STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of: ABDUL ABULLAH AND RAYEN HUSSEIN (T/A STOCK AIDE DELI) ALSO (T/A STOCK AIDE MARKET & DELI), Petitioners, To Review Under Section 101 of the Labor Law: An Order to Comply with Article 19 and an Order Under Articles 5 and 19 of the Labor Law, both dated May 24, 2012, - against - THE COMMISSIONER OF LABOR, Respondent.	DOCKET NO. PR 12-124 RESOLUTION OF DECISION

APPEARANCES

Girvin & Ferlazzo, P.C. (Scott P. Quesnel and Philip Miller of counsel), for petitioners.

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

WITNESSES

Abdul Abullah, Rayen Hussein, Shannon Speanburg, Robert Evans and William McCormick, for petitioners.

Crystal Magielda, claimant; and J. C. Dacier, Senior Labor Standards Investigator, for respondent.

WHEREAS:

The petition filed with the Industrial Board of Appeals (Board) on July 10, 2012, seeks review of two orders issued on May 24, 2012, by respondent Commissioner of Labor against petitioners Abdul Abullah and Rayen Hussein (T/A Stock Aide Deli) also (T/A Stock Aide Market & Deli) (together, petitioners). Respondent filed an answer on August 15, 2012.

Upon notice to the parties, a hearing was held on February 12, 2014, in Albany, New York before Wendell P. Russell, Jr., then Counsel to the Board and the designated hearing

officer in this proceeding. 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 (minimum wage order) directs petitioners to comply with Article 19 of the Labor Law and pay the Commissioner wages owed to employees Haroon Alradee, Jamal Alzanam, Abed Ghaithi and claimant Crystal Magielda for the period of March 14, 2007 through March 9, 2011, in the amount of $70,432.10, together with interest continuing thereon at the rate of 16% to the date of the order in the amount of $22,739.55, liquidated damages of 25% of the wage claims in the amount of $17,608.04, and a civil penalty of $70,432.10. The total amount due is $181,211.79.

The second order (penalty order) directs petitioners to pay a civil penalty of $100.00 for failure to allow employees at least 24 consecutive hours of rest in any calendar week from on or about March 1, 2007 through March 31, 2011, in accordance with Labor Law § 161; and $500.00 for failure to keep and/or furnish true and accurate payroll records for each employee for the period from on or about March 1, 2007 through March 31, 2011, in accordance with Labor Law § 661 and 12 NYCRR 142-2.6. The total amount due is $600.00.

The petition claims the orders are invalid or unreasonable because: (1) the employees listed in the minimum wage order were appropriately compensated for each hour of work at a rate that equaled or exceeded the minimum wage; (2) employees were not entitled to overtime because they were not permitted to work more than 40 hours in any given week; (3) the Department of Labor (DOL) ignored critical information provided by petitioners when reaching the conclusions set forth in the orders; (4) the method used in calculating the amount of underpayment is inconsistent with guidance, opinions and regulations in New York State and federal labor law; (5) the method used to calculate wages claimed failed to consider the actual number of hours of work that employees affirmed they performed; (6) petitioners did not engage in any conduct that would warrant the civil penalties based upon the criteria identified in the orders; (7) interest should not be assessed against petitioners for any periods of inactivity or delay attributable to DOL; (8) employees were not required to work a calendar week without receiving 24 consecutive hours of rest and evidence to this effect was made available to DOL; (9) petitioners maintained true and accurate payroll records that were made available to DOL; and (10) petitioners did not receive credit for meals and lodging provided to employees.

Petitioners presented subpoenas for (1) unemployment insurance records of claimant Crystal Magielda and (2) for respondent's counsel to provide contact information for claimant Crystal Magielda. The subpoena requests were approved by the Board and respondent moved to quash them on January 30, 2014, based upon DOL having issued its own subpoena for Magielda to appear at the hearing and having received assurance from Magielda of her intention to appear. Respondent's counsel stated that there were legitimate privacy concerns regarding disclosing the address of the claimant. With respect to the unemployment insurance records, respondent stated that it was statutorily prohibited from providing such information pursuant to Labor Law § 537, which provides that unemployment insurance records are confidential. Petitioners claimed that the unemployment insurance records were relevant with respect to the reliability of claimant's wage claim and may reflect inconsistency that goes to the credibility of Magielda's claim. The hearing officer granted respondent's motion to quash the two subpoenas in a decision issued on February 7, 2014, noting that at hearing petitioners would have a full opportunity to question Magielda in detail about her wage claim and would be able to make inquiry as to relevant areas

that go to the reliability and credibility of the witness' testimony. At hearing, petitioners renewed their objection to respondent's motion to quash because they were unable to obtain Magielda's consent to the release of her unemployment records since respondent did not provide her contact information.

