STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of:	:	
SODHI LONGIA AND GUARAN DITTA CORP. (T/A HAPPY DAYS DINER),	:	
Petitioners,	:	DOCKET NO. PR 11-276
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 27, 2011,	:	RESOLUTION OF DECISION
- against -	:	
THE COMMISSIONER OF LABOR,	:	
Respondent.	:	

APPEARANCES

Alan B. Pearl & Associates, P.C. (Beth Fagan of counsel), for petitioners.

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

WITNESSES

Neena Longia and Ruben Romero, for petitioners.

Dimitrios Mourngas, Juan Galicia, Luis Quizhpilema, Pedro Humbertoto, and Carla Valencia, Labor Standards Investigator, for respondent.

WHEREAS:

On August 25, 2011, petitioners Sodhi Longia and Guaran Ditta Corp. (T/A Happy Days Diner) 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 27, 2011. The Commissioner filed his answer on October 25, 2011.

Upon notice to the parties, hearings were held on October 22 and November 14, 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 minimum wages due and owing to four claimant employees in the amount of $74,652.94 during the overall time period from January 4, 2005 to December 31, 2010, as follows:

> $962.79 to Dimitrios Mourngas during the period from June 22, 2009 to July 25, 2009;
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> $1,921.13 to Juan Galicia during the period from October 8, 2010 to November 13, 2010;
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> $37,271.02 to Luis Quizhpilema during the period from January 4, 2005 to December 31, 2010, and;
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> $34,498.00 to Franki Rivera during the period from January 4, 2005 to December 23, 2010.

The wage order includes interest continuing at the rate of 16% calculated to the date of the order in the amount of $7,759.41, liquidated damages in the amount of $18,663.23, and a civil penalty in the amount of $74,652.94, for a total amount due of $175,728.52.

The second order (penalty order) under Article 19 of the Labor Law assesses two identical civil penalties of $750.00 against petitioners for failure to maintain and/or furnish true and accurate payroll records for the period from August 1, 2003 to December 23, 2010, for a total penalty of $1,500.00.

The petition alleges that: (1) Mourngas, Quizhpilema, and Rivera did not work at the diner for the entire periods of time stated in the wage order; (2) Galicia never worked at the diner; (2) petitioners properly paid their employees and kept proper payroll records; (3) liquidated damages and penalties are unreasonable because petitioners acted in good faith and with a reasonable belief that their actions did not violate the Labor Law; and (4) the wage order is barred by the statute of limitations.

SUMMARY OF EVIDENCE

At all relevant times, petitioners Sodhi Longia and Guaran Ditta Corp. owned and operated a 24-hour restaurant located on Montague Street in Brooklyn, New York known as the "Happy Days Diner."

On July 28, 2009, November 15, 2010, and January 4, 2011, claimants Demitrios Mourngas, Juan Galicia, Luis Quizhpilema, and Franki Rivera filed claims for unpaid wages with the Department of Labor (DOL) alleging that they were employed by petitioners at the diner

during the overall period from 2005 to 2010 and were not paid minimum wages for their regular hours and/or overtime for the hours they worked over 40 per week.[1]

The Wage Claims

Mourngas' claim stated that he was employed as a counter person during the period from June 22, 2009 to July 25, 2009. He worked seven days per week, from 8:00 p.m. to 6:00 a.m. each day, and was paid in cash at the rate of $7.15 per hour. He had one meal period of 15 minutes each day, received $30.00 to $40.00 per week in tips, and received "$0.00" for overtime.

Galicia's claim stated that he was employed as a general worker and porter during the period from October 8, 2010 to November 14, 2010 and was paid in cash at the rate of $2.00 per hour. He worked 25.50 hours and was paid $22.00 for the week ending October 10, 2010; 59.50 hours and $112.00 each week for the weeks ending October 17, 24, and 31, 2010; 51 hours and $92.00 for the week ending November 7, 2010; and 51 hours and $80.00 for the week ending November 14, 2010.

