fazzio testified that on June 4, 2010 she and another investigator performed an inspection of the restaurant and spoke with petitioner. Fazzio advised him that she was an investigator from DOL and requested to speak with the owner or manager. Petitioner identified himself as a partner and owner of the business and stated that Chikivchuk was also present and was his partner. As petitioner was identified by claimant as the person responsible for payment of her wages, Fazzio interviewed him and requested relevant payroll records.

Fazzio stated in her report that petitioner told her he did not keep payroll records showing the hours worked or gross wages paid to the employees. Four employees were present at the time, two in the front of the restaurant and two in the back. Anna Smirnova was interviewed and stated that she was hired in November 2009, worked Monday to Friday from 8:00 a.m. to 4:00 p.m., and was paid part in check and part in cash. A second employee was also interviewed but stated that he had just started and had not been paid. Fazzio left petitioner a Notice of Revisit requesting that he produce payroll records on June 18, 2010 of all hours worked and wages paid the restaurant's employees from June 4, 2004 to the present.

On June 18, 2010, Fazzio returned for the records inspection and spoke with petitioner again. Petitioner produced wage statements for the claimant for the period from June 2009 to November 2009, two wage statements for Smirnova, and no records for any other employees. Claimant's statements showed her working exactly 20 hours and paid exactly $160.00 each week, with no record of daily hours listed. Smirnova's statements showed her paid exactly $270.00 each week, with no daily or weekly hours listed.

Fazio testified that on both occasions when she spoke with petitioner he presented himself as a partner and owner of the business and as the person responsible for payment of claimant's wages. On neither occasion did he advise her that he was employed as a limousine driver.

Based on the information received from petitioners, it was determined that their payroll records were inaccurate and DOL calculated wages based on claimant's written claim. Fazzio issued them a letter on November 5, 2010 describing the investigation, the basis for DOL's findings, and a recapitulation of wages due. As they failed to respond, she issued them a second letter and recapitulation on December 6, 2010 advising them that they owed claimant a total of $27,170.00 in wages due for the period July 15, 2005 to November 15, 2009. Fazzio requested that they remit payment by December 28, 2010 or the matter would be referred for orders to comply. Both letters were addressed to petitioner's personal attention and confirmed that he stated in their meeting he did not keep proper payroll records in accordance with the Labor Law.

On December 23, 2010, Fazzio received documents faxed to DOL from an accountant representing the company. They included a certificate of incorporation for Bora-Bora-Bukovina, Inc., a death certificate showing that Chikivchuk died on October 12, 2010, payroll registers for 2009 and 2010, and quarterly tax forms for 2009. The certificate of incorporation identified Chikivchuk as the incorporator of the company on May 25, 2005 but listed no officers or

shareholders. A payroll register for the claimant showed her working exactly 20 hours and paid exactly $160.00 each week from April 1, 2009 to November 4, 2009, with no daily hours listed.

In the absence of adequate payroll records establishing the hours worked and wages paid the claimant, the Commissioner issued the orders under review on June 10, 2011. At the conclusion of the hearing, the Commissioner submitted revised wage calculations eliminating Sunday hours based on claimant's testimony that she ordinarily worked six days per week. The revised underpayment is now $18,984.00.

Testimony of Petitioner Boris Grayver

Petitioner testified that from 2005 to October 2010 he worked as a "limo driver" for a company that provided limousine and car service. Chikivchuk was his best friend and owned the bagel shop from 2005 until the date of his death in October 2010. Petitioner helped his friend out by picking up supplies during times when he was taking breaks from driving passengers. As Chikivchuk was not fluent in English, petitioner also accompanied him to NYC agencies to assist him and sometimes went to agencies without him to fill out applications for the restaurant. Petitioner acknowledged that he went to the NYC Health Department and signed his own name as an officer or owner of the business to renew its health permit. Petitioner explained that if he did not do so, the agency would send him back "and ask the owner of that -- the business to come [in], but when you sign they don't ask anything."