SUMMARY OF EVIDENCE

Petitioner Rayen Hussein

Hussein testified that he was partner and co-owner with Abullah in the Deli, a single convenience store and deli located at 33 State Street in Schenectady, New York. The store sold groceries, cigarettes, deli sandwiches, beverages and typical convenience store/deli items. He started the business with Abullah in 2007 with just the two of them working with Abullah opening the business at 8:00 a.m. and usually leaving at 8:00 p.m. and Hussein starting around noon time and closing at 10:00 p.m. or at 11:00 p.m. on weekends and cleaning up. The business operated this way every day for the first 18 months.

At some point, Abullah met Magielda who was working in the area at a Wendy's restaurant and was living down the street from the Deli at the YWCA. She used to come and "hang out" in the Deli and then one day she came in "crying to us" saying that she "got kicked out from the YWCA and she don't have no place to go." Hussein and Abullah discussed the matter and they agreed that she could stay with them at their apartment for two weeks until she was able to find "a better place for her."

Hussein testified that at some point in 2008, Magielda started working at the Deli four or five hours a day, four or five days a week. He stated that she never worked seven days a week and that her work was "off and on" because she would work for a month and then stop working for another month before returning to work. Hussein testified that he did not record Magielda's hours in writing, but that he knew how many hours she worked and his bookkeeper recorded them. Magielda was always paid $275.00 a week for 25 to 30 hours a week and never worked 40 or more hours a week. Hussein testified that Abullah and Magielda developed a personal relationship; she lived with Abullah for a time at their apartment but did not contribute to any of the expenses. The costs of the apartment were split in half between Abullah and Hussein, and Magielda was able to eat whatever food they cooked.

Hussein also testified that Abed Ghaithi worked at the Deli for a short period of time in 2010 but Hussein was overseas during part of the time Ghaithi worked at the Deli. He stated that Ghaithi was paid $175.00 weekly and worked "four to five hours a day, six days a week." Ghaithi was provided meals and shared a bedroom with Hussein in the apartment like Magielda shared a bedroom with Abullah at no cost. As to employee Haroon Alradee, Hussein testified that he worked at the Deli between five and six hours a day, six days a week in 2009 or 2010 and was paid $275.00 a week in addition to being provided with meals and housing. The other individual listed in the minimum wage order, Jamal Alzanam, worked at the Deli for "about a year" in 2009 or 2010. Hussein stated that Alzanam worked no more than six days a week for six to seven hours a day and was paid $400.00 per week and was provided free meals but he was not given housing because he was married and had his own housing. Hussein testified that he paid all his workers more than minimum wage.

Petitioner Abdul Abullah

Abullah testified that he and Hussein opened the Deli in 2006 and were the only ones working there until Magielda started working for them at the end of 2008 or beginning of 2009. He stated that she worked four to five days a week and when she first started not more than three hours a day. After three or four months, she worked no more than four or five hours a day. Abullah went on to testify that Magielda had been working for them for about one year when her schedule increased to four to five hours a day six days a week. He stated that her hours did not increase from that level and she never worked seven days a week or more than 40 hours in a week. Magielda's weekly pay started at $225.00, and then increased to $265.00 or $270.00 after the first three or four months. He stated that she was paid in cash and she did not pay for any meals or expenses at the apartment where they lived together. Abullah testified that Magielda stopped working at the Deli around the end of 2009 or in 2010. Abullah testified that he never kept a record of Magielda's work hours.

Abullah testified during a visit to the Deli, DOL may have spoken to Alradee, who does not speak English. He stated that he thought Alradee worked in 2010 between four and six hours a day, six days a week and was paid "around two hundred seventy-five, two hundred ninety" dollars a week. Alradee also received free housing at petitioners' apartment and meals. Abdullah testified that Ghaithi had a similar arrangement of working four to five hours a day six days a week, he was paid in cash around $230.00 a week, and he was also provided with a place to stay and meals at petitioners' apartment. Abullah never worked with Jamal Alzanam.