Quizhpilema's claim stated that he was hired as a dishwasher and delivery person in 2003. During the period from January 4, 2005 to December 31, 2010 he worked six days per week, from 8:00 p.m. to 6.00 a.m. each day. He was paid in cash at the rate of $240.00 per week from January 4, 2005 to December 15, 2010 and $200.00 per week from December 16, 2010 to December 31, 2010. Quizhpilema claimed he did not have a meal period, received approximately $20.00 per day in tips, and received "$0.00" for overtime.

Rivera's claim stated that he was hired as a dishwasher and delivery person in 2002. During the period from January 4, 2005 to December 23, 2010 he worked six days per week, from 8:00 a.m. to 8:00 p.m. each day, except for Wednesday when he worked from 6:00 a.m. to 8:00 p.m. He was paid in cash at the rate of $300.00 per week. Rivera claimed he did not have a meal period, received approximately $10.00 to $15.00 per day in tips, and received "$0.00" for overtime.

Testimony of Neena Longia

Neena Longia testified that the diner was a family restaurant and was owned and operated at all times by her father, petitioner Sodhi Longia. Starting in 2003, Neena worked at the diner on weekend days from September to June and had lunch or dinner with her father at the diner three or four times a week. In the summers she was in charge of the restaurant when her parents went on vacation and worked four to five days per week for one to two months.

As evidence of payment, petitioners submitted copies of payroll journals for the period from August 2, 2008 to December 31, 2010. Neena testified that her mother made the entries in the journals and wrote down the hours the employees worked before they were given their pay envelopes. When her parents went on vacation in the summers she wrote rough drafts of the

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[1] Mourngas filed his claim on July 28, 2009, Galicia on November 15, 2010, and Quizhpilema and Rivera on January 4, 2011.

information and gave it to them when they returned. Neena said her parents had journals for prior years that were kept on a counter with "all the restaurant['s] paperwork." However, the journals were stolen in an incident when someone took the restaurant's records. A police report was filed but the records were never recovered.

For the period from August 2, 2008 to May 22, 2009, the journals show a list of employees with weekly hours stated in exact even numbers such as 12, 24, 40, etc. A corresponding dollar amount is listed as the "Payment" for each employee. No daily hours or pay rate is stated for any employee. For the period from May 23, 2009 to December 11, 2009, the journals show weekly hours described in similar fashion and a dollar amount listed for some employees under a column called "Tip." Other employees are listed as receiving a pay rate of $7.15 or $7.25. No daily hours are stated and no weekly payment is stated for the employees listed as receiving a pay rate. For the period from December 26, 2009 to December 31, 2010, daily and weekly hours for employees are listed the same way, while a second page lists some employees receiving an amount under a column called "Tips." Other employees are listed as receiving a pay rate with no weekly payment stated.

Neena testified that she did not recall any employee with the name Juan Galicia who ever worked at the restaurant and did not recognize him at the hearing. She was not aware of any employee paid at the rate of $2.00 per hour.

Reviewing the journals for Quizphilema, Neena testified that they show he worked at the diner during the periods from May 22, 2010 to July 2, 2010 and September 11, 2010 to October 15, 2010, never worked more than 32 hours in any week, and was paid at the rate of $7.25 per hour. Neena added that Quizhpilema left his employment in July 2010 to return to Ecuador for medical treatment and when he returned in September worked another four weeks and resigned. He was never put on payroll.

Neena testified that Rivera was first employed at the restaurant "around" February 2005 and worked until "I think" June 2005. He left to return to Ecuador and was rehired by her father in September 2010. Her father terminated Rivera in October 2010, rehired him, and terminated him again in December 2010. He was never put on payroll. Reviewing the journals, Neena testified they show he worked at the diner during the periods from August 21, 2010 to October 1, 2010 and November 20, 2010 to December 17, 2010, never worked more than 24 hours a week, and was paid $7.25 per hour.

Testimony of Ruben Romero

Ruben Romero testified that he worked at the diner from 2000 to 2010 as both a waiter and manager. His duties as manager included making sure the diner ran efficiently and distributing pay to employees in envelopes given him by petitioner Sodhi Longia. Romero worked six days per week, from 7:00 a.m. to 2:00 p.m. or 12:00 a.m. to 7:00 p.m. each day, and was paid extra for the tasks he performed as manager.

