

STATE OF NEW YORK  
INDUSTRIAL BOARD OF APPEALS

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In the Matter of the Petition of: :  
 :  
MIKE GORDON A/K/A MEIR GORDON AND :  
KENBEN INDUSTRIES LTD., :  
 :  
Petitioners, :  
 :  
DOCKET NO. PR 14-048  
To Review Under Section 101 of the Labor Law: :  
An Order to Comply With Article 19 of the Labor Law, : RESOLUTION OF DECISION  
An Order to Comply with Article 6 of the Labor Law, :  
and An Order Under Articles 5 and 19 of the Labor :  
Law, each dated January 15, 2014; :  
 :  
- against - :  
 :  
THE COMMISSIONER OF LABOR, :  
 :  
Respondent. :  
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**APPEARANCES**

Kaufman Dolowich & Voluck, LLP (Jeffery A. Meyer of counsel), for petitioners.  
Pico P. Ben-Amotz, General Counsel, NYS Department of Labor (Jeffrey G. Shapiro of counsel),  
for respondent.

**WITNESSES**

Petitioner Mike Gordon, Frank Alfano, Randi Sexton, NYC Marshal Richard A. Capuano, NYC  
Marshal Robert Solimine, Raul Garcia, Roberto Garcia, Michael Kennedy, Benjamin Lopez,  
Robert Medina, Jay Miranda, Dennis Rivera, and Edwin Sammy, for petitioners.  
Senior Labor Standards Investigator Jose Medina for respondent.

**WHEREAS:**

The petition in this matter was filed with the Industrial Board of Appeals (Board) on March  
14, 2014, and seeks review of three orders issued against petitioners Mike Gordon A/K/A Meir  
Gordon and Kenben Industries Ltd. Respondent Commissioner of Labor filed an answer to the  
petition on April 28, 2014.

Upon notice to the parties hearings were held in this matter on July 9, July 10, August 3, August 10 and September 21, 2015, and January 28, 2016, in New York, New York, before Devin A. Rice, Counsel to the Board, and the designated hearing officer in this proceeding. Each party was afforded a full opportunity to present documentary evidence, to examine and cross-examine witnesses, make statements relevant to the issues, and to file legal briefs.

The order to comply with Article 19 (minimum wage order) under review directs compliance with Article 19 of the Labor Law and payment to the Commissioner for unpaid minimum wages due and owing to 209 employees for the time period from January 4, 2003 to December 31, 2008, in the amount of \$1,108,252.34, with interest continuing thereon at the rate of 16% calculated to the date of the order in the amount of \$1,012,188.06, liquidated damages in the amount of \$277,063.19, and assesses a 100% civil penalty in the amount of \$1,108,252.34, for a total amount due of \$3,505,755.93.

The order to comply with Article 6 (unpaid wages order) under review directs compliance with Article 6 of the Labor and payment to the Commissioner for unpaid wages due and owing to Michael H. Kennedy for the time period from April 17, 2007 to December 31, 2008, in the amount of \$798.00, with interest continuing thereon at the rate of 16% calculated to the date of the order in the amount of \$650.64, and assesses a 100% civil penalty in the amount of \$798.00, for a total amount due of \$2,246.64.

The order under Articles 5 and 19 of the Labor Law (penalty order) assesses a \$1,000.00 civil penalty for violating Labor Law § 661 and 12 NYCRR 142-2.6 by failing to keep and/or furnish true and accurate payroll records for each employee from on or about January 4, 2003 through December 31, 2008; a \$1,000.00 civil penalty for violating Labor Law § 162 by failing to provide employees with at least thirty minutes off for the noon day meal when working a shift of more than six hours extending over the noon day meal period from eleven o'clock in the morning to two o'clock in the afternoon from on or about July 18, 2007 through December 31, 2008; and a \$1,000.00 civil penalty for violating Labor Law § 661 and 12 NYCRR 142-2.7 by failing to give each employee a complete wage statement with each payment of wages from on or about January 4, 2003 through December 31, 2008; for a total amount due of \$3,000.00.

The petition alleges the orders are invalid or unreasonable because employees covered by the orders are subject to the "inside sales" exemption (29 USC § 207 [i]) and the motor carriers exemption (29 USC § 213 [b] [1]); employees did not work over 40 hours a week; employees were properly compensated for all hours worked; the penalties, liquidated damages, and interest imposed by the orders are excessive, punitive, and unreasonable because the alleged violations were not willful and are barred by laches because of investigative delay; the statute of limitations bars portions of the orders, petitioners maintained required records and provided wage statements with each payment of wages; and all employees were allowed a proper meal break as required by law. We find, as explained below, that the minimum wage order is unreasonable and must be revoked because respondent's determination of the amounts due is unreasonable, not based on the best available evidence, and not supported by a rational basis in the record. We do not, therefore, reach whether petitioners' employees were subject to the inside sales or motor carriers exemptions. The unpaid wages and penalty orders, however, are affirmed.

## SUMMARY OF EVIDENCE

### A. Petitioners' evidence

#### 1. Testimony of petitioner Mike Gordon

At the time of hearing, Mike Gordon was general manager of Kenben Industries, the position he held during the time period relevant to this proceeding, January 4, 2003 to December 31, 2008. Gordon testified that during the relevant time period, Kenben, located in Brooklyn, New York, provided towing services to New York City marshals as part of the "scofflaw" towing program to collect unpaid fines for the New York City Department of Finance. Kenben also provided commercial towing services, including interstate towing, to the public. Kenben's employees worked in the field in the scofflaw towing program along with the marshals, or at one of Kenben's two yards – one in Brooklyn and one in Queens – or in the office.

#### *Scofflaw Towing*

Gordon testified that Kenben's scofflaw towing operation was affiliated with two to three marshals at a time working in Brooklyn and Queens. Each marshal had a team, which included four to six scouts, at least two stage guards, two to three flatbed drivers, tow truck (wrecker) drivers, and a dispatcher. Gordon explained that the scouts used handheld devices to match parked vehicles' license plates to the city's scofflaw database. They checked every vehicle on every street in an assigned precinct and when they found a vehicle identified by the database as a scofflaw, they notified the team's dispatcher by radio. Gordon testified their work was to "identify and move on." The dispatcher, who was in the marshal car with the marshal and driver, then relayed the location of the scofflaw vehicles identified by the scouts to the tow drivers, who, after execution by the marshal, moved the vehicles to a staging area from where they were transported by the flatbeds to one of Kenben's yards. The stage guards watched the vehicles in the staging area to make sure they were not damaged or reclaimed after the marshal had seized them and before they were transported to the yard.

Gordon testified that the marshals' schedules varied. They were not permitted by the city to execute on vehicles before 3:00 a.m. and generally started work between 3:00 to 6:00 a.m. Gordon explained that scofflaw towing usually shut down or "wrapped up" at 12:00 to 1:00 p.m. each day depending on the marshal so he or she could work on other duties such as enforcement of judgments and evictions, and the city prohibited marshals from seizing vehicles after 11:00 a.m. on Friday. Each marshal normally worked Monday to Thursday. Gordon further testified that there was no scofflaw towing for three weeks for the December holidays, on federal and city holidays, and during severe weather. On the rare occasions when a marshal worked on a Friday due to a holiday during the week or for some other reason such as weather or a computer outage, all work was finished by 12:30 p.m. There was never scofflaw towing on Saturday or Sunday.

Gordon explained that the scouts arrived to work each day at a prearranged area 30 minutes before the marshal arrived. The wrecker drivers started from the yard 15 minutes before the marshal's start time for the day, and the dispatcher typically met the marshal at the staging area. Gordon further explained that the stage guards worked on a staggered schedule with one arriving at the same time as the marshal and another arriving one to two hours later. Gordon testified that he tried to always have two stage guards at the staging area each day. The flatbed drivers started

an hour or sometimes two hours after the marshal arrived. The scouts were dismissed first each day, around 20 to 30 minutes before the marshal wrapped for the day. The wrecker drivers worked until the marshal executed on the last vehicle, and 30 minutes after the marshal seized the last vehicle, the stage was cleared, everybody went back to the yard, and the day was over.