Abullah also stated that Magielda was not his girlfriend but they became friends from her "hanging out" at the Deli. When she lost housing at the YWCA, he allowed her to stay in his apartment for two weeks that got extended once she started to work at the Deli. Abullah testified that he fired Magielda at one time, but rehired her because he felt sorry for her. Abullah said that she worked again for a few months and then she was fired for a second time that he thought was at the end of 2009.

On cross-examination Abullah admitted that he had never provided Magielda with any documentation relative to her hiring or the times he said he fired her. Abullah testified that he did not keep any records of the employees' work hours between 2007 and 2011 and stated the Deli was initially open from 8:00 a.m. until 10:00 or 11:00 p.m. and in 2008 or 2009 it changed to 7:00 a.m. until midnight.

Shannon Speanburg

Shannon Speanburg testified that she lives across the street from the Deli and has visited it on a daily basis since 2007. Speanburg stated that she went to the Deli usually in the morning to get her coffee and often other times during the day. Speanburg would see Magielda working at the Deli four or five days a week but never seven days a week. Speanburg also testified that while she saw Magielda in the morning, by 1:00 or 2:00 p.m. she would not see her working behind the counter and she never saw her working after 5:00 p.m. when Speanburg would also visit the store at least five evenings a week. Speanburg testified that she saw Alzanam working at the Deli in the mornings "a couple of times a week." Speanburg testified that from 2007 to 2010, the Deli was open until midnight for some time before it changed its closing time to 1:00 a.m., times during which she would often visit the Deli.

Robert Evans

Robert Evans testified that he has lived "three doors away" from the Deli since 2005 and has been going to the Deli daily since it opened in 2006 or 2007. Evans said that he visited the store six or seven times a day to buy a 12-ounce can of beer each time and would drink them starting in the afternoon "like one an hour—one an hour and a half." He testified that he would see Magielda working at the Deli usually in the mornings and seldom after 12:00 p.m., three to five days a week. Evans also testified that he observed Alzanam working at the Deli from opening until about 3:00 p.m. and never on the weekends.

William McCormick

William McCormick testified that he is employed as a bus driver and the Deli is on one of the routes that he drives. Petitioners allow the bus drivers to use the restroom and to rest at the Deli. He testified that he was working as a bus driver during the claim period and usually visited the Deli five to six days a week often four to six times a day. He said that sometimes he was there in the evening "but most of the times, I would be driving mornings." He identified Magielda as a former employee of the Deli and said that he saw her at the Deli four or five days a week as early as 10:00 or 11:00 a.m. and as late as 6:00 or 7:00 p.m. McCormick also remembered seeing Ghaithi working at the Deli early in the morning and Alzanam at noon. On cross-examination, McCormick testified that he usually worked a morning shift that often started before the Deli was open and he would work until early afternoon. He usually worked five or six days a week and he generally had Sundays off. While he usually worked the early shift, he also worked split shifts so that he would be working during afternoons and sometimes into the evening.

Senior Labor Standards Investigator J.C. Dacier

Dacier testified that he was not involved with the investigation of this case and his only contact with any of the claimants was with Magielda, just prior to the hearing and well after the minimum wage and penalty orders had been issued. Dacier said that David Mattice was the DOL investigator who had worked on the case. Dacier did not speak to him about the case but reviewed the file to prepare for the hearing.[1] Dacier was questioned about Respondent's Exhibit H that was a report prepared by Mattice. The report states that the employer did not provide "day of rest in a retail establishment, as per claim form and interviews." Dacier testified that the only interview Mattice conducted was with Alradee and as Alradee's English ability was very poor, Mattice might have used an interpreter following usual practice but Dacier did not know if one was engaged by Mattice during this interview.

Dacier testified about Respondent's Exhibit C that included handwritten notes by Mattice of his interview with Alradee on February 1, 2011. The notes include a date of hire of January 21, 2011, while the minimum wage order lists an underpayment for Alradee covering the period from January 6, 2010 to March 9, 2011. Dacier testified that this was a mistake but he would have to look at the payroll records since respondent might have used a different date if payroll records showed Alradee working during a different time period. Dacier was questioned about

[1] At the time of hearing, Mattice was apparently no longer a DOL employee and petitioners' attempt to subpoena him was not successful.

