STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of: IQBAL AHMED, Petitioner, To Review Under Section 101 of the Labor Law: An Order to Comply with Article 6, an Order to Comply with Article 19, and an Order Under Articles 5 and 19 of the Labor Law, all dated November 15, 2012, - against - THE COMMISSIONER OF LABOR, Respondent.	DOCKET NO. PR 12-081 RESOLUTION OF DECISION

APPEARANCES

Iqbal Ahmed, petitioner pro se.

Pico P. Ben-Amotz, General Counsel, NYS Department of Labor (Benjamin T. Garry of counsel), for respondent.

WITNESSES

Iqbal Ahmed, Shahid Zia, and Rana T. Singh, for petitioner.

Guangming Liu and Cloty J. Ortiz, Labor Standards Investigators, for respondent.

WHEREAS:

On March 15, 2012, petitioner Iqbal Ahmed filed a petition with the Industrial Board of Appeals (Board) seeking review of three orders issued against Shahnaz Ahmed a/k/a Iqbal Ahmed a/k/a Iqbal Khan and SI Best Food Inc (T/A Mezban Palace) by respondent Commissioner of Labor (Commissioner) on January 19, 2012. The Commissioner filed an answer on September 3, 2013.

By leave of the Board granted on October 17, 2012, the Commissioner withdrew the orders and issued amended orders against Iqbal Ahmed a/k/a Iqbal Khan and SI Best Food Inc (T/A Mezban Palace) on November 15, 2012. SI Best Food Inc did not file a petition for review.

Upon notice to the parties, hearings were held on July 29, 2014 and January 7, January 26, March 20, and September 11, 2015 in New York, New York, before Board Member J. Christopher

Meagher, Esq., the designated hearing officer in this proceeding.[1] The parties were afforded a full opportunity to present documentary evidence, examine and cross-examine witnesses, and make statements relevant to the issues.

The Order to Comply with Article 6 (wage order) directs payment to the Commissioner of unpaid wages due and owing to claimant Rana P. Singh in the amount of $12,614.29 for the period from November 3, 2007 to March 28, 2008, interest continuing thereon at the rate of 16% calculated to the date of the order in the amount of $9,322.82, and a civil penalty of $12,614.29, for a total amount due of $34,551.40.

The Order to Comply with Article 19 (minimum wage order) directs payment to the Commissioner of unpaid minimum wages due and owing to claimant Rana P. Singh in the amount of $2,549.79 for the period from November 3, 2007 to March 28, 2008, interest continuing thereon at the rate of 16% calculated to the date of the order in the amount of $1,892.29, liquidated damages in the amount of $637.45, and a civil penalty of $2,549.79, for a total amount due of $7,629.32.

The Order Under Articles 5 and 19 (penalty order) assesses a $1,000.00 civil penalty against petitioner for each of the following violations for the period from November 3, 2007 through March 28, 2008: (1) failure to keep or furnish true and accurate payroll records for each employee; (2) failure to provide employees at least a 30 minutes noon day meal period; and (3) failure to provide each employee a complete wage statement with every payment of wages; and a $1,000.00 civil penalty against petitioner for failure to allow employees of a restaurant at least 24 consecutive hours of rest in any calendar week for the period from November 3, 2007 through March 26, 2008, for a total amount due of $4,000.00.

The petition alleges that: (1) petitioner was not claimant's employer and is therefore not responsible for any wages owed; and (2) the Commissioner erred in his calculation of the amount of wages owed.

SUMMARY OF EVIDENCE

The Wage Claim

On March 28, 2008, claimant Rana P. Singh filed a claim for unpaid wages with the Department of Labor (DOL) stating that he was employed by petitioner as a cook at a restaurant called "Mezban Palace" in Queens, New York and was not paid his wages during the period from November 3, 2007 through March 26, 2008. Claimant stated that he worked seven days per week, from 10:00 a.m. to 11:00 p.m. each day for the first two months, and from 10:00 a.m. to 8.00 p.m. thereafter, with no time off for meals. The claim form listed Iqbal Khan as the owner of the business and Shahid Zia as a supervisor or manager.