Gordon testified that scouts were paid on commission of \$20.00 to \$25.00 per vehicle located with a guaranteed minimum of \$8.00 an hour if they failed to earn sufficient commissions. A scout could typically find 20 to over 100 scofflaw vehicles a week. Gordon further testified that scouts did receive overtime pay, but rarely worked more than 40 hours a week. Wrecker drivers were paid an hourly rate of \$10.00 to \$15.00, plus a commission based on the number of vehicles towed by the team they worked with. The commission rate was \$25.00 for 30 cars plus \$25.00 for each additional ten cars. The dispatchers received an hourly rate and the same commission as the wrecker drivers. Flatbed drivers were paid a commission of approximately \$10.00 for each vehicle they towed and had a guaranteed minimum. Gordon estimated that in an average week a team could tow 170 to 200 vehicles, with 70 to 80 towed on Monday and less vehicles towed as the week went on. Gordon testified that the stage guards were paid an hourly rate only, including overtime if they worked overtime. Stage guards did not receive commissions, because, as Gordon explained, "they really have nothing to do with any trucks, they are really just sitting there watching the [seized] vehicles."

#### *Yard and office employees*

Gordon testified that Kenben also had yard and office employees including mechanics, drivers, security guards, and clerks. Clerks worked 9:00 a.m. to 5:00 p.m. with a one hour lunch break. Mechanics worked 8:00 a.m. to 5:00 p.m. with a one hour lunch break. The security guard shifts varied with one guard on duty at a time 24 hours a day broken into three shifts with an hour meal period each shift. The yard employees worked on staggered schedules starting from 7:00 to 9:00 a.m. and leaving between 5:00 to 7:00 p.m. when the yard closed. Yard employees usually worked eight hour shifts with a one hour meal period. The yard and office employees' hours were tracked with a hand scan time clock system and were called into the payroll company each week. According to Gordon, none of the yard or office employees worked over 40 hours a week.

#### *Recordkeeping*

Gordon testified that Kenben kept records of the hours employees worked daily and weekly, including log sheets maintained by the marshals showing the first and last vehicles towed each day, and records kept by the dispatchers of the daily hours worked by the teams in the field. Gordon further testified that DOL investigators requested records and were allowed to review them at Kenben's office. He also explained that records were maintained and he believes DOL "took them."

#### *Petitioners' employees*

##### 2. Testimony of Frank Alfano

Frank Alfano testified he was Kenben's manager during the relevant time period and had no ownership interest in the company. When asked to describe his job, he testified, "I manage everybody," including the drivers and stage guards. Alfano further testified he worked in the field

everyday going from stage to stage and keeping in touch with the workers to “see what was going on.” Alfano testified that Kenben worked with Marshals Capuano, Solimine, Rose, Stringer, Siracusa, and “a bunch of associate marshals” during the relevant time period.

### *Scofflaw towing*

Alfano explained that the start time for the workers assigned to the marshal teams depended on the marshal, because cars could not be seized without the marshal present. Alfano testified that Marshals Capuano, Solimine, and Rose started scofflaw towing each day at 4:00 a.m., and Marshal Siracusa started between 4:30 to 6:00 a.m. Marshal Stringer started at 4:30 a.m. Each team, according to Alfano, consisted of two to three stage guards, two to four flatbed drivers depending on the distance from the precinct to the yard, and five wrecker drivers. The teams also included scouts and a dispatcher.

Alfano testified that the wrecker drivers began their day by going to the yard to get a truck and then driving to a predetermined staging area to wait for the marshal to arrive. The wrecker drivers, according to Alfano, were supposed to arrive at the yard between 3:30 to 4:00 a.m. The flatbed drivers at around 5:00 a.m., or later if they were assigned to Siracusa’s team. The stage guards did not report to the yard, but went straight to the first stage area. Alfano explained that:

“I use to try to have one stage guy, like around 4 o’clock and maybe 45 minutes, an hour, I used to have them come in steps because I really didn’t need them . . . I didn’t need them all at the same time . . . Once the marshal started picking up the cars, from the time that the first car came in like 4:15 or 4:20. Like every 15 minutes the car would come in. So I really didn’t need anybody.”

Alfano testified that Marshals Capuano and Solimine finished between 12:00 to 1:00 p.m. each day and Siracusa usually wrapped between 1:00 to 2:00 p.m. depending on what time he had started. Marshal Stringer finished between 11:00 a.m. to 12:00 p.m. because her husband was ill so she worked less than the other marshals. The scouts finished work first and normally left 30 minutes to an hour before the marshal. The employees in the marshal’s car finished at the same time as the marshal. The latest a stage guard worked until was “maybe” 3:00 or 3:30 p.m. at the beginning of the year when scofflaw towing restarted after the holiday break. Alfano testified that there was never an occasion where stage guards worked until 4:00 p.m., 7:00 p.m., or 8:00 p.m. Alfano also testified that employees in the field had a 30 minute to an hour meal break each day either at the same time as the marshal’s break or when instructed by the dispatcher to take a break.

Alfano testified that claimants Michael Kennedy, Edwin Sammy, and Robert Medina worked together on Marshal Siracusa’s team as stage guards on a staggered schedule with one coming in at 4:00 a.m., one at 5:00 a.m., and one at 6:00 a.m. According to Alfano, Sammy was the first stage guard to arrive to work for the team. He started between 4:00 to 4:30 a.m. and finished at 1:00 or 2:00 p.m. “depends when Siracusa used to finish.” Medina was the second or third stage guard to arrive, usually between 4:00 to 6:00 a.m. Kennedy started at 5:00 a.m., and worked until 12:00 or 1:00 p.m. Kennedy, according to Alfano, never worked past 4:00 p.m.

Alfano explained that the marshals worked Monday to Thursday and sometimes on Friday. Monday and Tuesday were the busiest days. Alfano estimated that on Monday a team could tow

60 to 80 vehicles, and occasionally 90. On Tuesday a team could tow 50 to 60 vehicles, on Wednesday 40 to 50, and on Thursday 30-35.

### *Recordkeeping*

Alfano testified that the dispatchers kept time records for the teams in a logbook that was given to the office at the end of each day. Everybody's hours of work were kept in these records, which were given to the secretary.

### 3. Testimony of Randi Sexton

Randi Sexton (a/k/a Randi Cohen) testified that she has been employed by Kenben since 2013, and by US Tow, which is the same company as Kenben, since 2001 as a bookkeeper. She testified that her duties included preparing payroll, paying bills, working auctions, and general office work. She did the payroll for Kenben and US Tow during the relevant time period.

Sexton testified that she received timesheets each day from the marshal cars and used them to make a computer spreadsheet to determine the hours and payroll. The time sheets were made by the dispatcher and included the starting and finishing times of the employees and number of vehicles towed. Sexton received the time sheets Monday to Thursday, reviewed them each day, and calculated the commissions based on the number of vehicles towed. Sexton testified that Marshal Solimine's team worked 40 to 42 hours a week, Marshal Siracusa's team worked 40 to 42 hours a week, Marshal Stringer's team worked 36 to 38 hours a week, and Marshal Capuano's team worked 38 to 40 hours a week. Sexton kept the logs for two to three months, and explained that, "Obviously, if the payroll was correct, no one said anything, we would just dispose of them, shred them."

Sexton explained that the "first 40 hours [was] regular rate, from 40 to whatever it was time and a half, and whatever the commission was." When Sexton called in the payroll to the payroll company she only told them the gross pay, but according to her testimony, the employees received all their compensation in their paychecks including overtime and commissions. The checks, however, were not itemized to show how the compensation was determined. Compensation varied weekly for each employee, because, "Everybody worked different hours every week and the commission changed based on the number of cars that were towed. It changed daily." The commissions were based on the numbers of vehicles towed, which were cumulative for a week and written down on a chart that Sexton consulted when preparing the payroll. She testified the commission rate was \$25.00 for the first 25 vehicles towed, \$50.00 for 40 vehicles, \$100.00 for 55 vehicles, and then \$25.00 for each additional 10 vehicles towed.

Sexton testified that DOL investigators came to the yard two or maybe three times. She recalled that, "They asked me for the payroll records. They gave me a time frame. We made copies of everything. We took them out of the book and made copies . . . thousands and thousands of pages" consisting of receipts from the payroll company that were provided to DOL.

#### 4. Testimony of Jay Miranda

Jay Miranda testified that he worked for Kenben from June 2003 to June 2013 in a variety of positions. He started as a stage guard and worked in that position for a year, then worked as a scout for six months, then worked as a dispatcher until he left Kenben in 2013.

