STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of: EVGENY A. FREIDMAN A/K/A GENE FREIDMAN A/K/A EVEGENY A. FREIDMAN AND MILLENNIUM TAXIMETER CORP. (T/A MILLENNIUM TAXI METER SHOP), Petitioners, To Review Under Section 101 of the Labor Law: An Order to Comply With Article 19 of the Labor Law and an Order Under Article 19 of the Labor Law, both dated January 14, 2014, - against - THE COMMISSIONER OF LABOR, Respondent.	DOCKET NO. PR 14-050 RESOLUTION OF DECISION

APPEARANCES

Abrams, Fensterman, Fensterman, Eisman, Formato, Ferrara & Wolf, LLP (Keith J. Singer and Alex Leibson of counsel), for petitioners.

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

WITNESSES

Samuel S. Pam, Evgeny Freidman, Sanel Ljesnjanin, for petitioners.

Sabas Rojas, Jaime Alberto Huezo Cortez, Rodrigo Maldonado, Senior Labor Standards Investigator Guangming Liu, for respondent.

WHEREAS:

The petition for review in the above-captioned case was filed with the Industrial Board of Appeals (Board) on March 14, 2014. Respondent Commissioner of Labor (Respondent, Commissioner or DOL) filed his answer on June 2, 2014. Upon notice to the parties a hearing was held on December 2, 2014 and January 23, 2015 in New York, New York, before Administrative Law Judge Jean Grumet, the designated Hearing Officer in this proceeding. Each party was afforded a full opportunity to present documentary evidence, to examine and cross-examine witnesses, to make statements relevant to the issues, and to file post-hearing legal briefs.

The order to comply with Article 19 (minimum wage order) under review was issued by the respondent Commissioner of Labor (Commissioner or DOL) on January 14, 2014 against petitioners Evgeny A. Freidman a/k/a Gene Freidman[1] and Millennium Taximeter Corp. T/A Millennium Taxi Meter Shop (Millennium). The minimum wage order directs payment to the Commissioner for wages due and owing to Jaime Huezo, Rodrigo Maldonado, and Sabas Rojas (claimants) in the total amount of $38,640.31 for various time periods from August 4, 2008 to September 8, 2012, with interest continuing thereon at the rate of 16% calculated to the date of the minimum wage order in the amount of $10,111.26 and 25% liquidated damages in the amount of $9,660.09. The minimum wage order also assesses a 100% civil penalty in the amount of $38,640.31, for a total amount due of $97,051.97.

The second order under Article 19 of the Labor Law (penalty order), also issued by the Commissioner on January 14, 2014, imposes a $1,000.00 civil penalty against the 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 September 23, 2006 through September 22, 2012.

The petition alleges that: (1) in 2009, DOL audited Millennium and concluded that Huezo and Rojas and a third individual "who performed the same specialized work as" Maldonado (who at that time, did not yet work for Millennium) were independent contractors, and DOL "should be estopped from changing its position, since the facts involving the workers did not change"; (2) DOL should be estopped from claiming wages for any period prior to DOL's 2009 audit; (3) claimants have always been independent contractors; (4) the audit determination provided a good faith basis for petitioners' belief that the individuals in question were independent contractors, such that no civil penalty or liquidated damages should be imposed; (5) Freidman was not an employer; (6) once the DOL agreed that the workers were independent contractors, petitioners had no obligation to keep records other than the payment records they forwarded to the DOL, and therefore, the DOL incorrectly relied upon the workers' statements alone to calculate wages owed; and (7) the DOL calculations failed to take into account vacation days and other time taken by the workers.

SUMMARY OF EVIDENCE

Petitioners' Evidence

Testimony of Petitioner Evgeny Freidman

Freidman purchased Millennium sometime in 2008 and is its president, secretary, and sole shareholder. Millennium is a New York City licensed and bonded meter shop, which "hacks" and "dehacks" medallion taxicabs, which entails installing the roof light, taxi meter, credit card machine, passenger module, partition, floors and seats; installing and sealing taxi meters; cutting the vinyl which covers the floors and the seats; and performing all the necessary calibration to turn an automobile into a medallion taxi. The three claimants have performed mechanic and electrician services for Millennium. All three could perform the same duties, but

[1] The orders listed petitioner's name as "Evegeny A. Friedman a/k/a Gene Friedman a/k/a Evgeny A. Friedman." The petition and other documents filed by petitioners show his name as Evgeny Freidman and we amend the orders accordingly.