Romero testified that he did not recognize Mourngas or Galicia at the hearing and did not know anyone by the name of Juan Galicia who worked at the diner. He first met Quizhipelema in

June 2010 when he worked past his regular shift one night and saw Quizhpilema working on the night shift. He saw him again in September, October, and December 2010 when he gave him his pay envelopes. Quizhipelema stopped working at the restaurant that December.

Romero testified that he first met Rivera in 2005 when Rivera worked as a dishwasher and delivery person on the day shift for a "few months." Rivera returned and worked at the restaurant in February 2010 for a "few weeks" and told Romero that he had a baby and had been in Ecuador. Rivera then worked at the diner again from September to December 2010.

Testimony of Claimant Dimitrios Mourngas

Claimant Dimitrious Mourngas authenticated his claim form and testified that he was employed as a counter person at the diner from June 22, 2009 to July 24, 2009. His duties included working as a cashier and taking outgoing orders on the phone. He worked seven days per week, from 8:00 p.m. to 6:00 a.m. each day, and was paid in cash by the owner or his wife. He was paid at the rate of $8.00 per hour and $560.00 per week, received one meal period of 15 minutes each day, and received approximately $10.00 to $15.00 per week in tips.

Mourngas was confronted with a W-4 form and time sheet that petitioners submitted to DOL during its investigation. The W-4 shows claimant's signature dated July 4, 2009. The timesheet shows his signature next to entries stating that he worked exactly 40 hours per week, was paid at the rate of $7.15 per hour, and received $286.00 per week for the three-week period from July 4, 2009 to July 24, 2009.

Mourngas explained that he was not put on payroll for the first two weeks of his employment and that the owner's wife came to him with the W-4 to put him on the books as of July 4, 2009. She also presented a time sheet for him to sign when she gave him his pay. When he objected that the information on the time sheet concerning his hours and wages was incorrect, she told him he had to sign the paper or he would be fired. He signed the document each time it was presented to him because he needed the job.

Testimony of Claimant Juan Galicia

Claimant Juan Galicia testified that he was employed at the diner twice in 2010, the second time being the period of his claim from October 8, 2010 to November 14, 2010. He was referred by an employment agency each time and worked as a bus boy, helping the waiters, and helping Ruben Romero. Claimant identified Romero at the hearing and said he was the person in charge at the diner and was "like the owner's son" because they were very close. He also identified Quizhpilema as one of his co-workers at the restaurant.

Galicia authenticated his claim form and testified that he worked at the diner from 7:00 a.m. to 5:00 p.m. or 6:00 p.m. each day and did not receive a meal break. He received around $45.00 per day in cash from Romero, plus tips when Romero and the waiters wanted to give them to him.

Testimony of Luis Quizhipelema

Claimant Luis Quizhpilema testified that he worked at the diner as a dishwasher and delivery person for six years from 2005 to December 2011, when he was terminated. He worked six days per week, from 8:00 p.m. to 6:00 a.m. each day, and was paid in cash at the rate of $240.00 per week. He was paid weekly by petitioner Sodhi Longia, and sometimes by his daughter.

Quizhipelema authenticated his claim form and said he worked at the restaurant continuously throughout the period of his claim, except for a two-month period when he went to Ecuador to deal with family matters. He could not recall the exact dates when he left the country but produced his passport showing his entry and leaving times. The parties stipulated that it shows he left on July 13, 2010, returned on September 8, 2010, left again on November 1, 2014, and returned on November 21, 2010.

Quizhpilema testified that when he started working at the diner Franki Rivera was already working there as a dishwasher and delivery person. Rivera was acting as a manager at the time and was "the person in charge" who trained Quizhpilema about how to perform the job: "When I got there he was the one that told me what to do and how to do it." Quizhpilema thereafter worked from 8:00 p.m. to 6:00 a.m. each day, while Rivera worked from 8:00 a.m. to 8:00 p.m. He saw Rivera at the job every day while they worked at the restaurant "because he was the one who would replace me when I left. He used to start work at eight in the morning but at six-thirty in the morning he was there." The last time he spoke with Rivera was when Quizhpilema left the job in December 2010.