Testimony of claimant Rana P. Singh

Claimant testified that petitioner Iqbal Ahmed hired him to work at Mezban Palace around 2008. He first met petitioner when Ahmed was working as a heating and air conditioning repairman

[1] While petitioner was represented by counsel at an earlier hearing date, he confirmed on March 20, 2015 that he was now appearing pro se. The July 29, 2014 and September 11, 2015 hearings were before then Associate Counsel to the Board Devin A. Rice, Esq.

and came to Singh's home to fix his boiler. The two struck up a conversation in which Ahmed asked Singh where he worked. Singh replied that he was a cook specializing in Greek food but was currently unemployed. Ahmed told Singh that he was opening a new restaurant and invited Singh to "please come with me and work with my restaurant."

Singh testified that he accepted the offer and reported to the restaurant three days before its "Grand Opening" to begin work. Ahmed assigned him to open the restaurant in the morning, close it at night, prepare its menu each day, work the counter and serve customers. Although Singh had asked for $700.00 per week when they first met, he and Ahmed agreed that he would be paid $350.00 per week and raised up to a higher rate after the restaurant got established. Singh worked an average of thirteen hours per day, seven days per week, cooking rice, biryani, vegetables, lamb, and chicken to prepare a daily menu of Pakistani and Greek cuisine. Ahmed had another job during the day but came to the restaurant at night to count the money that Singh put in the safe from the day's proceeds. He also paid the restaurant's bills, sampled and approved the menu that Singh prepared, and paid the employees in cash. He paid Singh sporadically, however, and after four weeks of work had paid him only $100.00, promising him that he would be paid the rest "little by little" as the business got "running." Singh estimated that Ahmed paid him at most between $500.00 and $1,000.00 and said he frequently had to ask to be paid so he could pay his bills and expenses. After waiting several months for his back pay, Singh was compelled to file his claim with DOL.

Singh characterized Shahid Zia as a silent partner in Mezban Palace. After its Grand Opening, Zia went to Pakistan for four months and returned to the United States on March 28, 2008. According to Singh, Ahmed was the partner who was responsible for "everything" at the restaurant and was there almost every day to supervise its operations. The restaurant closed sometime in 2008 and was reopened later that year by Zia under the name "Bar-B-Q Village." Zia hired Singh as a cook at the new restaurant and Singh worked there again from 2008 to 2013.

Testimony of Shahid Zia

Shahid Zia testified that he and Ahmed were business partners in SI Best Food Inc, the parent corporation of Mezban Palace, and that he was a silent partner in the restaurant responsible for financing various aspects of its operations. In exchange for his capital investment, Ahmed agreed to set up and operate the restaurant on a day to day basis. Zia would sometimes visit the restaurant because he was an investor but was not involved in Ahmed's decision to hire Singh.

Zia testified that he was in Pakistan from December 18, 2007 through March 1, 2008. Upon his return, Singh approached him several times to discuss the wages that Ahmed owed him. Zia told him that as a silent partner he was not responsible for the wages and he would have to collect them from Ahmed.

Zia further testified that when he returned from a second trip to Pakistan in August 2008 he learned that the sheriff had closed Mezban Palace because Ahmed had not paid the rent. Zia later met with an investigator from DOL and informed him that Ahmed had taken approximately $200,000.00 that Zia had invested in the restaurant, most of its records, and then disappeared. When Zia took possession of the premises he found various bills and other documents under Ahmed's name that Ahmed had left behind.

Testimony of Guangming Liu, Senior Labor Standards Investigator

Senior Labor Standards Investigator Guangming Liu testified concerning the investigation that resulted in the orders under review. In follow up to the claim, an investigator attempted a field visit to the premises in February 2009 and found that Mezban Palace was closed and was replaced by the new restaurant Bar-B-Q Village. The investigator issued a request to Zia for payroll records of the former restaurant and subsequently spoke with him concerning its closing.