Petitioners' Exhibit 6 that was a Claim Intake form completed by another DOL investigator, Lori Roberts. Dacier confirmed that the form indicates Magielda's claim period is from October 29, 2009 to March 5, 2010. Dacier testified that he thought the claim period was an error since Magielda's claim form noted a time period starting in March 2007.

Dacier testified that if Mattice would have known that Alradee and Ghaithi were Abullah's nephews during the investigation, Mattice could have excluded them from the orders as relatives of one of the employers following DOL policy. Dacier also testified that if meals and housing were provided to employees, certain credits could have been given against wages but this was not investigated by Mattice probably due to the lack of employer records.

Dacier testified that he included a 100% civil penalty for the minimum wage order following his supervisor's directive. He testified that Mattice's documentation indicated that the employer was cooperative, promised future compliance, and was not familiar with the law. Dacier stated that those factors usually suggest a lower penalty would be imposed, but that he had no leeway regarding the civil penalty and that there is never a consideration to include anything lower than 100% civil penalty.

Claimant Crystal Magielda

Magielda testified that she worked at the Deli from March 2007 until March of April 2011 at least nine hours a day, seven days a week, and never took a day off. Her hours were 7:00 a.m. until 3:00 or 6:00 p.m. and also some evenings, but she never used a time clock or other log to record her hours and did not get a meal break. Magielda also testified that she was paid some wages in cash and some by check with the combined total between $200.00 and $300.00 per week. She listed in her claim form only the periods during which she was paid by check because those are the only ones for which she had documents showing payments received. She believes she provided those documents to respondent. Magielda testified that she lived with Abullah for part of the claim period and that although he provided her with some meals, she paid for some of the food as well. Magielda worked with Alradee and stated that he understood English "pretty well."

Magielda was questioned about Petitioners' Exhibit 4 that was a sworn affidavit she executed before a Notary Public on April 19, 2011. Magielda affirmed in the affidavit that she was not underpaid by the Deli; that she worked approximately 36 hours a week; that she received meals and lodging from her employer; that she worked at the Deli from June 3, 2009 through March 3, 2010 only; and that her total hourly earnings were $8.22, and she did not believe she had been underpaid by petitioners. Magielda testified that her sworn affidavit is not "truthful and accurate" because she had been "intimidated and coerced" into signing the document. Magielda testified that she signed the document before petitioners' then attorney and was told by Abullah what to write while in a car on their way to his attorney's office. Magielda testified that she was in fear for her safety if she did not comply with petitioners' request, although Hussein had never threatened or hurt her and she had never had any physical fights with Abullah. Magielda continued to work for petitioners after signing the document because she "needed the money."

GOVERNING LAW

Standard 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. 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 invalid or unreasonable, the Board "shall revoke, amend or modify" the order (Id. § 101 [3]). The party alleging error bears the burden of proving every allegation in a proceeding (State Administrative Procedure Act § 306 [1]; Angello v Natl. Fin. Corp., 1 AD3d 850, 854 [3d Dept 2003]; 12 NYCRR 65.30). Therefore, by a preponderance of the evidence (Matter of Ram Hotels, Inc., PR 08-078, at 24 [2011]), petitioners must prove that the challenged orders are invalid or unreasonable (Labor Law § 101 [1]).

An Employer's Obligation to Maintain Records

New York State Labor Law and the Minimum Wage Order for Miscellaneous Industries and Occupations require that employers maintain and preserve for not less than six years, weekly payroll records which show each employee's name and address, social security number, regular and overtime wage rate, the number of regular and overtime hours worked daily and weekly, the amount of gross wages, deductions from gross wages, allowances, if any, claimed as part of the minimum wage, and net wages paid (Labor Law § 661 and 12 NYCRR 142-2.6). Upon request of the Commissioner, the employer is required to make the records available at the place of employment. 12 NYCRR 142-2.7 further provides that every employer shall furnish each employee with a statement with every payment of wages listing hours worked, rates paid, gross wages, allowances, if any, claimed as part of the minimum wage, deductions and net wages. Regulations at 12 NYCRR 142-2.5, 142-2.19, and 142-2.20 allow employers to receive credit for certain allowances such as meals and lodging provided to employees if certain conditions are met and the employer has appropriate records as required by 12 NYCRR 142-2.6.