Quizhpilema also identified Romero at the hearing as a manager at the restaurant and Galicia as a co-worker who worked at the diner for a short period of time.

DOL's Investigation

Labor Standards Investigator Carla Valencia testified concerning the investigation that resulted in the orders under review. The investigation was initiated by a claim filed by another employee of petitioners on July 24, 2008. A field visit was conducted at the employer's premises, petitioner Sodhi Longia was interviewed, and the claim was settled in 2009.

Valencia identified each of the claim forms filed by the claimants in the case and testified that they were filed with the assistance of a DOL investigator who interviewed them concerning their wages and hours. Valencia noted that Mourngas filed copies of three pay stubs from "Paychex, Inc." with his claim showing he worked exactly 40 hours each week, was paid at the rate of $7.15 per hour, and received $286.00 per week for the period from July 4, 2009 to July 24, 2009. No daily hours were stated in the pay stubs. The investigator who took the claim entered his pay rate at $7.15 per hour. An investigator also indicated on Galicia's form that he was paid at the rate of $2.00 per hour.

Following receipt of Mourngas' claim, the investigation was reopened and DOL issued petitioners a collection letter on August 12, 2009 requesting payroll records of all hours worked

and wages paid him during the period of his claim. Petitioners' accountant, and later petitioners' attorney, responded by submitting copies of the W-4 tax form, time sheet, and the three pay stubs from Paychex described above. Valencia testified that Mourngas visited DOL's office in response to the employer's contentions and explained that he was not put on payroll for the first two weeks of his employment and was told he had to sign the time sheets. He also clarified that he received $8.00 per hour and $560.00 per week during the period of his claim.

Following receipt of Galicia's claim, Valencia and investigator Christina Rivera performed an inspection of petitioner's premises on December 9, 2010. They requested payroll records and interviewed several employees, including claimant Franki Rivera. Ruben Romero was also present and was interviewed.

Franki Rivera told DOL that he worked six days per week, from 10:00 a.m. to 8:00 p.m. each day, was paid at the rate of $4.00 per hour and $220.00 or $280.00 per week, and was paid time and one-half for overtime. Investigator Christina Rivera indicated on claimant's interview summary that he was hesitant to answer questions and requested that he be contacted later by telephone. Valencia testified that it is DOL's experience that employees are often reluctant to candidly discuss their hours and wages at the workplace in the presence of the employer for fear they will lose their jobs. A "Notice of Revisit" was issued requesting that petitioners produce copies of all payroll records by December 22, 2010 of employees' hours worked and wages paid, including time cards, payroll registers, cancelled checks, cashbooks, dates of employment, and NYS 45 quarterly reports for the period from January 2004 to the present.

Valencia testified that on January 4, 2011, Quizhpilema and Rivera filed their claims at DOL's offices where they were interviewed in private by an investigator. Valencia spoke with them several times during the remainder of the investigation where they discussed their claims and clarified the time periods they worked at the restaurant. According to her contact log entry of January 11, 2011, Quizhpilema stated that he worked at the diner from August 2003 to June 1, 2010 and again from November 1, 2010 until December 23, 2010. Rivera stated that he worked there from 2002 to January 1, 2008 and again from August 1, 2010 to December 23, 2010.

In response to DOL's demand for records, petitioners' attorney submitted records for some of petitioners' employees during the period from 2008 to 2010, including Paychex payroll journals, selective pages from petitioners' handwritten payroll journals, time sheets, and W-4 forms. No time records or payroll records were submitted for any of the claimants, with the exception of those for Mourngas described above. On April 6, 2011, DOL issued petitioners an initial recapitulation of wages due, advising them that in the absence of adequate payroll records for any of the claimants, DOL had computed an underpayment of wages due, plus liquidated damages. Petitioners were requested to remit payment or orders to comply would be issued.