Petitioner testified that from 2005 to October 2010 he did not own shares in the business, receive wages or distributions, have authority to hire and fire employees, and did not manage the restaurant. Chikivchuk conducted all of the company's financial affairs and petitioner had no control over payroll records. Petitioner was familiar with the claimant since she worked at the store but could not recall when she was employed or the hours she worked.

Petitioner explained that when Fazzio visited the bagel shop in June 2010 Chikivchuk was also present and was the party in charge of its payroll records. Since Chikivchuk did not speak English well, petitioner answered all the investigator's questions for him. Petitioner was asked on cross-examination what position he represented to the investigator he held with the store. He replied, "I said that I -- I just told that I'm -- as far as he's -- the owner doesn't speak well. I'm helping to manage the store, this is what I said, that I helped." When Fazzio returned to review payroll records, Chikivchuk's wife made copies of some records and gave them to her. Petitioner said he did not know what the records were.

Petitioner testified that after Chikivchuk died in October 2010, his wife came to him and asked him to take over the business or the restaurant would close. Petitioner bought the business and operated it from that point forward. Petitioner received DOL's letters in November and December 2010 and gave them to his accountant. The accountant was Chikivchuk's accountant.

Testimony of Sherzod Gulamov

Sherzod Gulamov testified that he worked at the bagel store from September 2008 to May 2013 serving coffee, making bagels and sandwiches, and as a cashier. The restaurant was open from 7:00 a.m. to 7:00 p.m. Monday to Friday and 7:00 a.m. to 5:00 p.m. on Saturday and

Sunday, and sometimes closed earlier. He knew the claimant because they worked together for a little over a year until she left in November 2009.

Gulamov testified on direct examination that his work hours were 9:00 a.m. to 2:00 p.m. or 3:00 p.m. On cross-examination, he said that he was in school at the time and his schedule was usually from 8:00 a.m. to 2:00 p.m. or from 9:00 a.m. to 3:00 p.m., either five or six days a week. Saturday was his day off. According to Gulamov, everyone in the restaurant had a shift sometime between 8:00 a.m. and 3:00 p.m. Gulamov was asked if he knew what the claimant's shift was, and replied that he started at 9:00 a.m. every day, and claimant started at 8:00 a.m. He did not indicate when her shift ended, when she finished work, or the days she worked. Asked whether he was sure that claimant never worked more than six or eight hours a day, Gulamov said yes. Asked whether he had seen anyone ever work a 12 hour shift, Gulamov said he had not except for Chikivchuk who was there "24/7."

Gulamov denied that claimant opened the restaurant and asserted that Chikivchuk opened the bagel shop by himself every morning after he made the bagels. The employees would then arrive at 8:00 a.m. and Chikivchuk would leave for several hours. After he returned he would prepare the next day's bagels and would let all of the employees leave at 2:00 p.m. or 3:00 p.m. Gulamov explained that the "bagel store business work[s] this way, you have the morning rush, the lunch rush, [and] you don't have anything in the afternoon." Gulamov asserted that no one else but Chikivchuk worked in the store from 2:00 or 3:00 p.m. until 7:00 p.m.

Gulamov testified that petitioner was a friend of Chikivchuk's and did not take over the business until Chikivchuk died in October 2010. Before that time Chikivchuk hired and fired employees, managed the restaurant, and hired and paid Gulamov.

Testimony of Anna Smirnova

Anna Smirnova testified that she was employed at the bagel shop from 2004 to January 2007 and worked six days a week from 8:00 a.m. to 2:00 p.m. or 3:00 p.m. Her duties included working as a cashier and making coffee and sandwiches for customers. Chikivchuk took over the restaurant in 2005, paid her from that point forward, and was in charge of the everyday operations of the store. She did not specifically address petitioner's involvement in the business except to state that she knew him as a friend of Chikivchuk's.

Smirnova testified that Chikivchuk hired claimant in November 2005. Smirnova then trained her how to make coffee and sandwiches and operate the slicing machine. The training "usually" lasted one and a half months. During the training period claimant worked four hours a day from approximately 10:00 a.m. to 2:00 p.m. After the training was over claimant worked the same hours that Smirnova did, "approximately from 8:00 to 2:00 or 3:00." Smirnova testified that she did not see claimant work more than eight hours on any given day and did not know whether she ever worked a 12-hour day.