Burden of Proof in the Absence of Adequate Employer Records

An employer's failure to keep adequate records does not bar employees from filing wage complaints. Where employee complaints demonstrate a violation of the Labor Law, DOL must credit the complaint's assertions and relevant employee statements and calculate wages due based on the information the employee has provided. The employer then bears the burden of proving that the disputed wages were paid. Labor Law § 196-a provides that employers who keep inadequate records "shall bear the burden of proving that the complaining employee was paid wages, benefits, and wage supplements" (*Angello v Natl. Fin. Corp.*, 1 AD3d 850 [3d Dept 2003]).

In *Anderson v Mt. Clemens Pottery Co.*, 328 U.S. 680, 687-688 (1949), superseded on other grounds by statute, the U.S. Supreme Court discussed the fairness of relying on employee statements where the employer failed to keep adequate records:

> "[W]here the employer's records are inaccurate or inadequate . . . [t]he solution . . . is not to penalize the employee by denying him any recovery on the ground that he is unable to prove the precise extent of uncompensated work. Such a result would place a premium on an employer's failure to keep proper records in conformity with his statutory duty; it would allow the employer to keep the benefits of an employee's labors without paying due compensation as contemplated by the Fair Labor Standards Act."

Citing to *Anderson v Mt. Clemens,* the Appellate Division in *Mid-Hudson Pam Corp. v Hartnett,* 156 AD2d 818, 821 (3d Dept 1989) agreed:

> "The public policy of providing protection to workers is embodied in the statute which is remedial and militates against creating an impossible hurdle for the employee . . . . Were we to hold otherwise, we would in effect award petitioners a premium for their failure to keep proper records and comply with the statute. That result should not pertain here."

When a violation of the Labor Law is shown, DOL may credit a complainant's assertions and calculate wages due based on such information, and the employer then bears the burden of showing that the Commissioner's calculation is invalid or unreasonable by proof of the specific hours claimants worked and that they were paid for these hours, or other evidence that shows the Commissioner's findings to be invalid or unreasonable. (*Matter of Ram Hotels, Inc.*, PR 08-078 [October 11, 2011]; *Matter of Angello v National Finance Corp.*, 1 AD3d 850 [3d Dept. 2003]; *Matter of Mid-Hudson Pam Corp. v Hartnett,* 156 AD2d 818, 821 [3d Dept. 1989]; *Anderson v Mt. Clemens Pottery Co.*, 328 U.S. 680, 687-688 [1949]). In *National Finance Corp.*, the Court stated that "the burden of disproving the amounts sought in the employee claims fell to [the employer], not the employees, and its failure in providing that information, regardless of the reason therefor, should not shift the burden to the employees" (*National Finance Corp.*, 1 AD3d at 854).

Minimum Wage and Overtime

Article 19 of the Labor Law, known as the Minimum Wage Act, requires employers to pay not less than the applicable minimum wage to each covered employee (Labor Law § 652). During the time period relevant to this proceeding, the minimum wage was $7.15 an hour from March 14, 2007 to July 23, 2009, and $7.25 an hour from July 24, 2009 through the end of the claim period (Labor Law § 652 [1]; 12 NYCRR 142-2.1). Article 19, in addition to requiring employers to pay the applicable minimum hourly wage rate to covered employees, requires payment of an overtime premium of time and one-half the regular hourly rate for hours worked over 40 in a week (12 NYCRR 142-2.2).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

Officer of February 7, 2014, granting respondent's motion to quash petitioners' subpoenas for the reasons stated therein. Magielda appeared at the hearing and petitioners had a full opportunity to question her about all relevant matters. For the reasons stated below, we find that petitioners failed to meet their burden to prove the amount of minimum and overtime wages found due is unreasonable, but, as discussed below, we remove Ghaithi from the minimum wage order and revoke the civil penalty.

Minimum wage order is modified

This case was commenced when claimant Magielda submitted a claim form to respondent on March 11, 2010, in which she claimed to have worked for petitioners 63 hours a week, seven days a week for approximately a three year period. Magielda testified that she worked at least nine hours a day, seven days a week for three years and never took one day off. The wage order uses a claim period of March 14, 2007 to March 5, 2010. The burden of proof is on petitioners to counter employee claims by a preponderance of the evidence and where there are no records, this burden must be met by other evidence that shows the Commissioner's findings are invalid or unreasonable. (*Matter of Julianne W. Beckerman*, Board Docket No. PR 14-088 [June 10, 2015]; *Matter of Marvin Milich*, Board Docket No. PR 10-145 [June 12, 2013]). We find petitioners, admittedly lacking legally sufficient payroll records, failed to meet their burden of proof through other means such as testimonial evidence. As discussed below, their own testimony at hearing confirmed many of respondent's findings.