By letter dated April 7, 2011, petitioners' attorney responded to the recapitulation and advised DOL that petitioners maintained that Galicia and Quizhpilema never worked at the restaurant, Rivera worked there for only three days in December 2010, and that records for Mourngas showed he was owed no back wages. DOL requested and received written statements submitted by Quizhpilema and Rivera from customers who verified their employment at the restaurant. Petitioners' attorney submitted affidavits from employees of petitioners stating that

Galicia never worked at the diner and that Quizhpilema and Rivera worked there for short periods of time in 2010.

In the absence of adequate payroll records establishing that claimants were paid the wages due, the Commissioner issued the orders under review on June 27, 2011. The underpayment was based on an audit calculation performed by Valencia drawn from the information stated in the claimants' written claims and supplementary statements. Valencia testified that Rivera's written claim was utilized, rather than his prior interview, as he had been hesitant to answer questions at the worksite, requested that he be contacted later, and because he may have been intimidated in the presence of his employer.

No underpayment was calculated for the periods of time when Quizhpilema and Rivera said they did not work at the restaurant. Back wages for Mourngas and Galicia were calculated at the applicable minimum wage. One meal was credited per day for each employee. Since the employees were not given a full 30-minute meal period, time for meals was not deducted. The applicable tip credit was applied for each employee, except Galicia, and spread of hours payments were calculated for employees who worked more than 10 hours per day.

In support of the penalties assessed in the wage and penalty orders, the Commissioner submitted reports considering the size of the employer's business, gravity of the violation, the employer's good faith, and history of recordkeeping or other violations. Valencia testified that she believed the 100% civil penalty in the wage order was reasonable because the employer failed to submit required payroll records. A report titled "Labor law Articles 6, 19, and 19-A Violation Recap" recommended that a penalty of $750.00 be assessed for petitioners' failure to maintain/furnish payroll records, and a second penalty of $750.00 be assessed for failure to provide each employee a wage statement with every payment of wages. In the Commissioner's final penalty order, however, the count for failure to maintain/furnish payroll records was charged twice.

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).

Petitioners Failed To Meet Their Burden of Proof to Establish They Paid Claimants Their Wages Due

Petitioners' 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).

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. 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]).

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

We find that petitioners failed to meet their burden of proof to establish an accurate estimate of the amount of work performed by the claimants and the precise wages they were paid for that work or that the inferences supporting the calculation of wages made by the Commissioner were otherwise unreasonable.

Petitioners submitted no time or payroll records for any of the claimants during the investigation, except those we discuss below regarding Mourngas. At hearing they submitted copies of handwritten payroll journals allegedly made by petitioner's wife after the employees received their pay envelopes. There are no journals whatsoever for the period from January 2005 to August 2008, a period covering most of the wages owed Quizhpilema and Rivera. While petitioners claim that journals for this period were stolen in a robbery, it is well settled that the failure of an employer to produce adequate records disproving the amounts sought by employees "regardless of the reasons therefore" does not shift its burden of proof (*Angello v National Finance Corp.*, 1 AD3d 850, 854 [3rd Dept 2003]).

The journals do not show daily hours worked by any employee until December 2009. When weekly and then daily hours are listed, they are stated in exact even numbers to the minute. While weekly payments are stated for employees up to May 2009, no pay rates are shown for any of these employees. For the period from May 2009 until December 2010, some employees are listed as receiving a weekly payment called "Tip" or "Tips," while others are listed as receiving a pay rate but with no payment stated.

The incompleteness of petitioners' journals, absence of daily hours, hours rounded and stated in exact even numbers, and the confusing payments listed as tips for some employees while others have no weekly payment listed at all, demonstrate that petitioners' records are not credible and reliable to support an accurate estimate of the periods of claimants' employment, the hours they worked, or the precise wages they were paid.

Wages Owed Demetrios Mourngas

Petitioners submitted no testimony challenging the wages owed Mourngas but instead relied on their payroll journals, the W-4 form, and the time sheets presented to him on cross-examination. The W-4 form is not proof that he started work on July 4, 2009 but merely that he signed a tax form and was put on payroll as of that date. The time sheets do not list daily hours worked but instead state that he worked exactly 40 hours each week, was paid $7.15 per hour, and received exactly $286.00 per week from July 4 to July 24, 2009. Entries in the journals are not reliable as they state he worked exactly 40 hours each week, with no daily hours or gross or net wages listed.