##### *Stage guard*

Miranda testified that as a stage guard he watched vehicles that had been seized, "wrote them up" as the wreckers brought them to the stage area and as the flatbeds took them to the yard, provided security, and took inventories. Miranda explained that each marshal had a different schedule. The stage guards usually had to be at the first stage location at 3:00 a.m., but if the marshal started later, then the stage guards did not need to arrive until 4:00 a.m. Miranda worked with Marshals Solimini, Siracusa, Stringer, and Capuano. He testified that Solimine normally worked from 3:00 a.m. until 12:00 or 12:30 p.m., Siracusa started at 3:00 or 4:00 a.m. and worked until 12:00 or 12:30 p.m., Stringer worked from 3:00 or 4:00 a.m. until 12:00 or 1:00 p.m., and Capuano worked from 3:00 a.m. to 3:00 p.m. Stage guards took turns taking their lunch breaks, because somebody always needed to stay with the seized vehicles. Miranda testified that his lunch break was usually around 11:00 a.m. and lasted one hour. Miranda testified he worked as a stage guard four days a week, primarily Monday to Thursday unless there had been a Monday holiday, in which case the marshal would work on Friday. Miranda further testified that he worked 35 hours a week, because "as the week went on, the days got shorter because there wasn't a lot of cars to be picked up." Miranda was paid an hourly rate when working as a stage guard, and never worked over 40 hours a week.

##### *Scout*

Miranda testified that as a scout, his shift ended 30 minutes before the marshal, and that scouts had to leave at the same time as the marshal or before because it is not possible for the scout to work after the time the marshal leaves since no vehicles can be executed on without the marshal present. Miranda testified that he was paid hourly as a scout, "that I can remember." He further testified that when he worked as a scout he took a lunch break whenever he wanted as long as he informed the dispatcher.

##### *Dispatcher*

When working as a dispatcher, Miranda went to the yard, got the marshal car, and met the marshal at the first stage area of the day, or, in the case of Marshal Capuano, at his office. Normally the dispatcher, marshal, and driver worked in the marshal car, except that with Marshal Capuano, when work was slow, he would use a stage guard to write down Vehicle Identification Numbers (VINs) from seized vehicles. Medina testified that as dispatcher he was paid hourly plus a commission based on the number of vehicles towed by the team in a day. He received a \$25.00 commission if the team towed 50 cars, \$75.00 for 60 or 65 cars, \$90.00 for 85 cars, and \$200.00 for 105 cars or more. Medina further testified that he "hardly ever" worked more than 40 hours a week as a dispatcher.

*Raul Garcia*

Miranda testified that Raul Garcia was a wrecker driver who worked with Marshal Siracusa in Brooklyn. Miranda kept track of Garcia's hours when they worked together. Garcia, according to Miranda, worked four days a week from 3:30 a.m. until 30 minutes after the marshal wrapped for the day. Garcia did not "consistently" work until 3:00 p.m. when he was on Miranda's team. Miranda testified that prior to the hearing he saw Garcia in the waiting area. Miranda alleged that Garcia asked him to lie and testify that he worked 60 hours a week.

*Robert Medina*

Miranda testified that Robert Medina was a stage guard for Marshal Capuano, and was never a driver. According to Miranda, Capuano did not work five days a week and did not usually work past 1:00 p.m., although, "It could be later, it could be earlier, depending on – you cannot predict the business."

*Michael Kennedy*

Miranda testified that Michael Kennedy was also a stage guard, who, according to Miranda, worked for Marshals Capuano and Solimine. Miranda further testified that Solimine did not work five days a week, there is no scofflaw towing on Saturdays, and the marshals cannot work past 11:00 a.m. when they work on Fridays. The only times the marshals worked on Fridays, according to Miranda, was when there had been a holiday on a Monday.

*Edwin Sammy*

Miranda testified that Edwin Sammy was a stage guard, who, according to Miranda, also worked for Capuano and Solimine. Miranda testified that it was "not customary" for stage guards to work later than 4:00 p.m. Monday to Thursday, and that there was no scofflaw towing on Sunday. Miranda testified that prior to the hearing Sammy asked him not to "take Mr. Gordon's side."

*Records*

Medina testified that part of his work as a dispatcher included keeping "hit sheets" of vehicles that had been located and called in by the scouts, and also maintaining time sheets for the team. Medina gave the time sheets to the office at the end of each work day.

## 5. Testimony of Roberto Garcia

Roberto Garcia was a tow truck (wrecker) driver for Kenben from January 2002 to October 2012. He also worked occasionally as a dispatcher and filled in at the yard.

*Driver*

Garcia testified the first six months he worked for Kenben were as driver. The start time depended on the marshal. He worked with Marshals Siracusa and Solimine in Brooklyn. According to Garcia, Siracusa started at 5:00 or 5:30 a.m. and Solimine started at 4:00 a.m. Garcia

testified that he reported to the yard, picked up his wrecker, and drove to the meeting area. Garcia testified that the dispatcher radioed the locations of scofflaw vehicles to be towed and he waited at the locations of the vehicles or "sat on them" until the marshal told him he could tow them to the staging area. When Garcia worked with Marshal Siracusa, he was normally finished for the day at 1:30 to 2:00 p.m. When he worked with Marshal Solimine, he normally finished at 12:00 to 12:30 p.m. Garcia testified he took a 30 minute meal break each day. He was able to decide when to take his break. Garcia further testified that sometimes everybody took a break at the same time as the marshal.

### *Dispatcher*

Garcia testified that he became a dispatcher after his first six months at Kenben. He testified that he worked with Marshals Siracusa and Solimine, and sometimes filled in with Marshals Stringer and Capuano. Garcia testified that he started at 5:00 a.m. when he worked with Siracusa. and started at 3:30 or 4:00 a.m. when he worked with Solimine. Siracusa finished for the day at 1:00 to 1:30 p.m., and the latest was probably 2:00 p.m. Solimine wrapped up each day at 12:00 or 12:30 p.m. and the latest was "probably" 1:00 p.m. The marshals did not work later than this because, according to Garcia, they had other work to do in the afternoons such as evictions and "pulling [utility] meters." Garcia testified that he took a 40 to 45 minute break each day at the same time as the marshal.

Garcia testified that the stage guards left soon after the marshal because there was rarely a backlog of vehicles left in the staging area. Garcia estimated that the biggest backlog was "maybe" six to eight cars, which would take less than an hour to clear. Garcia further testified that the stage guards worked on a staggered schedule – one guard came in at 4:00 a.m. and one at 5:00 a.m., "because if there were any cars left over [at the end of the day], one guy would stay a little later." The guard who arrived first, left first.

### *Records*

Garcia testified that part of his work as a dispatcher included keeping timesheets for the team. He handed the time sheets into the office at the end of each day. Garcia does not know what happened to these records after he gave them to the office.

### *Claimants*

#### 6. Raul Garcia

#### *Claim*

Raul Garcia filed a minimum wage/overtime complaint with DOL on June 12, 2009, alleging he worked as a tow truck driver for Kenben from March 22, 2006 to the date of his claim. Garcia alleged he worked Monday to Thursday from 3:00 a.m. to 3:00 p.m. and Friday from 3:30 a.m. to 11:00 a.m., and that his pay rates during the claim period were \$10.00 and \$12.00 an hour with no overtime pay. He further alleged that he had meal periods of 15 to 30 minutes, and attached a handwritten commission or bonus schedule to his claim form.

*Testimony*

Garcia testified he worked for Kenben from 2004 to 2010 as a wrecker driver on the teams of Marshals Siracusa and Solimine. He testified he worked on Solimine's team from 2004 to 2006. Garcia started at 3:00 a.m. when he worked with Solimine. He went to the yard, picked up a truck, and drove it to the staging area, and started towing as soon as the marshal arrived. Garcia explained that, "If I got there at 3:00 or 3:30, he would be there within ten minutes after." Garcia further explained that his last communication with the marshal car was at 2:00 or 3:00 p.m. According to Garcia, Marshal Solimine "would be in by 3:30, 3:45, and by, I guess 2:00, 2:30, he would be gone." Garcia further testified that 40% of the time Solimine finished as early as 1:00 p.m. Marshal Solimine did not work on Fridays. Garcia testified that he sometimes worked until 5:00 p.m., and that he worked that late almost every day when working with Marshal Siracusa. Garcia did not take a break when he worked with Solimine, but had a 30 minute break when he worked with Siracusa. Garcia estimated he worked 60 hours a week, although did not work that many hours every week. There was no scofflaw towing from December 19 to January 2.