Petitioners had three customers testify on their behalf at hearing. Their testimony was too general, vague and unreliable to meet the burden of proof. None of petitioners' witnesses were able to accurately testify as to the hours worked by each employee listed in the minimum wage order and their sporadic even if frequent visits to the Deli are insufficient to account for the work hours of petitioners' employees at the Deli. At best, their testimony confirms respondent's findings.

Petitioners not entitled to meal or lodging credit

New York State Labor Law and regulations require employers to keep detailed records about meals and lodging provided in order for employers to be credited the amounts specified in the regulations (12 NYCRR 142-2.5). Here, petitioners are not entitled to a meal or lodging credit as they failed to comply with the applicable regulations that require record keeping. Mere testimony about free meals provided and that employees who lived with petitioners could eat anything they wanted is not enough to overcome the requirements of the law and regulations.

Wages due Magielda, Alzanam and Alradee as calculated

Respondent calculated $52,380.32 due to Magielda for the period from March 14, 2007 through March 5, 2010; $8,380.78 due to Alzanam for the period from August 26, 2009 through September 29, 2010; and $8,728.50 due to Alradee for the period from January 6, 2010 through March 9, 2011.

For Magielda, respondent based its determination in Magielda's claim form that indicated she worked 63 hours per week for the entire duration of the claim period and received weekly wages that started at $97.88 and were later increased to $203.00. Magielda's testimony was

consistent with her claim form. Both petitioners testified that Magielda started working at the Deli sometime in 2008, but lacking records or other evidence that credibly provides her specific work hours, we find it was reasonable for respondent to rely on Magielda's claim form and apply the same amounts to the claim period for which there are no payroll records. Although Hussein testified that some of her work was on and off and both petitioners testified Magielda was fired and rehired a few times, they did not provide any evidence to this effect. We therefore, affirm the underpayment calculated for Magielda.

For Alzanam, respondent used payroll documents provided by petitioners and assumed Alzanam worked 40 hours per week. Consistent with what is reflected in the payroll records, Hussein testified that Alzanam worked at the Deli for about a year between 2009 and 2010. Hussein's testimony that Alzanam worked no more than six days a week for six to seven hours a day results in a total of 36 to 42 hours per week. Hussein testified Alzanam was paid $400.00 per week, but payroll records indicate instead a weekly pay that varied from $97.88, to $201.19 to $290.00. Having no record of Alzanam's specific hours, it was reasonable for respondent to calculate Alzanam's hours to be 40 per week. We therefore, affirm the underpayment calculated for Alzanam.

For Alradee, respondent used information gathered during an interview conducted by its investigator at the Deli. According to these interview notes, Alradee worked 12 hours a day, 7 days a week and received $6.00 an hour. The interview sheet also indicates that Alradee's date of hire was January 21, 2011, but notes that he also worked in 2010. Petitioners did not provide any records that reflect Alradee in the payroll. However, petitioners testified that Alradee worked at the Deli in 2009 or 2010 and was paid $275.00 a week. At hearing, petitioners and respondent's witnesses disagreed as to Alradee's fluency in English and ability to communicate with respondent's investigator during the interview. Given petitioners' own testimony as to when Alradee worked at the Deli, and investigator Dacier's testimony as to usual policy of employing telephonic interpreters when DOL encounters an individual of limited English proficiency, we find that respondent used the best available evidence to reasonably calculate wages owed to Alradee. Petitioners' allegation that Alradee should have been excluded from the minimum wage order as a relative of petitioner Abullah is without merit. Dacier's testimony that DOL policy is to exclude relatives from wage order does not mean that respondent's finding is unreasonable as including relatives in orders is consistent with what the law permits. We affirm the underpayment calculated for Alradee.

No wages due Ghaithi

Respondent calculated $942.50 in minimum wages due to Ghaithi for the period from October 6, 2010 through December 29, 2010. In reaching this conclusion, DOL used payroll documents provided by petitioners and assumed Ghaithi worked 40 hours per week. Consistent with what is reflected on the payroll records provided by petitioners and used by respondent in reaching its calculations, Hussein testified that Ghaithi worked at the Deli for a short period of time in 2010. Both petitioners testified that Ghaithi worked four to five hours a day six days a week, although their testimony about his weekly payment varied between $175.00 and $230.00 while payroll records reflect a weekly payment of $217.50 during the entire period of employment. There was no testimony or documentary evidence in the record that Ghaithi worked at the Deli for 40 hours per week and respondent's investigation does not have any reasonable basis for that assumption and to calculate for more than a maximum total of 30 hours per week.