Freidman thinks that amongst the three of them, one is stronger than the other in certain specialized functions.

The shop is open 24 hours per day, seven days per week, 365 days per year. Sanel Lsjesnjanin is the manager. Even apart from "heavy" seasons when "we have to change 13,000 cabs," Millennium is "always looking for" technicians because "we always have contract work to do." Millennium hires technicians "that have their own tools and are licensed by the particular meter companies that we use." Besides being licensed by the meter companies Pulsar and Centrydyne, Millennium's technicians also "need to be certified by CMT, who is our technology provider" before Millenium will hire them.

Freidman identified his signature on Retainer Agreements between Millennium and claimants Huezo and Rojas. The one-page agreements, dated 08/01/08 (Huezo) and 09/01/08 (Rojas), list Millennium as "Client" and Huezo or Rojas as "Provider" of "services of mechanic/electrician," and are signed by Freidman as "Owner" and by Huezo or Rojas. Huezo's Retainer Agreement stated:

> "FEES: The monthly fee agreed upon to be paid by the 'Client' to the 'Provider' is of $2200.00 (two thousand two hundred) payable in weekly installments of $550.00 (five hundred fifty).
>
> "SERVICES: The services provided shall be totaling between 20 and 25 hours a week.
>
> "For such services performed above the mentioned hours the billing rate will be $25.00 per hour.
>
> "CANCELLATION: Should the 'Provider' cancel this agreement the 'Client' will be liable only for the number of hours worked by the 'Provider.'
>
> LIABILITY: The 'Provider' shall be liable for any and all claims filed by the 'Client's' clients pertaining to the 'Provider's' services provided."

Rojas's Retainer Agreement was identical except that the monthly, weekly and hourly rates stated were, respectively, $1,800.00, $450.00 and $23.00. Freidman testified that claimants "were assigned specific work with the specific duty to be done, and when they were finished, they were finished. That's what the retainer agreement is." The mechanics "were hired as professionals and they were paid as professionals, certified, with their tools, and I would like to say, I am always looking around at everybody. Obviously, I am not standing on top of them."

In general, Millennium "doesn't have any tools, that's a policy of mine" because any time Millennium purchased tools, they disappeared. "We have some house tools," but the claimants used their own tools. Freidman does not know if any of the claimants had their own business. Claimants were required to wear uniforms while working but Freidman did not know whether they were provided by Millennium. Claimants were free to work for other companies in addition to Millennium, since "I don't know if we gave them enough hours." Claimants had to be at Millennium when the duty they were assigned to, for example "hacking up a car or changing the

meter price," was being performed, "let's say between 10:00 a.m. and 4 p.m. . . . . They didn't need to be there any other hours."

Either Freidman or Ljesnjanin provided the payroll service with payroll information based on the technicians' self-reports of hours spent on their assignments. According to Freidman, he reviewed the payroll each week and paid the individuals. "Most of the time they submit their hours . . . . So maybe they were a little generous sometimes, maybe, but can't be too generous, because we knew the amount of work done." Freidman could not specifically say whether claimants ever worked more than 25 hours per week, but testified that some workers "[a]bsolutely" have.

Claimant Huezo now works for Millennium as an employee, not an independent contractor. The difference is that now "I get to tell him what to do . . . . what hours he works and what uniform he wears and what work he does and I get to tell him when he goes on vacation and/or he doesn't."

Petitioners provided documentation to DOL in 2009 concerning claimants Huezo and Rojas and a third worker, Ralph Diaz, to determine whether Millennium was required to pay additional unemployment contributions. The three individuals were found to be independent contractors and Millennium was not required to make unemployment insurance benefit fund contributions on their behalf. Petitioners "relied on that, and we conducted business for several years based on that."