Garcia testified that he was paid an hourly rate plus a bonus depending on how many cars the team towed in a day. He believed that the bonus was \$25.00 for 25 vehicles, \$50.00 for 50 vehicles, \$100.00 for 65 vehicles, \$125.00 for 75 vehicles, \$150.00 for 85 vehicles, and \$200 for 105 vehicles. The team did not receive a bonus each day. Monday and Tuesday were the busiest days, with fewer vehicles towed on Wednesday and Thursday, although Garcia worked the same number of hours. Garcia estimated that on an average day the team towed 65 vehicles. Garcia further testified that his hourly rate upon hiring was \$9.00 an hour. His final pay rate when he left Kenben was \$15.00 an hour. Kenben did not pay overtime. Garcia further testified he sometimes worked on the same team as Jay Miranda.

## 7. Michael Kennedy

*Claims*

Michael H. Kennedy filed a minimum wage/overtime complaint with DOL on May 2, 2008, alleging he worked as "security" for Kenben from August 16, 2006 to February 28, 2008. Kennedy's claim alleges he worked seven days a week from 3:00 a.m. to 4:00 p.m. and had a meal break when possible. His pay rate was \$10.50 an hour and he received no overtime pay.

Kennedy also filed a claim for unpaid wages alleging Kenben did not pay him any wages for work he performed the weeks ending February 3, February 10, February 17, February 24, and March 2, 2008. Kennedy alleged he worked 49, 52, 52, 40, and 36 hours respectively in those weeks at an agreed wage rate of \$10.50 an hour.

*Testimony*

Kennedy testified that between 2007 and 2010 he worked "on and off" for Kenben, and did not work for Kenben for approximately a year during that time period. Kennedy worked as a stage guard except for six months in 2008, when he worked in the marshal car checking VIN numbers on seized vehicles. Kennedy described the work of a stage guard as watching the cars until they were "picked up." Kennedy was paid hourly as a stage guard, but could not remember

his rate of pay. Kennedy testified that he worked with Marshal Solimine for a “couple years.” He also worked with Marshal Rose and once with Marshal Siracusa.

Kennedy testified that he started work each day at 2:30 or 3:00 a.m. depending on the location, and that when he worked in the marshal car, he had to be at the office by 2:30 a.m. in order to be in the car by 3:00 a.m. The marshal finished each day at “different times,” from 12:00 to 3:00 p.m. Kennedy testified that as a stage guard, his day ended when the staging area was cleared of vehicles. The stage guards, according to Kennedy, worked on a staggered schedule. Kennedy testified that the last staging area was not clear until 10:00 p.m. On a busy day there could be 100 to 120 vehicles towed by a team, and depending on the day, sometimes 40 to 50 cars built up in the staging area, although this did not happen often. Kennedy also testified that he worked until 8:00 p.m. five days a week, and that “sometimes the tow truck driver never return[s] to pick up the last car so we have to wait.” Kennedy further testified that all the marshals he worked with worked on Friday and that on Friday he only worked until 2:00 p.m. at the latest. Kennedy estimated that he worked more than 8 hours a day and more than 40 hours a week. He further estimated that he sometimes worked 55 hours and sometimes worked 60, it “depends.” Kennedy also testified that he never had a meal break.

#### 8. Edwin Sammy

##### *Claim*

Edwin Sammy filed a minimum wage/overtime complaint with DOL on May 28, 2008, alleging he worked “security” for Kenben from October 6, 2003 to the date of his claim. Sammy’s claim alleges he worked Monday to Thursday from 4:00 a.m. to 4:00 p.m., and Friday from 4:00 a.m. to 11:00 a.m. Sammy’s pay rates during the period of his claim were \$9.00, \$10.00, and \$12.00 an hour, and he alleged he was not paid overtime. The claim further alleges meal periods were when possible.

##### *Testimony*

Sammy worked for Kenben as a stage guard from October 6, 2003 to 2013, and testified that he did not work for three or four months during his first year of employment, which he did not disclose to DOL. Sammy testified he worked with Michael Kennedy and Robert Medina and that he spoke to them in the waiting area during the hearing to “try[] to figure out how many hours we all worked.” Sammy worked with Kennedy for a year or two on Marshal Siracusa’s team.

Sammy testified that all the stage guards started each day around the same time, which was normally 3:00 a.m. and had to wait until the marshal arrived, which was “anywhere between 3:30 and 4:00.” Sammy explained that there was no work for the stage guards to do until the marshal arrived, “but if we showed up after him, he gets really upset for that.”

##### *Marshal Stringer*

Sammy testified that he worked with Marshal Stringer from 3:30 a.m. to 2:30 or 3:00 p.m. four days a week and that it was busier at the beginning of the week “because of the weekend and the fact we didn’t work on Fridays.” However, Sammy also testified that on Mondays the Marshal “wrapped up” at 3:00 p.m. but “us stage guys, we have to stay back and wait until the cars are

taken in . . . That could be anywhere from 5, 6, 7, 8, 9 o'clock at night." Sammy estimated that on Monday the team towed 100 to 125 cars, on Tuesday they towed 90 to 100 cars, on Wednesday the team towed 80 cars, and on Thursday, which were shorter days, he finished at 5:00 p.m., and the team towed 65 to 75 cars. He also testified that during one year he worked 65 hours a week on Stringer's team from 3:00 a.m. to 3:00 p.m. four days a week.

#### *Marshal Siracusa*

Sammy testified that he also worked for Marshal Siracusa, who started later than Stringer. He testified that when he worked with Siracusa, his hours were 4:00 a.m. to 4:00 p.m.

#### *Marshal Solimine*

Sammy also worked with Marshal Solimine. The stage guards on Solimine's team worked staggered shifts and arrived to work at different times. Sammy testified that he worked one-and-one-half to two years with Solimine four days a week from 3:00 a.m. to 8:00 p.m. and that the earliest he ever left was "maybe 3:30."

#### *Meal breaks*

According to Sammy, he had no meals breaks when he was busy because he could not leave the vehicles in the staging area unattended. Other times he had breaks of 15 to 30 minutes.

#### *Pay rates*

Sammy testified that his starting pay rate was \$9.00 an hour and that he received raises to \$10.00 an hour, \$11.00 an hour, \$11.50 an hour, \$11.75 an hour, and \$12.00 an hour. Sammy further testified that he was not paid overtime.

#### *DOL*

Sammy testified that he kept handwritten notes of the hours he worked and paystubs, which he brought to DOL, but DOL did not take his records, telling him "it was too much to make copies . . . . All they took was two of my paystubs and that was it." Sammy also testified that he explained to DOL that he worked past when the marshals finished each day, but DOL "told us to just put down the shift we worked. You know, the shift that we were supposed to do."

### 9. Robert Medina

#### *Claim*

Robert Medina filed a minimum wage/overtime complaint with DOL on May 2, 2008, alleging he worked "security" for Kenben from September 15, 2003 to the date of his claim. The claim alleges he worked Monday to Thursday from 4:00 a.m. to 4:00 p.m., and Friday from 4:00 a.m. to 11:00 a.m. at pay rates of \$9.00, \$10.00, and \$11.50 an hour with no overtime. The claim further alleges that meal periods were taken when possible.

### *Testimony*

Medina testified that he worked as a stage guard for Kenben from September 15, 2003 to June 2013. He described his work as receiving vehicles that were seized in the street, taking inventory of the seized vehicles, and preparing them for transportation to the yard. Medina worked with Marshal Solimine for “a couple” years, with Marshal Stringer for a “few” years, with Marshal Siracusa for four to five years, and with Marshal Rose for “only a few” months. According to Medina, each marshal had a different start time which was anywhere from 3:00 a.m. to 4:00 a.m. Medina testified that when he worked with Solimine, he started between 3:00 a.m. to 4:00 a.m. until 2012 at which time he started at 4:00 or 4:30 a.m., with Stringer he started at 3:00 a.m., because she arrived at 3:30 a.m. “sharp,” with Siracusa he started at 3:00 to 4:00 a.m., because Siracusa arrived at 4:00 to 4:30 a.m. All the stage guards normally arrived around the same time, but later the schedules were staggered.

Medina testified there was no set finishing time, and explained that, “Whenever everything was done, the cars would be transported to the yard and all the paperwork done, then we would be done.” Medina further explained that the stage guards were the last to finish work, because they could not leave until all the vehicles had been transported to the yard, which could be three to four hours after the marshal had left for the day. The marshals, according to Medina, normally worked until 3:00 to 4:00 p.m., except Friday, which was a half-day. Medina testified Marshal Stringer worked four days a week and sometimes five, that Siracusa worked five days a week, and he was not “100 % sure” whether Solimine worked five days.