We credit claimant's specific testimony that he actually started on July 22, 2009 and was not put on payroll for the first two weeks. He worked 70 hours per week and was paid in cash at the rate of $8.00 per hour and $560.00 per week during the period from June 22, 2009 to July 24, 2009. He further testified, without rebuttal from petitioners, that when petitioner's wife presented him with his pay on July 4, 2009 she threatened him with dismissal unless he signed the time sheet. He signed each of the time sheets to protect his job. We find petitioners did not meet their burden of proof to overcome the Commissioner's approximation of wages he was owed and

affirm the wage order regarding his claim, subject to the modifications below. Petitioners' actions in coercing claimant into signing false time and pay records are further evidence that their recordkeeping is inaccurate and not credible.

We affirm the wage order for Mourngas but nonetheless modify the order as to the amount of wages owed. Claimant testified that he was paid at the rate of $8.00 per hour and received $560.00 per week, not at $7.15 per hour utilized by the Commissioner. The wage order applicable at the time of his claim also provided that an employee is entitled to spread of hours payments when his total hours, inclusive of meal breaks, "exceed[s]" ten hours per day (12 NYCRR 137-1.7 and 3.11). Since Mourngas testified that he worked ten hours per day, and not more, spread of hours' payments are inapplicable. Accordingly, we remand the order to the Commissioner to recalculate wages owed Mourngas utilizing his correct rate of pay and deleting spread of hours' payments.

Wages Owed Juan Galicia

Petitioners submitted no records challenging Galicia's underpayment, save their unreliable journals that do not show entries for him during the period of his claim. Neena Longia and Ruben Romero testified in general fashion that they did not recognize Galicia at the hearing and did not recall anyone by that name who worked at the diner.

We credit Galicia's testimony over the general testimony of petitioners' witnesses, as it was specific, credible, and corroborated by his claim form filed with DOL shortly after leaving his employment. Galicia credibly testified that he worked at the restaurant during the period of his claim as a busboy, helping the waiters, and helping Romero. He identified Romero as a manager and said he was "like the owner's son" because they were very close. He also identified Quizhpilema as a co-worker. Quizhpilema likewise corroborated that Galicia worked at the diner for a short period of time. We find that petitioners failed to meet their burden of proof to establish that he was not employed and affirm the Commissioner's determination finding he was owed back wages, subject to the modification below.

Galicia testified that he was paid at the rate of $45.00 per day during the period of his claim, and not the rate of $2.00 per hour utilized by the Commissioner. Accordingly, we remand the order to the Commissioner to recalculate his underpayment at the rate of $45.00 per day.

Wages Owed Luis Quizhpilema

Petitioners submitted no records challenging the Commissioner's approximation of wages owed Quizhpilema beyond their incomplete and unreliable payroll journals showing he worked for only short periods of time in 2010, worked less than 40 hours per week, and was paid at minimum wage. Neena Longia then read from the journals and testified in general fashion that after claimant's first stint at the diner ended in July 2010 he left to return to Ecuador for medical treatment. When he returned in September he worked another four weeks and resigned. Neena admitted that claimant was never put on payroll.

Neena's testimony was inconsistent with petitioners' initial assertion to DOL during the investigation that Quizhpilema was never employed at the restaurant. While petitioners later submitted affidavits stating that he worked for short periods of time in 2010, their shifting positions demonstrate the unreliability of their witnesses' testimony. Neena's testimony was also inconsistent with Romero's testimony that he saw claimant working at the diner in October, November, and December 2010 when he gave him his pay envelopes.