When asked on cross-examination whether the claimants ever received raises in pay, Freidman stated, "when you use independent contractors a lot, you get comfortable with them, and you value their services a lot more." They become "a little bit more productive . . . because of their familiarity. So you tend to increase the retainer rate." Freidman did not know whether he ever had claimants sign different retainer agreements with different rates of pay or if they ever got increases in their rates of pay.

Testimony of Sanel Ljesnjanin

Ljesnjanin has been Millennium's manager since 2008. Huezo was already working at Millennium when Ljesnjanin was hired, and a cousin of both Maldonado and Rojas introduced Ljesnjanin to them; they were good technicians and he had them come to the shop and do work. Either he or Freidman is at Millennium during the 24-hour period that the shop is open, and they "pretty much work around [each other's] schedules. I communicate with Mr. Freidman all day . . . . If I have to do something or he is busy, we work around that." Ljesnjanin's duties entail supervising and assigning work.

While Ljesnjanin himself does not have a set schedule, he would set up assignments in advance for the mechanics based on his knowledge of what is needed. When Ljesnjanin advised claimants of an assignment, "they would know if the car might have electrical issues or needs [a] new meter. They would know what needs to be done." The claimants' skills varied. Maldonado "knew how to wire vehicles," Huezo "knows everything inside out, and from my understanding Sabas Rojas would only do the seat covers and all the minor stuff . . . . Not much wiring." Ljesnjanin prepares the paperwork for the serial number of each medallion, which goes directly to the Taxi and Limousine Commission, attesting that the car was hacked up at Millennium.

Although claimants could refuse a particular assignment, they never did. The claimants did not have specific hours: their hours were based on the assignment they were given. Millennium did not keep track of the specific hours worked. Claimants used their discretion to determine how long a job would take, but Ljesnjanin was familiar with the approximate amount of time it took to do a particular task. Neither he nor the shop manager would stand over the claimants or track the time. The claimants did not need permission to come and go. "I assign the duties that need to be done . . . . [I]f they wanted to take off on lunch or vacation, whatever personal issues they have, that's on them." There were other technicians on call who could do the work. Ljesnjanin reported claimant's work time to "the corporate office" for pay purposes based on what claimants reported to him.

Asked whether Millennium provided claimants with uniforms, Ljesnjanin testified that he prefers workers to "wear a shirt, not just shorts sagging" but he only asks that "they look professional." Asked whether claimants wore anything with `Millennium's name, he testified that: "I might have given them a hat . . . . As long as they are working on our vehicles, at the time, yes."

Testimony of Unemployment Insurance Services Auditor Samuel Pam

Samuel Pam has been employed as an Unemployment Insurance Employment Services auditor for the DOL's Unemployment Insurance Division (UID) since March 2005. Pam audits employers' books and records to make sure contributions to the state unemployment insurance fund are correct and reflect all employees on the employer's payroll.

By letter dated January 22, 2009, UID Reviewing Examiner Roxane Teal requested that Millennium provide, among other things, "the names of the individuals you consider to be independent contractors since January 1, 2008." Teal's letter explained the factors relied upon by the UID to determine whether an individual is an employee or an independent contractor, and requested that Millennium answer 18 questions relating to these factors. After Teal's letter was sent and prior to May 18, 2009, Pam was assigned to and conducted an audit of Millennium's books and records in Manhattan, where the records were maintained. He did not visit Millennium's Long Island City facility, where the work in question was actually performed, although another UI auditor visited the Long Island City shop and interviewed supervisor Sanel Ljesnjanin.

Pam identified a May 18, 2009 letter addressed to him from Andreea Dumitru, Millennium's Chief Financial Officer, stating that: Millennium considered three mechanic/electricians, Ralph Diaz and claimants Huezo and Rojas, to be independent contractors. CFO Dumitru's letter stated that the three mechanics were: "retained weekly for work performed of approximately 15-20 hours"; given IRS 1099 forms for 2008; called in to perform the repairs and installations of various parts of the cabs based on the shop's needs; and had their own tool boxes. According to CFO Dumitru, the work performed by the mechanics included hacking up cars, installing meters and other technology and equipment, repairing and programming meters, other equipment repair, and car lettering and roof lettering.