On cross-examination, Smirnova testified that from 2004 to 2007 she left the store between 1:00 p.m. and 3:00 p.m. every day. She maintained that Chikivchuk usually opened the store in the morning, closed it at night, and was the only person working in the front of the

restaurant helping customers from 3:00 p.m. to 7:00 p.m. There were other employees working in the back until 7:00 p.m., however.

Smirnova authenticated her statement given to DOL and testified that she returned to the restaurant and worked from November 2009 to June 2010, three days a week, from 8:00 a.m. to 4:00 p.m.

Testimony of Efrain Cortes

Efrain Cortes testified that he was employed at the bagel shop from 2005 to 2008 and worked Monday to Saturday from 8:00 a.m. to 2:00 p.m. or 3:00 p.m. He was hired and paid by Chikivchuk. Cortes knew claimant during that time and her hours were also Monday to Saturday from 8:00 a.m. to 2:00 p.m. or 3:00 p.m. Cortes said he never worked more than eight hours a day and was unaware of whether any other employees did, including the claimant. Asked to describe petitioner's activities during the period, Cortes said he would perform deliveries and pick up supplies.

On cross-examination, Cortes testified that in 2005 he started work at 7:00 a.m. Asked who closed the store that year, Cortes said that Chikivchuk did but he didn't know what time the store closed. Asked who cleaned the store from 2005 to 2010, Cortes said he didn't know because he left at 3:00 p.m.

Cortes testified that he came back to the restaurant in 2010 and was rehired and paid by Chikivchuk up until the time he died. From that time through the date of the hearing he has been employed and paid by petitioner.

GOVERNING LAW

Burden of Proof

Petitioner's burden of proof in this case was to establish by a preponderance of 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).

Definition of Employer

"Employer" as used in Articles 6 and 19 of the Labor Law means "any person, corporation, limited liability company, or association employing any individual in any occupation, industry, trade, business or service" (Labor Law §§ 190 [3] and 651 [6]). "Employed" means "suffered or permitted to work" (Labor Law § 2 [7]).

The federal Fair Labor Standards Act (FLSA), like the New York Labor Law, defines "employ" to include "suffer or permit to work" (29 USC § 203 [g]). It is well settled that the test for determining whether an entity or a person is an employer under the New York Labor Law is the same test for analyzing employer status under the Fair Labor Standards Act" (*Matter of Yick*

Wing Chan v New York Industrial Board of Appeals, 120 AD3d 1120 [1st Dept 2014]; *Matter of Maria Lasso and Jamie Correa Sr. and Exceed Contracting Corp.*, PR 10-182 [April 29, 2013], *aff'd. sub nom, Matter of Exceed Contracting Corp. v Industrial Board of Appeals*, 126 AD3d 575 [1st Dept 2015]; *Chung v New Silver Palace Rest., Inc.*, 272 FSupp2d 314, 319n6 [SDNY 2003]).

In *Herman v RSR Security Services, Ltd.*, 172 F3d 132, 139 [2d Cir 1999], the Second Circuit articulated the "economic reality test" for determining employer status:

> "the overarching concern is whether the alleged employer possessed the power to control the workers in question . . . with an eye to the 'economic reality' presented by the facts of each case . . . . Under the 'economic reality' test, the relevant factors include whether the alleged employer (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records."

When applying this test "no one of the four factors standing alone is dispositive. Instead, the 'economic reality' test encompasses the totality of circumstances, no one of which is exclusive" (*Id*). Under the broad New York and FLSA definitions, more than one person or entity can be found to be a worker's employer.

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).

Petitioner Was an Employer Under the Labor Law

We find that the record evidence amply supports all four factors of the "economic reality test" and that petitioner was properly deemed an employer under the Labor Law.