Medina estimated that the team towed 80 to 100 vehicles on Monday and Tuesday, 60 to 70 on Wednesday, 50 to 70 on Thursday, and 40 to 50 on Friday, and that there could “sometimes” be 40 vehicles in the staging area at the end of the day.

Medina testified that there was no scofflaw towing the last two weeks of December from approximately December 19 to January 3.

### *DOL*

Medina further testified that he kept track of the hours he worked in a calendar. Medina told DOL he had a record of the hours he worked, and was told if they needed more evidence they would let him know. Additionally, the dispatchers from Kenben kept track of the hours Medina worked. Medina also testified that when he filed his claim form, DOL “said put down the time that the marshal starts and the time the marshal finished . . . round it up.” DOL investigators told Medina to round up, “because the hours and days, there wasn’t a set time.”

### 10. Dennis Rivera

#### *Claim*

Dennis Rivera filed a minimum wage/overtime complaint with DOL on May 28, 2008, alleging he worked “security” for Kenben from June 1, 2007 to April 22, 2008. Rivera’s claim alleges he worked Monday to Thursday from 4:00 a.m. to 4:00 p.m., and Friday from 4:00 a.m. to 11:00 a.m. Rivera’s pay rate was \$10.00 an hour with no overtime and he took meal breaks when possible.

*Testimony*

Rivera worked for Kenben as a stage guard for “close” to a year starting June 18, 2008. He worked with Marshals Siracusa, Solimine, Rivera, and Bosch, and was part of the same team as Robert Medina, Michael Kennedy, and Edwin Sammy, who all worked the same hours as him. Rivera testified that he worked Monday to Thursday with Solimine and Friday with Siracusa, who had his regular crew plus additional guards on Friday. Rivera explained that Friday was extra, “if you wanted to work Friday, you worked Friday.” Rivera testified that Bosch covered for Siracusa, and Rivera covered for Solimine.

Rivera testified that his pay rate was \$10.00 an hour straight time and that his paystubs did not indicate his hourly rate.

## 11. Benjamin Lopez

*Claim*

Benjamin Lopez filed a minimum wage/overtime complaint with DOL on January 26, 2009, alleging he worked as a “security guard” for Kenben from September 15, 2008 to the date of the claim. Lopez alleged he worked Monday from 3:00 a.m. to 6:30 p.m., Tuesday from 3:00 a.m. to 7:00 p.m., Wednesday and Thursday from 3:00 a.m. to 8:00 p.m., and Friday from 3:00 a.m. to 1:00 p.m. He alleged his rate of pay was \$10.00 an hour with no overtime pay, and that he did not have a meal break.

*Testimony*

Lopez testified he started working as a stage guard for Kenben in September 2008, and mainly worked with Marshal Rose, but also worked with Marshals Solimine and Capuano. Lopez did not work with Marshal Siracusa. Lopez testified he did not get a lunch break, his pay rate was \$10.00 an hour, and he was not paid overtime. According to Lopez, Mike Gordon told him he does not pay overtime.

*Marshals*

## 12. Testimony of Marshal Richard A. Capuano

Marshal Richard A. Capuano testified that he worked with Kenben in scofflaw towing for the entire period from 2003 to 2008. Marshall Capuano’s starting time varied from day to day, but he normally started between 3:00 a.m. and 4:00 a.m. and worked four days a week. Marshal Capuano testified that he only worked on Friday if there had been a Monday holiday that same week. He stopped scofflaw towing each day between 11:30 a.m. and 1:00 p.m. because he had other work to do in the afternoon such as evictions, serving notices of levy and sale, and serving property executions on banks. However, he sometimes worked later if the computer system was down. Marshal Capuano estimated that he worked 35 to 40 hours a week at scofflaw towing. According to Marshal Capuano, the scouts and drivers could no longer find vehicles after he left, because without the enforcement officer present, there could be no enforcement. However, vehicles that already been executed on could be moved after he left, and he did not need to be present for the drivers to tow the vehicles back to the yard. Marshal Capuano further testified that

the team took a one hour lunch break each day. There was no scofflaw towing on official holidays or when the weather made it unsafe to operate the trucks.

Marshal Capuano testified that "The scouts would start at various times, whenever they basically got in because they worked on a commission basis, so some of them came in earlier because they wanted to, others later." The scouts, according to Marshal Capuano, could start "possibly two hours" before he arrived for the day. The wrecker drivers started at 3:00 a.m. so they could be in position to pick up vehicles, and the flatbeds arrived after 4:00 a.m.

Marshal Capuano estimated that on average Monday and Tuesday, the team towed 40 vehicles, and on Wednesday and Thursday 35 vehicles were towed.

### 13. Testimony of Marshal Robert Solimine

Marshal Robert Solimine testified that his duties included scofflaw towing, evictions, and property executions in Brooklyn, New York. He testified that he worked in the scofflaw towing program with U.S. Tow, which was affiliated with Kenben. Marshal Solimine testified that he normally arrived at the staging area each day between 3:00 and 4:00 a.m. and started towing vehicles at 4:00 a.m. that had been prepared by the scouts. Marshal Solimine testified that he worked in scofflaw towing Monday to Thursday because he had other work to do on Friday. He only worked in scofflaw towing on Friday when there had been a Monday holiday that week. Marshal Solimine wrapped everything up by 12:00 p.m. each day. Marshal Solimine's team was usually composed of a dispatcher, a VIN worker, four scouts, four wrecker drivers, three stage guards, and two flatbeds. The scouts, according to Marshal Solimine, arrived at approximately 2:30 a.m. and started work 30 minutes before he arrived. Marshal Solimine testified that the team worked an average of 35 to 40 hours a week. According to Marshal Solimine it was not possible for scouts to work later than the marshal, but vehicles could be transported back to the yard "on occasion" after he left for the day. Marshal Solimine further testified that he "occasionally" left before all the vehicles in the staging area had been transported back to the yard.

Marshal Solimine estimated that on Mondays the team "maybe" towed 30 to 40 vehicles, but that each day was different, "it is all hit and miss." The beginning of the year was very busy and the team may have worked more hours because scofflaw towing was closed the second half of December for the holidays. Additionally, it was possible for the team to work extra hours on Monday and Tuesday if they were doing well, however, as the week went on less scofflaw vehicles were found and the work ended earlier. Marshal Solimine further testified that no work could be done when the computer system was down, and there was no scofflaw towing approximately five to seven days a year due to inclement weather. Marshal Solimine maintained a logbook of the vehicles he towed. Solimine testified that marshals could not work past 5:00 p.m. in scofflaw towing without authorization from the Department of Finance.

## B. Respondent's evidence

### 1. Testimony of Senior Labor Standards Investigator Jose Medina

Senior Labor Standards Investigator Jose Medina testified that he was assigned to DOL's investigation of Kenben on July 22, 2010. At the time Medina had worked at DOL for approximately a year and was a Labor Standards Investigator. The investigation had been

reassigned to Medina from the original investigator, Cordie McCann. Medina testified that the investigation was initiated based on “8 to 10 original claims,” alleging Kenben did not pay overtime to employees who worked over 40 hours in a week. Medina was not present when the claims were filed, and did not speak to the claimants about the substance of their allegations, except for a telephone call with Robert Medina to clarify information about gaps in log books for Marshal Siracusa that petitioners had provided to DOL.

Medina also testified, and notes in DOL’s investigative file confirm, that DOL investigators made two field visits to Kenben’s headquarters and office in Brooklyn where employees were interviewed. DOL investigators interviewed Albert DeJesus, Joseph Maldonado, and Andy Morales on December 5, 2008. John Beharry and Jonathan Castro were interviewed by DOL investigators on October 12, 2010. Medina did not take part in the interviews. The interview notes in the investigative file show that DeJesus, a driver, and Morales, a security guard for the yard, indicated they did not often work overtime, but were paid straight time on the occasions when they did work overtime. Medina never discussed the credibility of the claimants or employees interviewed at the yard with the DOL investigators who took the claims or interviewed the employees.