We credit Quizhipilema's testimony over the general and inconsistent testimony of petitioners' witnesses as it was specific, credible, and corroborated by his claim filed shortly after he left his employment. Quizhipelema credibly testified that he was employed as a dishwasher at the diner from 2005 to December 2011, worked six days per week from 8:00 p.m. to 6:00 a.m. each day, and was paid $240.00 per week. He worked continuously throughout the period of his claim, except for a two-month period when he went to Ecuador to deal with family matters. The parties stipulated to the periods of time he was gone based upon the entry and leaving times from his passport.

While petitioners argued in closing that the Commissioner's wage calculation is in error because it does not literally coincide with the dates he was out of the country, no underpayment was calculated for some 22 weeks during the period from May 29, 2010 to October 31, 2010. The passport shows he was gone for a total of 12 weeks during and after that time. As such, the calculation is simply under inclusive and does not make the Commissioner's approximation of wages owed unreasonable since it is only an estimate (*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"]).[3]

We find that petitioners failed to meet their burden of proof to establish that the Commissioner's approximation of wages was unreasonable and affirm the wage order finding he was owed back wages.

Wages Owed Franki Rivera

DOL calculated an underpayment for Rivera for the period from January 4, 2005 to December 31, 2007 and August 7, 2010 to December 23, 2010 based on his written claim, supplemented by his statement to the investigator that he did not work during the interim period. Petitioners did not submit *any* payroll records covering the first three years of the claim to overcome that calculation. Those submitted for the last four and one-half months are not credible or reliable to establish an accurate estimate of the hours that claimant worked or the precise wages he was paid.

In lieu of adequate records, Neena Longia testified in general fashion that Rivera started "around" February 2005 and worked until "I think" June 2005. Romero testified that Rivera worked for a "few months" in 2005. Both witnesses said claimant left his employment and

[3] Similarly, although Quizhipelema advised DOL during its investigation that he was terminated on December 23, 2010, the calculation of his underpayment through December 31, 2010 is reasonable given that he is actually owed back wages in an amount greater than stated in the wage order.

returned to work in 2010, with Romero testifying that he returned for a "few weeks" in February 2010, and Neena asserting that he returned in September 2010 and worked intermittently to December 2010. Both witnesses' testimony is inconsistent with petitioners' initial assertion to DOL during its investigation that Rivera worked at the diner for only three days in December 2010. The Board has repeatedly held that, absent adequate payroll records, such general, conclusory, and inconsistent testimony concerning the scope of work performed by an employee is insufficient to meet an employer's burden of proof (*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]; *Matter of Boris Grayver*, PR 11-257 at pp.11-12 [general, inconsistent, and conclusory testimony insufficient to meet employer's burden of proof]). Petitioners' shifting positions regarding the length of claimant's employment are further evidence that the testimony of their witnesses is suspect.

Quizhpilema credibly testified that when he started at the diner in January 2005 Rivera was already working there as a dishwasher, was acting as a manager, and trained him how to perform the job. He thereafter worked from 8:00 p.m. to 6:00 a.m. each day, while Rivera worked from 8:00 a.m. to 8:00 p.m. He saw Rivera at the job every day they worked at the restaurant "because he was the one who would replace me when I left. He used to start work at eight in the morning but at six-thirty in the morning he was there." Quizhpilema's testimony corroborated the information in Rivera's claim and supports the inference that the two worked together at the diner during the time frames calculated by the Commissioner. Petitioners failed to negate the reasonableness of that inference with credible evidence.

Finally, petitioners argued in closing that it was error for the Commissioner to rely on Rivera's written claim to calculate wages because he stated hours and wages in his prior interview that were less than those stated in his claim. We credit Valencia's testimony that she deemed the interview unreliable because Rivera was hesitant in the interview to answer questions, requested that he be contacted later by the investigators, and because he may have been intimidated by the presence of the employer at the worksite where the interview was taken. Valencia's determination was based on her training and experience as an investigator that employees are often reluctant to candidly discuss their wages in the presence of the employer for fear of retaliation. In light of the coercive threats made by petitioners to claimant Mourngas, there is ample support in the record to find DOL's reliance on Rivera's written claim to be the "best available evidence" to calculate his back wages.[4]

We therefore find the approximation of hours and wages drawn by the Commissioner to calculate wages owed to the four claimants in this case to be reasonable, subject to the modifications described above. It was petitioners' burden in this case to provide contemporaneous payroll records establishing an accurate estimate of the hours worked and precise wages paid the claimants for the periods they worked at their restaurant, not the claimants'. In the absence of such 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 claims, even where imprecise (*Mt. Clements Pottery*, at 687-88; *Reich v Southern New*

[4] Petitioners also submitted into evidence the affidavits they submitted to DOL during its investigation. We give them no weight as they are conclusory and insufficient to establish an accurate estimate of the hours worked and precise wages paid.