Liu testified that on January 18, 2011 he made a second field visit to the site and spoke with claimant who confirmed that there were two owners of Mezban Palace, Zia and Ahmed, and that the restaurant had been closed for failure to pay rent. Claimant indicated that he did not have an address for Ahmed but would try to find one and advise DOL. As Zia was not present, Liu issued him a letter on February 22, 2011 requesting that he appear at DOL's offices for a conference to discuss the investigation and that he produce payroll records for all employees of Mezban Palace from November 2007 to March 2008, including time and pay records listing hours worked and gross wages paid.

On September 14, 2011, Zia and Singh visited DOL's office and provided information regarding Singh's employment, the restaurant's operations during the period of the claim, and Ahmed's home address. They informed Liu that Zia and Ahmed were business partners but Zia was not involved in the day-to-day operations of the business. Zia stated that he was not in the country during the period of Singh's claim and that Ahmed performed all of those duties, including issuing checks and paying wages to employees. As proof of his contentions, Zia submitted bank statements for the company bearing Ahmed's signature, a notice from the New York State Department of Taxation and Finance to Ahmed, and telephone and utility bills for Mezban Palace under Ahmed's name.

Based on the information provided by claimant and Zia, Liu determined that Ahmed was the business partner responsible for payment of claimant's wages. Wage calculations were made based on Singh's written claim and statements to DOL that he never got paid, and utilizing an agreed rate of pay of $600.00 per week.[2]

On September 15, 2011, Liu issued a final collection notice to Ahmed at his home address and a recapitulation of wages due in the amount of $15,164.08. The notice advised petitioner that DOL's investigation had revealed that he was responsible for payment of wages to all employees of Mezban Palace for the period from November 3, 2007 to March 28, 2008. The notice further advised him that since DOL had been unable to reach him at his business address, it was compelled to compute back wages owed based solely on the employee's statements. Petitioner was requested to remit payment by October 11, 2011 or the matter would be referred to Orders to Comply, entailing additional interest and penalties. Ahmed failed to remit payment or respond to the notice and the orders under review were issued on January 19, 2012.

[2] A box on the claim form for "latest agreed rate of pay" has an erasure over the amount that was not explained at hearing.

Testimony of Cloty J. Ortiz, Supervisor, Division of Labor Standards

Cloty J. Ortiz is employed as a supervisor for DOL's Division of Labor Standards and has been a Labor Standards Investigator since August 2004. Ortiz testified that in assessing penalties against an employer for labor violations the Commissioner takes into consideration the size of the employer's business, its history with respect to compliance with the Labor Law, the severity of the violations, and whether the employer has acted in good faith.

Ortiz testified that when DOL made its site visit they found the employer had gone out of business. DOL made attempts to contact the employer to reach a resolution of the issues, but those efforts were unsuccessful. In the absence of required records, DOL assessed 100% penalty with respect to the unpaid wages, taking into account the above factors and that the employer failed to pay time and one half of the regular wage rate for overtime as required by law. The Commissioner can assess up to a 200% penalty, but this was the first recorded violation.

Ortiz explained that DOL assessed a $1,000.00 penalty for failing to furnish or maintain payroll records, taking into account the available evidence, including that claimant was not afforded a day of rest or a meal period and no records were produced, even though DOL had requested them.

Testimony of petitioner Iqbal Ahmed

Petitioner Iqbal Ahmed testified that he is a "handyman" and that he has worked his entire professional life as a plumber and electrician. Ahmed first met Zia in 2006 when Zia hired him to fix a refrigerator at his bagel restaurant. Zia then sought to hire him to do electrical work at a new restaurant that Zia was opening. Ahmed provided Zia with a $20,000.00 estimate for the work and Zia made a counter proposal that they form a business partnership to operate the restaurant. Ahmed agreed to the proposal and they opened a bank account, established the company, and made Zia President and Ahmed Vice President. The company was named SI Best Food Inc -- the "S" represents Shahid Zia and the "I" represents Iqbal Ahmed.

Ahmed testified that he first met claimant when Singh hired him to fix a problem with the heating at his home. According to Ahmed, Singh was never an employee at Mezban Palace during the period of his claim and simply visited the restaurant several times a week, sitting around for two-to-four hours each time and coming and going at his leisure. Singh once taught the restaurant's staff how to cook Greek dishes but never did regular cooking. Ahmed acknowledged that he gave Singh $500.00 as a loan, from one friend to another. Only after Zia returned to the restaurant in March 2008 did Singh become a regular employee.