Medina testified that during the October 12, 2010 field visit, he interviewed petitioner Mike Gordon, Randi Sexton, and two employees in the yard, however, interview notes in the file indicate that Labor Standards Investigator Favio Escudero conducted the employee interviews. Medina testified that he did not interview any of the employees working scofflaw towing in the field, because, “They were not there when we were there during the office hours, 9 to 5.” Medina further testified that DOL did not interview any of the scouts, stage guards, drivers, or any other field employees, and conducted no surveillance of the employees in the field to verify the hours they worked. Medina explained that surveillance can be done “if warranted,” but was not done in this investigation. Medina also testified that no questionnaires were sent to the non-complaining employees. Medina further testified that DOL never contacted the marshals, although petitioners did provide DOL with a sample of logbooks and timesheets. Medina explained that DOL did not ask the marshals for information or records, because petitioners “provided us with some logs or whatever [they] thought [we] needed to have.”

Aside from nine minimum wage/overtime complaints filed with DOL and notes from five interviews taken by investigators on two occasions, Medina used an “employee contact list” provided to him by Kenben during the investigation to audit petitioners for overtime liability. The employee contact list contains employee names, hire dates, last day of employment if any, hourly rate, commissions, salary, and position. The list also may indicate each employee’s address, but the copy in evidence is redacted. In the column marked salary, some employees have “Sir” or “Cap” written next to their name, which appears to indicate that they worked with either Marshal Siracusa or Marshal Capuano. Medina testified that he used the employee contact list to determine employees’ pay rates and assumed the pay rate indicated for each employee was that employee’s pay rate for the entire duration of their employment with petitioners. Medina did not consider in his audit that the pay rates may have been the current or last rate of pay and the employees may have had other pay rates at different times during their employment with petitioners.

Medina testified that the audit assumed all stage guards worked 13 ½ hours a day, four days a week unless a specific employee had provided DOL with different information. Medina further testified that the audit assumed four days of work in 2003 and 2004, and five days after

2004, because Gordon told him that after 2004, "People worked four days and after that people, on Fridays, people had to quit at 11:00 a.m. by orders of New York City." Medina also testified that the audit was adjusted for holidays and the two-week period in December when scofflaw towing was shut down each year. No adjustments were made for weather days, although Medina was aware that there was no scofflaw towing when weather conditions did not permit it.

Medina testified that he did not consider petitioners' payroll records or any of the pay stubs provided by the claimants in his audit. The payroll records DOL reviewed were incomplete and, according to Medina, DOL determined that they could not be used. Medina explained that the pay stubs, which showed the amount paid but did not include the pay rate or hours worked, were not considered, because "nothing could be concluded from them." Medina further explained that "we had an average and we used an average."

Medina testified that the audit did not take commissions into account, because that would have required "speculation." He further testified that if the employee contact list showed an employee received commissions, then he assumed the employee was only paid commission, because he had no information that employees were paid commissions plus an hourly rate. Medina explained that:

"I was aware that people were paid depending on what people may have done, but we have no records from the employer as to what people actually had been paid. We had no way of knowing that Mr. Garcia was very productive . . . and did 75 cars a day and whether he was an average person and pulled 40 cars per day and so we have no information from the employer as to what the payroll was. Therefore we do not use that information."

Medina testified that DOL included liquidated damages in the orders because that is the "standard procedure." He further testified that he did not recommend the civil penalty, which was done "a grade above," although he agreed with the recommendation of a 100 % civil penalty, because DOL "gave the employer ample time opportunities to provide the records and there were none that were in compliance and none were ever provided.

## ANALYSIS

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

### Burden of proof

The petitioners' burden of proof in this matter is to establish by a preponderance of the evidence that the orders issued by the Commissioner are invalid or unreasonable (State Administrative Procedure Act § 306 [1]; Labor Law §§ 101, 103; 12 NYCRR 65.30; *see also Matter of Ram Hotels, Inc.*, PR 08-078, at 24 [2011]). We find petitioners met their burden of proof to show the minimum wage order is unreasonable. The burden having shifted, respondent did not submit sufficient evidence to rebut petitioners' proof. Petitioners did not meet their burden of proof with respect to the unpaid wages and penalty orders.

Petitioners failed to maintain required records

Article 19 of the Labor Law requires employers to maintain for no less than six years payroll records that show for each employee, among other things, the wage rate, number of hours worked daily and weekly, including the time of arrival and departure of each employee working a spread of hours exceeding ten, the amount of gross wages, and the net wages paid (12 NYCRR 142-2.6 [a]; *see also* Labor Law § 661). Article 19 also requires every employer to provide each employee a statement with each payment of wages showing the hours worked, rates paid, gross wages, allowances, if any, claimed as part of the minimum wage, deductions and net wages (12 NYCRR 142-2.7). Payroll records must be produced to DOL for inspection when requested (Labor Law §§ 660, 661).

The record shows that petitioners kept records of the hours employees worked daily and weekly. The credible evidence shows the dispatchers kept daily time sheets for their teams, which were given to the office at the end of each day. These records, however, were not preserved for six years as required by Article 19, and were never produced to DOL during its investigation. The record also shows that petitioners failed to provide employees with complete wage statements as required by law. The wage statements in evidence do not show, among other things, the number of hours worked and pay rates. We find petitioners failed to maintain required payroll records for no less than six years as required by Article 19, and did not give each employee a complete wage statement with each payment of wages.

The minimum wage order is unreasonable

Article 19 of the Labor Law, entitled the “Minimum Wage Act,” sets forth the minimum wage that every employer must pay each of its non-exempt employees for each hour of work (Labor Law § 652 [1]), and its implementing regulations require payment of time and one-half a non-residential employee’s regular hourly rate for each hour worked over 40 in a week (12 NYCRR 142-2.2).

The minimum wage order finds based on nine complaints and five interviews that petitioners failed to pay overtime in the amount \$1,108,252.34 to 209 employees in 14 occupational classifications over a period of six years. In the absence of required records, petitioners bear the burden of proving that the disputed wages were paid (Labor Law § 196-a; *Angello v Natl. Fin. Corp.*, 1 AD3d 850, 851 [3d Dept 1989]; *Heady v Garcia*, 46 AD3d 1088 [3d Dept 2007]). As the Appellate Division stated in *Matter of Mid Hudson Pam Corp v Hartnett*, 156 AD2d 818, 821 [3d Dept 1989], “[w]hen an employer fails to keep accurate records as required by statute, the commissioner is permitted to calculate back wages due to employees by using the best available evidence and to shift the burden of negating the reasonableness of the Commissioner’s calculation to the employer” (*see also Matter of Bae v Industrial Board of Appeals*, 104 AD3d 571 [1<sup>st</sup> Dept 2013], *cert denied* 21 NY3d 858 [2013]). The petitioners have the burden of showing that the minimum wage order is invalid or unreasonable by a preponderance of the evidence of the specific hours that the employees worked and that they were paid for those hours, or other evidence that shows the Commissioner’s findings to be invalid or unreasonable (*Ram Hotels, supra*). Where no wage and hour records are available, DOL is “entitled[d] to make just and reasonable inferences and use other evidence to establish the amount of underpayments, even though the results may be approximate” (*Hy-Tech Coatings v New York State Dept. of Labor*, 226 AD2d 378, [1<sup>st</sup> Dept 1996],

*citing Mid-Hudson Pam Corp.; see also Matter of Bae v Industrial Board of Appeals*, 104 AD3d 571).

Petitioners may meet their burden of proof by establishing the precise hours worked by their employees *or* by negating “the reasonableness of the inference to be drawn from the employee’s evidence” (*Anderson v Mt. Clemens Pottery*, 320 US 680, 688 [1949] [emphasis added][*superseded on other grounds by statute*]). While the Commissioner is entitled to make just and reasonable inferences in awarding damages to employees, nevertheless “the approximation must at least have some rational basis” in the record (*Matter of John Shepanski Roofing & Gutters v Roberts*, 133 AD2d 757, 758 [2d Dept. 1987]); *Matter of Kong Ming Lee et al.*, PR 10-293 at 16 [April 10, 2014]).

As discussed below, we find that petitioners met their burden to negate the reasonableness of the inferences drawn from the evidence relied upon by the Commissioner and thereby established that it does not have a rational basis in the record.

There is no evidence in the record that any of the 195 non-complaining employees worked more than 40 hours a week or were not paid overtime if they did work over 40 hours. Respondent’s investigators did not interview any of the non-complaining employees despite being provided their contact information by petitioners, did not send surveys to them, and made no efforts to conduct surveillance or interviews in the field. Furthermore, none of the employees who filed claims with respondent or who were interviewed by respondent’s investigators provided any information about the hours worked or wages paid to the non-complaining employees. Of the 14 occupational classifications listed in the order, respondent only had information concerning 3 of those classifications. Under the circumstances of this case, DOL’s use of averages that are flawed and based on a small and unrepresentative sample of petitioners’ workforce to impute overtime liability for every week for every employee during a six year period is unreasonable and without a rational basis in the record.