Attached to CFO Dumitru's letter was a response to the 18 questions in UID Reviewing Examiner Teal's January 22, 2009 letter to Millennium. The responses indicated that Millennium does not provide training, but requires all certificates of training be kept current; and Millennium reimburses "for parts only." Other responses indicated that the individuals listed as independent

contractors "perform work at other garages in the LIC area"; had retainer agreements that "were renegotiated periodically"; worked by assignment, not by a set schedule; had to finish their assignment for the day; used "individual discretion on how long they take for each job"; "are responsible to the customers" if a job was not properly done; and there was no requirement to report at established times and work certain hours. On May 28, 2009, CFO Dumitru, at Pam's request, sent him a memorandum stating that the mechanics that were contracted for jobs in 2009 were the same as in 2008, except for Diaz, who worked only until March 2009. Millennium also provided Pam with Huezo's and Rojas'ss Retainer Agreements.

According to Pam and following general procedure, he spoke to the head of the business and not the claimants. Based on the information provided by Millennium, Pam created and signed an Investigation Report dated June 9, 2009 indicating that Millennium owed no contributions to the UI fund.

Respondent's Evidence

Testimony of Claimant Sabas Rojas

Rojas worked for Millennium from September 15, 2008 to December 12, 2009 installing meters. Rojas had no prior experience in the taxi industry nor was he licensed or certified to do his work. After he was hired, Huezo and Evaristo (Ljesnjanin's predecessor) taught Rojas how to do his job.

Millennium was open 24 hours per day. Rojas worked six days per week, 1:00 p.m. to 11:00 p.m. Monday through Friday and 9:00 p.m. to 7:00 a.m. on Saturdays. Evaristo assigned his schedule. When Rojas took a one week vacation, he asked Evaristo for permission; Evaristo had to first obtain Ljesnjanin's permission before agreeing to let Rojas take the time. Other than the one-week vacation, Rojas's only day off was Thanksgiving Day 2009. Rojas did not work for anyone else while working at Millennium, never sought out his own customers, and did not have business cards or his own insurance. According to Rojas, Millennium was a meter shop whose base of business was "cabs that belonged to the company."

When he began working, Rojas was paid $450.00 per week, but his wages were increased to $575.00 per week. Although he was scheduled to work 60 hours, Rojas actually worked between 60 and 62 hours because if a taxi arrived right before the end of his schedule, he would have to stay and finish the work. Rojas was never paid time and a half for hours worked over 40 in a week. He had a meal break of 30 minutes to an hour, depending on the work, and sometimes ate while working.

Millennium supplied Rojas with a blue uniform that had both his name and the name of the shop. Everyone who worked at Millennium wore the same uniform. Each worker had his own tools and left them at the shop until his last day of work. Rojas's tools included a drill, drill bits, a pressure pistol, pliers, a knife, and ties for wires. When he was hired, Evaristo loaned him tools, then he bought his own.

Rojas identified his signature on his Retainer Agreement, which, he testified, Ljesnjanin told him to sign without explaining the contents of the document. Rojas was able to read his name at the bottom of the document before he signed, but did not read the rest of the document

and had no idea of what it said. He did not tell Ljesnjanin that he did not understand written English nor did he ask to have the document translated before signing.

Rojas also identified his handwriting on a form entitled "Joint Enforcement Task Force on Employee Misclassification, Reporting Fraud and Other Violations," which was stamped "Received 2009 Dec 1" by the DOL Liability and Determination Fraud Unit, which alleges activity by Millennium including among other things, not paying the appropriate rate for overtime, not paying employees for all hours worked, and not keeping proper wage records. Rojas testified that he believed Ljesnjanin gave him this form, and that he filled out a complaint form and sent it to the DOL, he believes, in 2009. In 2013, Rojas came to the DOL office, was interviewed by an investigator who took notes, and signed a Division of Labor Standards' "Minimum Wage/Overtime Complaint." The record includes several slightly different versions of this complaint, including two that say "See JETFEM referral" on the line for "Signature of Claimant," and one with Rojas's signature dated 08/13/13 on that line.