Ahmed testified that Mezban Palace opened for business on October 29, 2007, with himself, Zia, and Singh in attendance. Zia then left the country on December 18, 2007 and asked Ahmed to "take care" of things at the restaurant while he was away. Zia trained Ahmed how to manage the restaurant's staff in his absence, including how to pay the employees every week and keep records of those payments. Ahmed ran all aspects of the business while Zia was out of the country, including paying the employees, issuing check payments to vendors, paying the restaurant's taxes, making deposits to the company's bank accounts, and receiving its bank statements. Ahmed claimed that while he issued check payments under his own signature he did so at Zia's direction and that he "blind[ly]" trusted Zia because he was "the big shot."

Ahmed further testified that Mezban Palace employed a cook, an assistant to the cook, a baker, two dishwashers, and an employee who worked at the restaurant's front counter. The restaurant was open seven days a week during the first month and six days a week thereafter. Restaurant staff arrived and started work at 11:00 a.m. The cook prepared rice and curry in the morning, from 11:00 a.m. to 1:00 p.m., and then was done with his duties. Foodservice began at 12:00 p.m. and the restaurant closed to customers at 10:00 p.m. Ahmed added that all food preparation took place the night before -- the cook would prepare the food for the following day and leave the restaurant by 8:00 p.m.

Ahmed at first disavowed having authority over the restaurant's employees but later testified that he hired the dishwasher, set his rate of pay at $50.00 per week, and later terminated him. Ahmed paid the cook $600.00 per week, the dishwashers between $250.00 and $300.00 per week, and kept weekly records of their payments. Ahmed testified that when the Marshalls evicted him from the restaurant on August 18, 2008 he lost possession of all the restaurant's pay records.

Responding to DOL's investigation, Ahmed testified that he believed the investigation and the orders were unfair and unreasonable because he never received any letters from DOL and the investigator never sought to speak with him.

SCOPE OF REVIEW AND BURDEN OF PROOF

An aggrieved party may petition the Board to review the validity and reasonableness of an order issued by the Commissioner (Labor Law § 101 [1]). A petition must state in what respects the order on review is claimed to be invalid or unreasonable and any objections not raised in the petition shall be deemed waived (*Id.* § 101 [2]).

The Labor Law provides that an order of the Commissioner is presumptively valid (*Id.* § 103 [1]). Should the Board find the order or any part thereof is invalid or unreasonable, the Board shall revoke, amend or modify the order (Labor Law § 101 [3]).

The party alleging error bears the burden of proving every allegation in a proceeding (State Administrative Procedure Act § 306 [1]; 12 NYCRR 65.30; *Angello v Natl. Fin. Corp.*, 1 AD3d 850, 854 [3d Dept 2003]). A petitioner must prove that the challenged order is invalid or unreasonable by a preponderance of evidence (Labor Law § 101 [1]; *Matter of Ram Hotels, Inc.*, PR 08-078 at 24 [October 11, 2011]).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Board makes the following findings of fact and conclusions of law pursuant to Board Rule 65.39 (12 NYCRR 65.39).

Definition of Employer Under the Labor Law

"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 that a person is "permitted or suffered to work" (Labor Law § 2 [7]).

Like the New York Labor Law, the federal Fair Labor Standards Act (FLSA) defines "employ" to include "suffer or permit to work" (29 USC § 203 [g]), and the test for determining whether an entity or person is an employer under the Labor Law is the same test for analyzing employer status under the FLSA (*Matter of Yick Wing Chan v. N.Y. State Indus. Bd. of Appeals*, 120 AD3d 1120 [1st Dept 2014]; *Chung v. New Silver Palace Rest., Inc.*, 272 F Supp 2d 314, 318 n6 [SDNY 2003]).

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

> "[T]he 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" (internal quotations and citations omitted).