England Telecommunications Corp., 121 F3d 58, 70 n.3 [2d Cir 1997] [finding no error in damages that "might have been somewhat generous" but were reasonable in light of the evidence and "the difficulty of precisely determining damages when the employer has failed to keep adequate records"]).

Statute of Limitations

Petitioners did not submit proof at hearing supporting their claim that the wage order is barred by the statute of limitations beyond the conclusory allegation in its petition. As the order directs petitioners to pay back wages within six years of the filing of the respective claims, it is reasonable (*Matter of 238 Food Corp.*, PR 05-068 [April 23, 2008] [reasonable for Commissioner to recover wages for period six years from date employee files claim with DOL]; *see also Matter of Richard M. Aufrichtig*, PR 11-260 [June 10, 2015]).

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 claimants Mourngas and Galicia and the interest shall be 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 to believe that its underpayment was in compliance with the law, an additional amount as liquidated damages." Such damages shall not exceed one hundred percent of the total amount of wages found to be due.

Petitioners did not submit proof at hearing supporting their claim that the Commissioner's determination to assess liquidated damages in the wage order was unreasonable. 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 claimants Mourngas and Galicia and liquidated damages shall be reduced proportionally.

Civil Penalties

Labor Law § 218 (1) provides that when the Commissioner determines that an employer has violated a provision of Article 19, he must issue an order directing payment of any wages found to be due, plus "the appropriate civil penalty."

If a violation involves a willful or egregious failure to pay wages, or an employer who has previously been found in violation, the penalty "shall" be in an amount "not to exceed double the total amount . . . found to be due" (*Id.*). For all other types of violations, the amount of the penalty is discretionary. Where the violations involve "a reason other than the employer's failure to pay wages," the amount shall not exceed $1,000.00 for a first violation, $2,000.00 for a second, and $3,000.00 for a third or subsequent violation (*Id.*). In applying his discretion, the statute directs the Commissioner to give:

> "due consideration to the size of the employer's business, the good faith of the employer, . . . the gravity of the violation, the history of previous violations and, in the case of wages, benefits or supplements violations, the failure to comply with record-keeping or other non-wage requirements" (*Id.*).

Petitioners did not submit proof at hearing supporting their claim that the civil penalty assessed in the wage order was unreasonable and the issue is thereby waived pursuant to Labor Law § 101 (2). The order is modified as to the total amount of wages owed claimants Mourngas and Galicia and the civil penalty shall be reduced proportionally.

Penalty Order

Petitioners did not submit proof at hearing supporting their claim that the civil penalties assessed in the penalty order are unreasonable. The issue is thereby waived as to the penalty assessed in Count 1 for failure to furnish/maintain payroll records. However, the second penalty for the same violation is on its face invalid and unreasonable since, by administrative error, the Commissioner charged the same offense twice. We therefore affirm the order as to Count 1 but revoke the civil penalty assessed in Count 2.

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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 owed claimants Mourngas and Galicia, and;

2. The Commissioner is directed to recalculate the wages owed Mourngas and Galicia and enter an amended order consistent with this decision, together with interest, liquidated damages, and civil penalty reduced proportionally, and;

3. The penalty order is affirmed as to Count 1 but revoked as to Count 2, and;

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

Vilda Vera Mayuga, Chairperson

J. Christopher Meagher, Member

LaMarr J. Jackson, Member

Michael A. Arcuri, Member

Dated and signed by the Members
of the Industrial Board of Appeals
in New York, New York on
September 16, 2010.