We credit claimant's testimony concerning petitioner's supervision and authority over her employment, as it was detailed, specific, and credible. Claimant described in detail that she was referred to the restaurant for a position and was interviewed and hired by petitioner in July 2005. Petitioner spent some two hours with her on the day of her hire, interviewing her, showing her the restaurant, explaining the duties she would perform, and directing her to report the next morning to start her employment. Claimant reported the next morning, and after receiving further orientation from petitioner and a co-worker, started that day and worked under petitioner's direction and supervision from July 15, 2005 to July 15, 2009. Claimant further described how petitioner assigned her the duties she was to perform, supervised her work, scheduled her hours, set restrictions on her sick and vacation leave, and paid her at the rate of $8.00 per hour. Petitioner required her to keep a record of her hours and claimant gave him her time sheet every Saturday. Petitioner then paid her in cash at the end of the day on Saturdays, except for her last six months when he paid her half in cash and half by check.

In contrast, petitioner's testimony concerning his status and authority in the business was vague and evasive, inconsistent with admissions he made during the investigation and at hearing, and not credible. Petitioner testified that he worked for a limousine company during the period from 2005 to the date of Chikivchuk's death in October 2010. He helped his friend out by picking up supplies when he was taking breaks from driving passengers. Petitioner never advised DOL during its investigation that he worked as a "limo driver," however, and did not submit any employment or tax records at hearing showing that he did.

Petitioner further testified that he did not own shares in the business, receive wages or distributions, have authority to hire and fire employees, have control over payroll records, and did not manage the restaurant. Investigator Fazzio testified, however, that when she visited the bagel shop in June 2010 she met with petitioner, identified herself as an investigator from DOL, and requested to talk with the owner or manager. Petitioner identified himself as an owner and partner of the business and stated that Chikivchuck was also present and was his partner. As claimant had identified petitioner as the person who paid her wages, and not Chikivchuk, Fazzio then interviewed petitioner and requested relevant payroll records. In response, petitioner admitted that he did not keep any records of the employees' hours or wages. When Fazzio returned for the records review two weeks later, petitioner produced wage statements for the claimant for a six month period in 2009 when she said he had paid her half in cash and half by check.

Fazzio testified that on both occasions when she spoke with petitioner, he held himself out as a partner and owner of the business and as the person responsible for payment of claimant's wages. We credit Fazzio's testimony as it was credible and corroborated by reports and letters issued to petitioner that were entered in the investigative file. Petitioner's testimony that he told the investigator he was answering questions for his friend because "the owner doesn't speak well" and he was merely "helping" to manage the store is not credible, as the evidence clearly establishes that he identified himself as an owner and partner in the business without qualification. Petitioner further admitted at hearing that he listed himself as an owner or officer of the restaurant to renew its health permit at the NYC Health Department. His explanation that he misrepresented his status merely to save Chikivchuk from having to come to the agency himself is self serving, and simply not credible.

The testimony of petitioner's three other witnesses did not credibly rebut claimant's testimony concerning petitioner's control over her employment. Each of these witnesses testified that Chikivchuk hired and paid them during the periods they worked with claimant. However, none of them except Smirnova contradicted claimant's testimony that it was petitioner, and not his partner, who hired and supervised *her*, scheduled *her* hours, and paid *her* throughout the period of the claim. The fact that petitioner may have shared his authority in the business with another partner or owner is of no consequence, as limitations or restrictions on control "do not diminish the significance of its existence" (*Herman* at 139; *Moon v Kwan*, 248 FSupp 2d 201, 237 [SDNY 2002] [fact that hotel manager may have "delegated or shared" control with other managers is of no consequence]).

We do not credit Smirnova's testimony that it was Chikivchuk who hired claimant, as she did not address or rebut claimant's specific and credible testimony concerning her interview and

hiring by the petitioner. Nor do we credit the three witnesses' testimony that Chikivchuk was the only owner and manager of the restaurant, as it is inconsistent with petitioner's admissions.

We find the evidence establishes that petitioner had authority to hire and fire the claimant, supervise and control her work schedules and conditions of employment, determine the rate, manner, and means of payment for the work she performed, and maintain employment records. Based on the totality of circumstances, we affirm the Commissioner's determination that petitioner was an employer under the Labor Law (*Herman* at 139; *Matter of Kong Ming Lee*, PR 10-293 at pp. 13-15 [April 10, 2014]).