The audit is also unreasonable for not using the best available evidence. Senior Labor Standards Investigator Medina testified that DOL did not credit any of the records supplied by the claimants and petitioners because they did not contain all of the information required by law. While the records that were available may not have been payroll records as defined by Article 19, they did contain information that could have been used by respondent to conduct a reasonable audit. Paystubs were available for at least some portion of the claim period that showed the exact amounts each employee was paid per week. While these paystubs did not indicate pay rates or hours worked, they do show that employees did not receive the same amount of wages each week, which strongly suggests, contrary to respondent’s findings, that they did not work the same number of hours each week, and they also showed the precise wages paid each week were not credited to petitioners as wages paid to the extent available. The paystubs also may have been used to make a reasonable average of weekly wages, which could then have been utilized to determine hourly rates and hours worked as a function of weekly wages.

In addition to the paystubs provided by petitioners, several of the claimants provided samples of their own weekly paystubs, which clearly demonstrated they did not receive the same amount of wages each week, and therefore, if working straight time as determined by respondent, could not have worked the same number of hours each week. Michael Kennedy even filed a claim for unpaid wages in which he claimed he worked a different number of hours for each week he

claimed he was not paid, which was far fewer hours than he claimed he worked in his minimum wage/overtime complaint. Nevertheless, respondent determined each claimant, and indeed each employee, worked the same number of hours each week at the same wage rate shown in the "employee contact list" for the entire duration of each employee's employment with petitioners, unless a particular claimant provided specific information of previous pay rates. Claimants testified that they offered respondent's investigators additional paystubs, but were told they were too voluminous to copy, and were therefore never reviewed or considered despite being the best evidence of what each claimant was paid in each week that a pay stub was available. Claimants also testified that they kept their own records of the hours they worked, but respondent's investigators did not take them, instead relying on an estimate of hours worked based on the work schedules the claimants indicated on their claim forms, which we do not credit because of the consistent and credible testimony that petitioners' employees did not work such long hours every week and rarely worked five days a week. Furthermore, several claimants testified that they explained to DOL investigators that their hours varied from week to week, but were instructed by the investigators to estimate their weekly schedule or "round up," which in itself calls into question the veracity of the claim forms upon which the entire audit was based.

Other records that were available to DOL were samples of logbooks maintained by the marshals that showed the times of all vehicles towed each day. While not technically time and attendance records of petitioners' employees, they do show the times the first and last vehicles were towed each day, which is a very good estimate of the number of hours the marshals worked each day, and shows that the hours worked varied from day to day. Respondent did not contact the marshals to obtain additional logs, and, in fact, never contacted the marshals for any information during the course of the investigation.

That DOL had evidence available which may have provided a more accurate estimate of the hours petitioners' employees worked, particularly the claimants' own records of weekly hours worked and paystubs, but failed to consider them compels us on the record before us to find the audit unreasonable.

The credible evidence shows petitioners' employees worked varying hours each week depending on the marshal team they were assigned to, their occupational classification, and other factors such as time of year, day of the week, and weather, and that most employees only worked four days a week. The credible evidence also shows that some employees were paid an hourly rate plus a commission or bonus based on the number of vehicles towed, and that DOL investigators were aware of this but did not consider commissions or bonuses in making their determination of wages owed.

We credit the testimony of Marshals Solimine and Capuano that their hours varied, particularly their ending time each day, and that they did not work afternoons and Fridays because they had other civil enforcement duties to perform such as evictions. We further credit their testimony that they worked on Friday only if there had been a holiday or day off during the same week. We also credit their testimony concerning the typical hours they worked in scofflaw towing. Marshal Solimine testified he started scofflaw towing each morning between 3:00 to 4:00 a.m. and finished at 12:00 p.m., but could work later. Marshal Capuano testified that he started between 3:00 and 4:00 a.m. and finished between 11:30 a.m. to 1:00 p.m. The credible evidence shows the other marshals affiliated with petitioners worked similar schedules, except that Marshal Siracusa started scofflaw towing later in the morning and worked later in the afternoon, and sometimes

worked five days a week. The credible evidence also shows that petitioners' employees did not normally work more than an hour after the marshal left for the day. We credit the testimony of Roberto Garcia that at the time the marshal quit for the day there would on average less than ten vehicles remaining to be cleared from the staging area that would take less than an hour to transport to the yard.

We do not credit claimants' testimony, which in many respects conflicted with the complaints they filed with DOL, and with respondent's findings. Additionally, the record shows two claimants – Edwin Sammy and Raul Garcia – attempted to influence Jay Miranda to give false testimony exaggerating the number of hours petitioners' employees worked. Miranda credibly testified that in the waiting room before the hearing, Raul Garcia asked him to testify that he worked 60 hours a week and Sammy implored him not to side with petitioners.

Michael Kennedy, a stage guard,<sup>1</sup> claimed he worked seven days a week from 3:00 a.m. to 4:00 p.m. The record is clear that there was never scofflaw towing on weekends, and that if a marshal worked on Friday, he or she worked a half-day because all towing was to be finished on Friday by 11:00 a.m. Kennedy's claim is false on its face and contradicts his own claim for unpaid wages which alleged petitioners failed to pay him for several weeks, and that he worked a different number of hours in each of those weeks that was far less than the 91 hours he claimed he worked each week in his minimum wage/overtime complaint. Kennedy gave conflicting and incredible evidence concerning the hours he worked each week. We cannot credit his testimony that he worked 14 ½ hours a day five days a week every week during the claim period. We also do not credit respondent's determination that he worked 12 hours a day Monday to Thursday and 8 hours on Friday, for a total of 56 hours a week, because respondent's investigator failed to explain any rational basis at hearing for such determination. The record does not support respondent's determination that Kennedy worked 16 hours of overtime hours per week.

Raul Garcia, a wrecker driver, claimed he worked Monday to Thursday from 3:00 a.m. to 3:00 p.m. and Friday from 3:30 a.m. to 11:00 a.m. Respondent determined he worked from April 9, 2005, which was approximately a year prior to the date he claimed he started working for petitioners, until December 27, 2008, and that he worked 12 hours a day Monday to Thursday and 7 ½ hours a day on Friday. Garcia testified he worked 3:00 a.m. to between 1:00 p.m. and 2:30 p.m. on Marshal Solimine's team Monday to Thursday, and from 3:00 a.m. to 5:00 p.m. on Friday for Marshal Siracusa's team. Garcia testified that he worked fewer hours Monday to Thursday than respondent found, and we do not credit his testimony that he worked for Marshal Siracusa every Friday until 5:00 p.m. Records in evidence show Siracusa did not work every Friday and the weight of evidence also shows Fridays were half-days so employees did not work as late as 5:00 p.m. Garcia also testified that he only worked four days a week when assigned to Solimine's team, which is not accounted for in respondent's audit. Furthermore, Garcia testified he received an hourly rate plus a bonus based on the number of vehicles towed. Respondent did not factor bonuses paid to Garcia into the determination of wages owed. Respondent's determination that Garcia worked 15 ½ hours of overtime hours a week is unreasonable where respondent provided no rational basis for its finding that Garcia worked 55 ½ hours a week, and failed to include bonus payments as compensation in the audit.

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<sup>1</sup> Kennedy is incorrectly classified as a dispatcher in the order.

Edwin Sammy's claim alleged he worked as a stage guard for petitioners from October 6, 2003 to May 2, 2008, the date of his claim. Sammy's claim alleges he worked Monday to Thursday from 4:00 a.m. to 4:00 p.m., and Friday from 4:00 a.m. to 11:00 a.m. Respondent determined he worked 12 hours a day Monday to Thursday and 7 hours on Friday from May 21, 2005 to November 27, 2008. Sammy testified that he worked with Marshals Stringer, Siracusa, and Solimine, but did not specify the time periods he worked for each Marshal. We do not credit Sammy's testimony that each day he worked on Marshal Solimine's team he worked until 8:00 p.m. and the earliest he left was at 3:30 p.m. This conflicts with Marshal Solimine's credible testimony as well as records in evidence showing a sample of the hours Solimine's team worked. We likewise do not credit Sammy's testimony that he worked 12 hours a day for the other marshals nor do we credit respondent's determination that he worked five days a week every week of his employment because he testified that he worked four days a week with Marshal Stringer, the record shows Solimine worked only four days a week, and the record also shows Siracusa did not work five days a week every week. Respondent's determination that Sammy worked 15 hours of overtime a week is not supported by the credible evidence in the record, nor is it based on the best available evidence where Sammy offered to provide DOL with records he kept of the hours he worked and paystubs, which DOL investigators refused to accept because they were too voluminous to photocopy.