No one of these factors is dispositive; the purpose of examining them is to determine the economic reality based on a "totality of circumstances" (*Id.*). Under the economic reality test, employer status "does not require continuous monitoring of employees, looking over their shoulders at all times, or absolute control of one's employees. Control may be restricted, or exercised only occasionally, without removing the employment relationship from the protections of the FLSA, since such limitations on control do not diminish the significance of its existence" (*Herman*, 172 F3d at 139 [internal quotation marks omitted]). Under the broad New York and FLSA definitions, it is well settled that more than one entity or person can be found to be a worker's employer (*id.*; *Matter of Robert H. Minkel and Millwork Distributors, Inc.*, PR 08-158 at 8 [January 27, 2010]).

"The existence and degree of each factor is a question of fact while the legal conclusion to be drawn from those facts . . . is a question of law" (*Brock v Superior Care, Inc.*, 840 F2d 1054, 1059 [2d Cir 1988]). In applying the factors, the reviewing tribunal is to be mindful that "the remedial nature of the statute . . . warrants an expansive interpretation of its provisions so that they will have the widest possible impact in the national economy" (*Herman*, 172 F3d at 139 [internal quotation marks omitted]).

Petitioner Is An Employer Under The Labor Law

Applying this test to the present case, we find that petitioner was claimant's "employer" as a matter of economic reality and was responsible for the wages owed.[3]

Petitioner first argued that Singh was never an employee of the restaurant during the period of his claim, testifying in general fashion that Singh simply visited the restaurant two to four hours

[3] While petitioner argued that Zia should also have been listed in the orders as an employer responsible for claimant's wages, our review is limited by the Commissioner's orders that were issued in this case and we need not address or resolve that issue.

a day several times a week, coming and going as he pleased. Petitioner acknowledged that Singh attended the Grand Opening, gave cooking tips to the staff, and that he once gave him $500.00 as a loan between friends. According to Ahmed, Singh did not become a regular employee until after Zia returned from his trip to Pakistan. Petitioner submitted no payroll records showing the names, hours, and dates of employment for any of the employees that *did* work at the restaurant, however, and submitted no proof corroborating that the payment was a loan and not wages.

In contrast to petitioner's vague and general testimony, Singh described the circumstances of his hiring and employment by Ahmed in detail, explaining that after Ahmed learned that he had experience as a cook he invited Singh to come work for him at a new restaurant he was opening. Claimant accepted the offer and reported to the restaurant a few days before it opened. Ahmed assigned him to open the restaurant in the morning, close it at night, prepare its daily menu, and work the counter and serve customers. The parties agreed that claimant would receive $350.00 per week and be raised to a higher rate after the restaurant got established. Singh testified that Ahmed paid him in cash, giving him $100.00 after his first month and promising to pay the rest of his wages "little by little" after the business was running. He was paid at most between $500.00 and $1,000.00 and frequently had to ask for his pay simply to pay his bills and expenses. Singh further described in detail that petitioner was responsible for "everything" at the restaurant and that he supervised its operations on a daily basis, coming to the restaurant at night to count the day's proceeds, pay the bills, and sample and approve the menu that Singh prepared each day. Claimant's testimony concerning his hiring and employment by the petitioner was detailed, specific, and credible and we credit it over petitioner's vague and general denials.

Ahmed acknowledged that during Zia's absence from the country he ran all aspects of the business, including paying the employees, issuing check payments to vendors, paying the restaurant's taxes, making deposits to the company's bank accounts, and receiving its bank statements. Ahmed admitted that he paid some six employees on a weekly basis, recorded their payments in records he maintained, and hired and fired a dishwasher during this time period. Together with Singh's testimony, the record evidence amply demonstrates that as a matter of economic reality petitioner had authority to hire the claimant and other employees, supervise and control their schedules of work and conditions of employment, determine their rate and method of payment, and maintain their employment records (*Herman*, 172 F3d at 179). While petitioner sought to characterize himself as acting at Zia's behest at all times, employer status under the Labor Law is not limited to a single person or entity, but may include any agent, manager, supervisor, and subordinate, as well as any other person or entity acting in such capacity (Labor Law §§ 2 [6], 2 [8-a]). It is also well settled that employees may have more than one employer (*see, e.g., Matter of Robert H. Minkel and Millwork Distributors, Inc.*, PR 08-158 at 8]).