Petitioner Failed To Meet His Burden of Proof to Establish That He Paid Claimant Her Wages Due

Labor Law Article 19 requires every employer to pay each of its covered employees the minimum wage in effect at the time payment is due. During the time period covered by the wage order, the minimum wage was $6.00 per hour in 2005, $6.75 an hour in 2006, $7.15 in 2007, and $7.25 an hour after July 24, 2009 (Labor Law § 652 [1]; 12 NYCRR 132-1.2). An employer must also pay every covered employee overtime at a rate of one and one-half times the employee's regular rate of pay for all hours worked in excess of 40 in a given work week (12 NYCRR 137-1.3).[2]

The Labor Law requires employers to maintain accurate payroll records that include, among other things, its employees' daily and weekly hours worked, wage rate, gross and net wages paid, and any allowances claimed as part of the minimum wage (Labor Law 661; 12 NYCRR 137-2.1). Employers are required to keep such records open to inspection by the Commissioner or a designated representative at the place of employment (*Id.*). Employers are further required to furnish each employee a statement with every payment of wages listing the hours worked, rates paid, gross and net wages, and any allowances claimed as part of the minimum wage (Labor Law § 661; 12 NYCRR 137-2.2). The required recordkeeping provides proof to the employer, the employee, and the Commissioner that the employee has been properly paid.

In the absence of accurate records required by the Labor Law, an employer bears the burden of proving that the disputed wages were paid (Labor Law § 196-a). Where the employer has failed to keep such records, the Commissioner may draw reasonable inferences and calculate unpaid wages based on the "best available evidence" drawn from employee statements or other evidence, even though the results may be approximate (*Matter of Mid-Hudson Pam Corp. v Hartnett*, 156 AD2d 818, 820-21 [3d Dept 1989]; *Ramirez v Commissioner of Labor*, 110 AD3d 901 [2d Dept 2010]).

In a proceeding challenging such determination, the employer must come forward with evidence of the "precise" amount of work performed or with evidence to negate the reasonableness of the inferences to be drawn from the employees' evidence (*Anderson v Mt.*

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[2] 12 NYCRR Part 137 was replaced by 12 NYCRR Part 146, effective January 1, 2011.

Clemens Pottery, 328 U.S. 680, 688 [1949]; *Mid-Hudson Pam Corp.*, 156 AD2d at 821). Given the interrelatedness of wages and hours, the same burden shifting applies to wages and requires the employer to prove the "precise wages" paid for that work or to negate the inferences drawn from the employee's statements (*Doo Nam Yang v ACBL Corp.*, 427 FSupp2d 327, 332 [SDNY 2005]; *Matter of Gattegno,* PR 09-032 [December 15, 2010]).

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

Petitioner failed to submit any payroll records concerning the claimant during DOL's investigation, except for six months of wage statements issued her in 2009 and a payroll register from his accountant for the same period. The statements and register show her working exactly 20 hours and paid exactly $270.00 per week, with no daily hours listed. Claimant explained to DOL during its investigation that she was paid half in cash and half by check during this period. The uniformity and incompleteness of petitioner's records demonstrate that they are unreliable as accurate estimates of hours worked and wages paid (*Matter of Kong Ming Lee,* at p. 17).

In lieu of accurate and complete payroll records, petitioner submitted the testimony of Sherzod Gulamov, Anna Smirnova, and Efrain Cortes to support his assertion that claimant never worked more than 40 hours per week. The credibility of each witness was undercut by their testimony that Chikivchuk was the sole owner and manager of the restaurant during the period of the claim and that petitioner was not an active partner and manager. Cortes was still employed by petitioner as of the date of his testimony and was not an independent witness. The testimony of petitioner's witnesses was also in large part general, inconsistent, and implausible. In contrast, claimant provided detailed and specific testimony concerning the hours she worked that credibly rebutted their testimony. In the absence of accurate payroll records establishing an accurate estimate of the hours worked by the claimant, their testimony is insufficient to show that the Commissioner's approximation of those hours drawn from her written claim was unreasonable.