Robert Medina, a stage guard, filed a claim alleging he worked for petitioners from September 15, 2003 to May 2, 2008, the date of his claim, and that he worked Monday to Thursday 4:00 a.m. to 4:00 p.m. and Friday from 4:00 a.m. to 11:00 a.m. DOL determined Medina worked 14 hours day Monday to Thursday, and that he did not work Friday. Medina testified he worked four or five days a week, started each day at 3:00 or 4:00 a.m. and had no set quitting time. Medina also testified that he maintained his own records of the days and hours he worked, which he offered to provide DOL, but was refused. Medina provided additional testimony that DOL investigators advised him to round his hours up since he had no set finishing time each day. The determination that Medina worked 14 hours a day four days a week is not consistent with his claim or testimony, is irrational, is not based on the best available evidence, which would have been his own records he offered to provide DOL of the hours he worked, and is not supported by the credible evidence.

Dennis Rivera, a stage guard, filed a claim alleging he worked for petitioners from June 1, 2007 to April 22, 2008, and that he worked Monday to Thursday 4:00 a.m. to 4:00 p.m. and Friday from 4:00 a.m. to 11:00 a.m. DOL determined he worked Monday to Thursday 12 hours a day and 7 hours a day on Friday from March 24, 2007 to April 26, 2008. Rivera refused to provide any testimony on the hours he worked each day, testifying only that he worked five days a week. We find respondent's determination that Rivera worked 15 hours of overtime a week is unreasonable. The credible evidence in the record does not support the determination that Rivera worked five days a week, every week of his employment with petitioners.

Benjamin Lopez, a stage guard, filed a claim alleging he worked for petitioners from September 15, 2008 to January 26, 2009, the date of his claim, and that he worked from 3:00 a.m. to 6:30 p.m. on Monday, 3:00 a.m. to 7:00 p.m. on Tuesday, 3:00 a.m. to 8:00 p.m. on Wednesday and Thursday, and 3:00 a.m. to 1:00 p.m. on Friday. Respondent determined Lopez worked Monday to Thursday 14 ½ hours a day, and 10 hours on Friday, from September 20, 2009 to December 27, 2008. Lopez did not provide any relevant testimony on the hours he worked per day or the number of days he worked per week. We do not credit Lopez's claim that he worked 75 ½ hours a week. We also do not credit respondent's determination that Lopez worked 68 hours a

week, including 28 hours of unpaid overtime, which is unsupported by the credible evidence and unreasonable.

Adam Hernandez, Marcos Laguer, and Paul Aguilera filed claims with DOL, but did not testify at hearing. The burden having shifted, respondent failed to present evidence to support a reasonable inference as to the number of hours worked by Hernandez, Lagurer, and Aguilera (*Grochowski v Phoenix Construction*, 318 F3d 80, 88 [2d Cir 2003]). The record does not support respondent's determination that these employees worked the amounts of uncompensated overtime hours respondent found due.

Respondent determined Albert DeJesus and Andy Morales, who were interviewed at Kenben's yard by DOL investigators, are owed unpaid overtime wages. DeJesus, Maldonado, and Morales did not testify and respondent presented no evidence to support the determination of unpaid overtime found due by the audit. DeJesus and Morales informed DOL investigators they worked less than 40 hours a week, according to the investigator's notes, but that they "sometimes" (DeJesus) worked overtime or did "not often" work overtime (Morales). Respondent, nevertheless, determined DeJesus worked four hours of overtime every week throughout his employment with petitioners, and determined Morales worked ten hours of overtime every week he was employed by petitioners. Respondent's determination that these employees worked overtime every week throughout their employment with petitioners is not supported by the record, is contrary to the employees' own statements, and has no rational basis.

Respondent determined Joseph Maldonado, who DOL investigators interviewed at Kenben's yard, worked ten hours of unpaid overtime for each work he was employed by petitioners. This determination, however, is not consistent with Maldonado's statement to DOL investigators that he worked four days a week from 8:00 a.m. to 5:00 p.m. with a 30 minute meal break. Maldonado, therefore, worked less than 40 hours a week according to his statement to DOL (34 hours), and respondent's determination he worked unpaid overtime hours has no rational basis and is unreasonable.

The minimum wage order is unreasonable. Petitioners presented credible evidence that employees did not regularly or routinely work the amount of overtime hours respondent determined they had worked. Petitioners also presented credible evidence showing respondent's audit upon which the order is based is not rational. Respondent's only evidence – the testimony of Senior Labor Standards Investigator Medina and documents contained in DOL's investigative file – was insufficient to rebut petitioners' evidence. The minimum wage order is revoked.

#### The unpaid wages order is affirmed

The unpaid wages order finds petitioners failed to pay earned wages to Michael H. Kennedy for the time period from April 17, 2007 to December 31, 2008, in the amount of \$798.00, with interest continuing thereon at the rate of 16% calculated to the date of the order in the amount of \$650.64, and assesses a 100% civil penalty in the amount of \$798.00, for a total amount due of \$2,246.64.

Kennedy filed a claim for unpaid wages on May 2, 2008, alleging he was not paid any wages for the weeks ending February 3, 2008, February 10, 2008, February 17, 2008, February 24, 2008, and March 2, 2008. He claimed he worked 49 hours (5 days), 52 hours (5 days), 52 hours

(5 days), 40 hours (5 days), and 36 hours (3 days) respectively. He further claimed his pay rate was \$10.50 an hour. Because petitioners presented no evidence that Kennedy was paid the amounts claimed during these weeks, we affirm respondent’s determination that petitioners owe him \$798.00 in unpaid wages for the time period claimed, which appears to be for an amount less than what he actually claimed.<sup>2</sup>

*Civil penalty*

The unpaid wages order also includes a 100% civil penalty pursuant to Labor Law § 218 in the amount of \$798.00. Petitioners presented no evidence that the civil penalty imposed specifically in the unpaid wages order was unreasonable or invalid. The civil penalty is affirmed.

*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.” The Commissioner’s determination of interest due was required by statute and did not exceed the statutory limit, and is therefore not unreasonable or invalid.

The penalty order is affirmed

The penalty order assesses a \$1,000.00 civil penalty against petitioners for violating Labor Law § 661 and 12 NYCRR 142-2.6 by failing to keep and/or furnish true and accurate payroll records for each employee from on or about January 4, 2003 through December 31, 2008; a \$1,000.00 civil penalty for violating Labor Law § 162 by failing to provide employees with at least thirty minutes off for the noon day meal when working a shift of more than six hours extending over the noon day meal period from eleven o’clock in the morning to two o’clock in the afternoon from on or about July 18, 2007 through December 31, 2008; and a \$1,000.00 civil penalty for violating Labor Law § 661 and 12 NYCRR 142-2.7 by failing to give each employee a complete wage statement with each payment of wages from on or about January 4, 2003 through December 31, 2008; for a total amount due of \$3,000.00. We affirm the civil penalty.

As discussed above, petitioners did not maintain required payroll records for six years as required by law, and did not provide a complete wage statement to each employee with every payment of wages. Furthermore, the credible evidence in the record shows that there were occasions when employees were not able to take the required 30 minute meal break. The penalty order is reasonable and valid in all respects.

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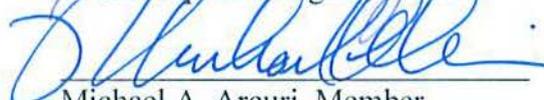
<sup>2</sup> According to Kennedy’s claim, he is actually owed \$2,577.75 for the weeks in question.

**NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:**

1. The minimum wage order is revoked; and
2. The unpaid wages order is affirmed; and
3. The penalty order is affirmed; and
4. The petition for review be, and the same hereby is, granted in part and denied in part consistent with this decision.

  
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Vilda Vera Mayuga, Chairperson

  
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J. Christopher Meagher, Member

  
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Michael A. Arcuri, Member

  
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Molly Doherty, Member

  
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Gloribelle J. Perez, Member

Dated and signed by the Members  
of the Industrial Board of Appeals  
in Albany, New York, on  
July 13, 2016.