For these reasons, we find that Ghaithi is not owed any wages and must be removed from the minimum wage order.

Civil Penalty

Labor Law § 218 requires respondent to assess a penalty in cases where she finds that an employer has violated a provision of Article 19. Here the wage order issued by respondent assessed a civil penalty of 100%. Labor Law § 218 (1) provides in relevant part:

> "In assessing the amount of the penalty, the commissioners 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 the failure to comply with recordkeeping or other non-wage requirements".

Petitioners objected to the appropriateness of the civil penalty and respondent's investigator testified that he applied 100% following his supervisor's directive and not applying any factors. Investigator Dacier further testified that respondent never considers imposing anything other than 100% civil penalty. Lacking evidence that respondent applied the considerations required by Labor Law § 218 (1), we find the civil penalty imposed in the wage order unreasonable and, we revoke it.

Liquidated Damages

Labor Law § 663 (2) provides that a wage order issued by the Commissioner shall include liquidated damages in an amount of no more than 100% of the total underpayment found due unless the employer proves a good faith basis to believe the underpayment was in compliance with law (*see also* Labor Law § 218 [1]). Respondent included 25% liquidated damages in the minimum wage order. The petitioners presented no evidence they had a good faith basis to believe failing to pay minimum wages was in compliance with law. We affirm the imposition of 25% liquidated damages, but the amount must be recalculated on the modified principal amount.

Interest

Labor Law § 219 (1) provides that when the Commissioner determines that wages are due, then the order directing payment shall include "interest at the rate of interest then in effect as prescribed by the superintendent of financial services pursuant to section fourteen-a of the banking law per annum from the date of the underpayment to the date of payment." Banking Law Section 14-a sets the "maximum rate of interest at sixteen per centum per annum." Interest is affirmed but must be recalculated on the modified principal amount.

Penalty order

The penalty order imposes a penalty on petitioners for violating Labor Law § 161 by failing to provide employees at least 24 consecutive hours of rest in any calendar week (count 1) and a penalty for violating Labor Law § 661 and 12 NYCRR 142-2.6 by failing to keep and/or

furnish true and accurate payroll records for each employee (count 2), both during the period March 1, 2007 through March 31, 2011. Petitioners admitted that they did not keep and maintain proper records for their workers' hours and pay periods and we affirm the civil penalty for count 2 in the amount of $500.00. Petitioners challenged count 1 by testifying that their workers at most worked six days a week. As discussed above, we find that petitioners' general testimony was not enough to find respondent's order unreasonable. Respondent determined that at least two of petitioners' employees worked seven days a week and we affirm the $100.00 penalty for the failure to provide the required day of rest.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The order to comply with Article 19 (minimum wage order) is modified to reflect a principal amount due of wages totaling $69,489.60 with liquidated damages and interest to be recalculated accordingly; and

2. The civil penalty in the minimum wage order is revoked; and

3. The order under Articles 5 and 19 is affirmed; and

4. The petition for review be, and the same hereby is, granted in part and denied in part.

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
at New York, New York, on
March 2, 2016.

furnish true and accurate payroll records for each employee (count 2), both during the period March 1, 2007 through March 31, 2011. Petitioners admitted that they did not keep and maintain proper records for their workers' hours and pay periods and we affirm the civil penalty for count 2 in the amount of $500.00. Petitioners challenged count 1 by testifying that their workers at most worked six days a week. As discussed above, we find that petitioners' general testimony was not enough to find respondent's order unreasonable. Respondent determined that at least two of petitioners' employees worked seven days a week and we affirm the $100.00 penalty for the failure to provide the required day of rest.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The order to comply with Article 19 (minimum wage order) is modified to reflect a principal amount due of wages totaling $69,489.60 with liquidated damages and interest to be recalculated accordingly; and

2. The civil penalty in the minimum wage order is revoked; and

3. The order under Articles 5 and 19 is affirmed; and

4. The petition for review be, and the same hereby is, granted in part and denied in part.

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
at Albany, New York, on
March 2, 2016.