Sherzod Gulamov, for example, testified in general terms that when he worked with claimant from 2008 to 2009 his shift was from 9:00 a.m. to 2:00 p.m. *or* 3:00 p.m. On cross-examination, he testified that he worked a shift from 8:00 a.m. to 2:00 p.m. *or* 9:00 a.m. to 3:00 p.m., either five or six days a week. He further testified that everyone worked a shift between 8:00 a.m. and 3:00 p.m. Asked if he knew what the claimant's shift was, however, Gulamov said he started at 9:00 a.m. and that claimant started at 8:00 a.m. He did not indicate when she finished work, when her shift ended, or the specific days she worked. Gulamov nonetheless testified in conclusory fashion he was sure that claimant never worked more than 8 hours a day and never saw anyone but Chikivchuk work a 12 hour day.

Cortes likewise testified in general terms that he worked Monday to Saturday from 8:00 a.m. to 2:00 p.m. *or* 3:00 p.m., and that claimant worked the same hours. On cross-examination, he testified that in 2005 he actually started work at 7:00 a.m. Asked who closed the store that year, Cortes said that Chikivchuk did but he didn't know what time the store closed. Asked who cleaned the store from 2005 to 2010, Cortes said he didn't know because he left at 3:00 p.m. Cortes nonetheless testified in conclusory fashion that he never worked more than eight hours a day and was unaware of whether any other employees did, including the claimant.

The Board has repeatedly held that such general, conclusory, and inconsistent testimony concerning the work schedules of employees is insufficient to meet an employer's burden of proof (*Matter of Mohammed Aldeen*, PR 07-093 at pp. 12-15 [general, conclusory, and inconsistent testimony held insufficient to meet employer's burden of proof]; *Matter of Matter of Young Hee Oh*, PR 11-017 at p.12 [May 22, 2014] [employer cannot shift burden with arguments, conjecture, or incomplete, general, and conclusory testimony]).

Smirnova testified that she worked six days a week from 8:00 a.m. to 2:00 p.m. *or* 3:00 p.m., but on cross-examination said she actually left the store between 1:00 p.m. and 3:00 p.m. According to Smirnova, Chikivchuk hired claimant in November 2005 and Smirnova trained her how to make coffee, sandwiches, and operate the slicing machine. During the training period, which "usually" lasted a month and a half, claimant worked from 10:00 a.m. to 2:00 p.m. Claimant then worked the same hours as Smirnova did, from approximately 8:00 a.m. to 2:00 p.m. *or* 3:00 p.m. We give no weight to Smirnova's testimony concerning claimant's hours, as she testified inaccurately concerning a material issue dealing with claimant's employment, i.e. that claimant was hired by Chikivchuk and not by petitioner. It is also unlikely that the tasks she described as training would take a month and a half to learn.

We credit claimant's testimony concerning the hours she worked, as it was detailed, specific, and corroborated by her claim form filed shortly after leaving her employment. She authenticated the claim form and testified that the hours stated were accurate. Claimant testified that she normally worked six days a week, Monday to Saturday, but that petitioner routinely changed her schedule and assigned her to work several nights a week until 7:00 p.m. She described in detail how she helped a co-worker open the restaurant at 7:00 a.m. each day and identified a co-worker for each year of the period of her claim. She denied that Chikivchuk let everyone go by 3:00 p.m., or that he cleaned the restaurant every day, and described how she helped another co-worker close up the shop when petitioner assigned her to stay until 7:00 p.m. At the time of filing her claim, claimant estimated it was two nights a week. On those evenings she did the work necessary to close up the front of the restaurant and a co-worker named Ruben did the work necessary to close up the back. While petitioner's witnesses said that Chikivchuk opened and closed the restaurant by himself, none of them said they were present during those hours. We credit claimant's specific description of the work she performed over their general and conclusory testimony.

We therefore find the approximation of hours drawn by the Commissioner to calculate claimant's wages owed to be reasonable. In the absence of adequate payroll records, the Commissioner may rely on the "best available evidence" and draw an approximation of the hours worked and wages owed from the claimant's written statements, even where imprecise (*Mt. Clements* Pottery, 328 US at 687-88 ["The 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"]; *Reich v Southern New England Telecommunications Corp.*, 121 F3d 58, 70 n.3 [2d CA 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"]).