Based on the totality of circumstances, we find that as a matter of economic reality petitioner was claimant's employer during the period of his claim and thereby responsible for any back wages owed.

The Wage and Minimum Wage Orders Are Affirmed
But Modified As to the Amount of Wages Owed

The Labor Law requires employers to maintain accurate payroll records that include, among other things, 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 and maintain the records for no less than six years (*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 employee's evidence (*Anderson v Mt. Clemens Pottery*, 328 US 680, 687–88 [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 credible evidence (*Doo Nam Yang v ACBL Corp.*, 427 F Supp 2d 327, 332 [SDNY 2005]; *Matter of Kong Ming Lee*, PR 10-293 at 16 [April 20, 2014]).

Petitioner produced no payroll records establishing the hours that claimant worked and the wages he was paid during the period of his claim, explaining that the restaurant's pay records were removed by the Marshalls when he was evicted from the premises. However, the Appellate Division held in *Angello v National Finance Corp.*, 1 AD3d 850, 854 [3d Dept 2003], that where the employer does not provide the records required under the Labor Law, "regardless of the reason therefor," the presumption favoring the Commissioner's determination based on the employee's statements applies.

In lieu of adequate payroll records, petitioner disputed the Commissioner's calculation because the restaurant was purportedly open seven days per week during its first month of operation, six days per week thereafter, and the hours worked by the cook were less than those claimed by Singh. We find the Commissioner's calculation of claimant's hours to be a reasonable approximation, however, as it was based on claimant's written claim submitted to DOL while the restaurant was still in operation. Petitioner also argued that no person would work more than two weeks without receiving a regular wage. The Board has repeatedly held that such general testimony and conjecture is insufficient to meet an employer's burden of proof (*see, e.g., Matter of Young Hee Oh*, PR 11-017 at 12 [May 22, 2014] [employer cannot shift its burden to the Commissioner with arguments, conjecture, or incomplete, general, and conclusory testimony]). Moreover, claimant credibly explained that he made repeated requests for his wages and was told that Ahmed would pay him "little by little" after the business got running. After waiting several months for his wages, he filed his claim with DOL.

In the absence of adequate payroll records submitted by petitioner, the Commissioner was entitled to rely on the written claim and other statements filed by the claimant in this case as the "best available evidence" and draw an approximation of his hours worked and wages owed, even where imprecise (*Mt. Clements Pottery Co.*, 328 U.S. 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"]). Petitioner failed to overcome that approximation with credible or reliable evidence at hearing establishing the precise hours claimant worked, and that he was paid for those hours, or with other evidence showing the Commissioner's findings to be unreasonable.

At hearing claimant testified that he agreed to accept $350.00 per week and was paid a total of between $500.00 and $1,000.00 for the claim period. Accordingly, we modify the wage order as to the amount of wages owed. We recalculate the wages owed for the period of the claim from November 3, 2007 to March 28, 2008, utilizing a pay rate of $350.00 per week and crediting petitioner with a payment of $750.00, for a total of $6,600.00 with interest reduced proportionally.

For the minimum wage order, we find that utilizing the $350.00 rate per week would result in petitioner owing an amount greater than that calculated be respondent. However, we are bound by the wage calculation made by the commissioner in the Article 19 order, and may not modify the wages upward since this was the determination issued to petitioner that is under review. (*Matter of Beqiraj*, PR 11-393 at 9 n.3 [July 22, 2014] [Board precluded from modifying wages upward]). We therefore affirm the minimum wage order, but reduce the total amount due by revoking the civil penalty as discussed below.

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 (1) sets the "maximum rate of interest" at "sixteen per centum per annum."

Petitioner failed to submit evidence at hearing challenging the interest assessed in the wage and minimum wage orders and the issue is thereby waived pursuant to Labor Law § 101 (2) ("Any objections to the . . . order not raised in such appeal shall be deemed waived"). However, consistent with our findings above, the amount of interest in the wage and minimum wage orders must be recalculated.