Testimony of Claimant Jaime Alberto Huezo

Huezo has worked for Millennium since 2004, and has not worked anywhere else during this time period. He installs partitions, meters, roof lights, and travel lights. He works six days per week. In 2008, his hours were Sunday through Friday from 9:00 a.m. to 7:00 p.m. and Sundays 11:00 a.m. to 9:00 p.m. In 2012, his hours changed to 9:00 a.m. to 7:00 p.m. six days per week. In 2008, Huezo was paid $550.00 per week and in 2012, $700.00 per week paid with a bi-weekly $1,400.00 check. In January 2013, Huezo was hired as an employee. His work has not changed in any way, but he now earns $980.00 gross per week, is paid bi-weekly, and takes home $1,385.00 every two weeks. During the relevant period, Huezo took two one-week vacations, for which he obtained prior permission from Evaristo, and no other days off. Huezo worked every holiday including every Christmas, Thanksgiving and New Year's Day.

Huezo had no training for his job. When he began work he already knew about electricity, "Evaristo told me which wire was negative and which was positive," and "[t]he rest is basic knowledge of the electricity" to install a meter. When Huezo began working at the shop, Evaristo set his schedule and assigned work; later Ljesnanin did so. Ljesnjanin tells him what needs to be done, and Huezo knows how to do it. Ljesnjanin does not stand over Huezo to watch him after giving him an assignment. Huezo has never declined to work on a particular car and does not think he could. He wears a blue uniform with his name and the name of the company that makes the uniforms, Taxo Park; Ljesnjanin gave the uniform to him. He never had his own business or business cards, never brought in any customers, and never hired anyone to help with a particular job. Huezo has his own tools, which he leaves at Millennium. Huezo stated that he did not sign the August 1, 2008 Retainer Agreement, but that he "signed a paper that had an amount per hour."

Huezo signed a "Labor Standards Employee Interview Sheet" dated September 20, 2012 recording a DOL investigator's interview with him conducted on Millennium's premises. The investigator filled out this form based on what Huezo told him, and Huezo read and signed it. This was Huezo's first contact with the DOL.

Testimony of Claimant Rodrigo Maldonado

Maldonado worked as a technician at Millennium from September 7, 2009 to around November 2013. He learned the job from others already working at Millennium. Maldonado worked six days per week, 10 hours per day, from 8:00 a.m. to 6:00 p.m. Monday through Saturday. When he began working, Maldonado was paid $550.00 per week in cash, but was later told he had to be paid by check, and was then paid $1,100.00 by check every two weeks, a rate that was later increased. Maldonado provided a wage statement for the period 1/14/12 to 1/27/12, which indicates that he was paid $1,200.00 during this pay period and $2,400.00 to date in 2012, was treated as a 1099 worker, and had no deductions taken from his pay. In 2013, Maldonado started getting paid as a salaried employee without explanation, although he continued doing the same work as before when he received an IRS 1099 form and was treated as an independent contractor.

Ljesnjanin set Maldonado's schedule. Maldonado's work was "always the same" and the only change was the amount of vehicles, and he performed the same duties as Huezo and Rojas. He did not have his own business, customers or business card, and supplied his own basic tools such as wire strippers, pliers, screwdrivers, and drills. According to Maldonado, "The shop [also] had a lot of tools," such as air compressors to fill tires.

Maldonado identified a Minimum Wage Field Investigation Employee Statement dated September 21, 2012, and testified that a DOL investigator who came to Millennium filled out this form based on what Maldonado told him, and Maldonado read and signed it. This statement lists Maldonado's hours as 7:00 a.m. to 8:00 p.m. Monday through Friday and 3:00 p.m. to 1:00 a.m. on Saturday, which Maldonado testified was a mistake since he did not work more than 10 hours per day. Maldonado received 30 minutes per day for meals, but if a car arrived, he had to stop eating and work on the car. He worked all holidays from 2008 to 2012 including New Year's, Christmas, and Thanksgiving.

Testimony of Senior Labor Standards Investigator Guangming Liu

SLSI Liu supervised and participated in the DOL Division of Labor Standards' investigation in this matter. The case was referred to the Division of Labor Standards by the Joint Enforcement Task Force on Employee Misclassification, based on a December 1, 2009 form filed by claimant Rojas. Rojas subsequently filed a minimum wage/overtime complaint with the Division of Labor Standards, on August 13, 2013.