The Commissioner made application at the hearing to reduce the wages owed in the wage order to eliminate Sunday hours. We grant the application and affirm the wage order against petitioners, but modify it to reduce the wages owed to $18,984.00, with interest, liquidated damages, and civil penalty reduced proportionally.

Liquidated Damages

Labor Law § 663 [2] provides that when any employee is paid less than the wage to which he is entitled, the Commissioner may bring administrative action against the employer to collect such claim, and the employer shall be required to pay the full amount of the underpayment "and unless the employer proves a good faith basis for believing that its underpayment of wages was in compliance with the law, an additional amount as liquidated damages." Such damages shall not exceed 100% of the total amount of wages found to be due.

Petitioners did not challenge the Commissioner's determination to assess liquidated damages in the wage order. The issue is thereby waived pursuant to Labor Law § 101 [2] and we affirm the determination as valid and reasonable in all respects. The order is modified as to the total amount of wages owed and the liquidated damages shall be reduced proportionally.

Interest

Labor Law § 219 (1) provides that when the Commissioner determines that wages are due, the order directing payment shall include "interest at the rate of interest then in effect as prescribed by the superintendent of 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."

Petitioners did not challenge the interest assessed in the wage order and the issue is thereby waived pursuant to Labor Law § 101 [2]. We find that the computations made by the Commissioner in assessing interest in the wage order are valid and reasonable in all respects. The order is modified as to the total amount of wages owed and the interest shall be reduced proportionally.

Civil Penalties

Petitioners did not challenge the civil penalty assessed in the wage order and the issue is thereby waived pursuant to Labor Law § 101 [2]. The order is modified as to the total amount of wages owed and the penalty shall be reduced proportionally.

Petitioners also did not challenge the civil penalty assessed in the penalty order. The issue is thereby waived pursuant to Labor Law § 101 [2]. We affirm the penalty order as valid and reasonable in all respects.

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NOW, THEREFORE IT IS HEREBY RESOLVED THAT:

1. The wage order is affirmed, but modified as to the amount of wages due and owing to $18,984.00, with interest, liquidated damages, and civil penalty reduced proportionately; and

2. The penalty order is affirmed; and

3. The petition for review be, and the same hereby is otherwise dismissed.

Vilda Vera Mayuga, Chairperson
At Albany, New York

J. Christopher Meagher, Member
At Albany, New York

LaMarr J. Jackson, Member
At Rochester, New York

Michael A. Arcuri, Member
At Syracuse, New York

Dated and signed by the Members
of the Industrial Board of Appeals
on July 22, 2015.

Petitioners also did not challenge the civil penalty assessed in the penalty order. The issue is thereby waived pursuant to Labor Law § 101 [2]. We affirm the penalty order as valid and reasonable in all respects.

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NOW, THEREFORE IT IS HEREBY RESOLVED THAT:

1. The wage order is affirmed, but modified as to the amount of wages due and owing to $18,984.00, with interest, liquidated damages, and civil penalty reduced proportionately; and

2. The penalty order is affirmed; and

3. The petition for review be, and the same hereby is otherwise dismissed.

Vilda Vera Mayuga, Chairperson
At Albany, New York

J. Christopher Meagher, Member
At Albany, New York

LaMarr J. Jackson, Member
At Rochester, New York

Michael A. Arcuri, Member
At Syracuse, New York

Dated and signed by the Members
of the Industrial Board of Appeals
on July 22, 2015.

Petitioners also did not challenge the civil penalty assessed in the penalty order. The issue is thereby waived pursuant to Labor Law § 101 [2]. We affirm the penalty order as valid and reasonable in all respects.

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NOW, THEREFORE IT IS HEREBY RESOLVED THAT:

1. The wage order is affirmed, but modified as to the amount of wages due and owing to $18,984.00, with interest, liquidated damages, and civil penalty reduced proportionately; and

2. The penalty order is affirmed; and

3. The petition for review be, and the same hereby is otherwise dismissed.

Vilda Vera Mayuga, Chairperson
At Albany, New York

J. Christopher Meagher, Member
At Albany, New York

LaMarr J. Jackson, Member
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