Liquidated Damages

Labor Law § 663 (2) provides that when wages are found to be due, the Commissioner shall assess against the employer the full amount of the underpayment "and an additional amount as liquidated damages, unless the employer proves a good faith basis for believing that its underpayment of wages was in compliance with the law." Such damages shall not exceed 100% of the total amount of wages found to be due.

Petitioner failed to submit evidence at hearing challenging the liquidated damages assessed in the minimum wage order and the issue is thereby waived pursuant to Labor Law § 101 (2).

However, consistent with our findings above, the amount of liquidated damages in the minimum wage order must be recalculated.

The Civil Penalties in the Wage and Minimum Wage Orders Are Revoked

Labor Law § 218 (1) provides that when determining the amount of civil penalty to assess against an employer who has violated a provision of Articles 6 or 19 of the Labor Law, or sections 161 (day of rest) and 162 (meal periods), the Commissioner shall give:

> "due consideration to the size of the employer's business, the good faith basis of the employer to believe that its conduct was in compliance with the law, 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.*)

Ahmed testified that he believed the orders were unfair and unreasonable because he never received any letters from DOL and the investigator never sought to speak with him throughout the course of the investigation. In explaining the basis for the civil penalties, investigator Ortiz testified that they were recommended after DOL had made efforts to contact the employer to reach a resolution of the issues and those efforts had proved unsuccessful. She testified in general fashion that whether the employer acted in good faith was considered and that the penalties in the orders were in large part based on the employer's failure to submit required payroll records.

The record in this matter shows, however, that DOL did not contact petitioner until *after* its determination was made that he was responsible for the wages owed. Petitioner was simply requested to remit payment of the wages or orders to comply would be issued. While relevant payroll records and other information may have been requested from Zia, no request was made from Ahmed that he furnish records, speak with the investigator, or provide a statement of reasons why the wages were not owed. In the circumstances of this case, we find the Commissioner failed to "duly consider" the factors concerning petitioner's good faith and compliance with record-keeping obligations. We revoke the civil penalties in the wage and minimum wage orders accordingly.

Penalty Order

Count 1: Failure to keep and/or furnish payroll records.

Count 1 of the penalty order assesses a $1,000.00 civil penalty for violating Labor Law § 661 and 12 NYCRR 137-2.1 by failing to keep and/or furnish accurate payroll records for each employee from November 3, 2007 through March 28, 2008. Ahmed testified that the orders were unreasonable because he never received any letters from DOL and the investigator never attempted to speak with him throughout the course of the investigation. He also testified that all of the restaurant's payroll records were removed by the Marshalls when the restaurant was closed in 2008, including the records he maintained of the wages paid to the employees in Zia's absence. As we find above, the record establishes that DOL contacted petitioner only after its determination that he was responsible for the wages owed. No request was ever made of him that he produce any relevant payroll records. In the circumstances of this case, we find the Commissioner failed to

"duly consider" the factor concerning petitioner's good faith and revoke the civil penalty in count 1 for failure to maintain and/or furnish accurate payroll records.

Counts 2 through 4: Failure to allow employees of a restaurant at least 24 consecutive hours of rest in any calendar week; failure to provide employees at least a 30 minute meal period; failure to provide each employee a complete wage statement with every payment of wages.

Ahmed did not submit evidence challenging the $1,000.00 civil penalty assessed for each of count 2, 3 and 4 of the order for violation of Labor Law §§ 161 and 162 and 12 NYCRR 137-2.2. The issue is thereby waived pursuant to Labor Law § 101 (2).

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The wage order is affirmed, but modified to reduce the amount of wages owed to $6,600.00, with interest reduced proportionally, and the civil penalty is revoked; and

2. The minimum wage order is affirmed, but modified to reduce the total amount due by revoking the civil penalty; and

3. Count 1 of the penalty order is revoked, counts 2, 3, and 4 are affirmed, and the total penalty is reduced to $3,000.00; and

4. The petition be, and the same hereby is, otherwise denied.

Vilda Vera Mayuga, Chairperson

J. Christopher Meagher, Member

LaMarr J. Jackson, Member

Michael A. Arcuri, Member

Dated and signed in the Office
of the Industrial Board of Appeals
in Albany, New York on
April 13, 2016.