On September 21, 2012, SLSI Liu and Labor Standards Investigator Fang Zou visited Millennium's Long Island City premises, where they interviewed and obtained signed statements from claimants Huezo and Maldonado as well as Alon Ljesnjanin, who stated he was a mechanic hired by Freidman in April 2012, was paid $600.00 per week, and was supervised by his brother Sanel. Liu's recollection is that these interviews were conducted in English. The investigators left a Notice of Revisit requesting payroll and other records for the period September 20, 2006 to September 20, 2012 and petitioners, through their accountant at a November 9, 2012 meeting, provided payroll registers from October 2008 to September 2012. The payroll records provided

by petitioners did not include the daily and weekly hours worked by claimants, but indicated that claimants were paid the following wages on a bi-weekly basis:[2]

Huezo	$1,000.00	from 10/20/08 to 11/4/08
	$1,100.00	from 11/5/08 to 5/5/09
	$1,300.00	from 5/6/09 to 3/12/10
	$1,400.00	from 3/13/10 to 9/7/12
Rojas	$ 900.00	from 10/20/08 to 4/7/09
	$ 948.00	from 4/9/09 to 5/5/09
	$1,148.00	from 5/6/09 to 12/31/09
Maldonado	$1,100.00	from 10/9/09 to 3/12/10
	$1,200.00	from 3/13/10 to 9/7/12

On February 8, 2013, petitioners' accountant sent a letter to Liu enclosing, among other things, the January 22, 2009 and May 18, 2009 correspondence between Millennium and the UID.

LSI Zou sent petitioners a June 4, 2013 letter stating that DOL calculated the minimum wage underpayments based on information provided in Rojas's claim and Huezo's and Maldonado's signed Field Investigation Employee Statements for periods that claimants worked from 2006 to 2012. Attached to LSI Zou's letter were a Recapitulation Sheet- Preliminary Report, an Excel spreadsheet, and a Notice of Violation. At a November 13, 2013 compliance conference, petitioners: (1) contested the pay rates used for the DOL's computations; (2) provided payroll reports to show that claimants were not paid the same rates throughout their claim periods; and (3) claimed that vacation time taken by claimants was not reflected in the DOL's computations. Claimants confirmed that their pay rates changed during their employment period, and that they did take vacation and additional days off. Huezo stated that he took two weeks' vacation in 2009 and 2012, and took two to three days off in 2008, 2010, and that on average he took two to three days off each year during the relevant period. Maldonado stated that he took one week of vacation in 2010 and 2012, two days off in 2010, and three days off in 2011 and 2012. Rojas did not take vacation time or days off besides his normally scheduled day off in 2008, but did take one week of vacation. As a result of the compliance conference: (1) the minimum wage underpayments were reduced based on the claimants' weekly earnings reflected in the "payroll generals;" (2) the petitioners were credited with the vacations and days off reported by the claimants; and (3) the start of the audit period was changed to August 9, 2008 to reflect when Freidman purchased the company. The minimum wage order was issued based on the findings of the compliance conference, which included these modifications.

SLSI Liu recommended the imposition of a 100% civil penalty for the minimum wage order based on the size of the firm, the bad faith of the employer, including the petitioners' continued argument that claimants were independent contractors, and the failure to provide payroll records with daily and weekly hours.

[2] The registers beginning with the payroll period 10/20/08 record weekly pay periods through July 2009: for those ten months, the payments listed here were for two weekly pay periods.

STANDARD OF REVIEW AND BURDEN OF PROOF

When a petition is filed, the Board reviews whether an order issued by the Commissioner is "valid and reasonable" (Labor Law § 101 [1]). A petition must state "in what respects [the order on review] is claimed to be invalid or unreasonable," and any objections not raised shall be deemed waived (*Id.* § 101 [2]). The Labor Law provides that an order of the Commissioner shall be presumed valid (*Id.* § 103 [1]). The hearing before the Board is *de novo* (Board Rule 66.1 [c], 12 NYCRR 66.1 [c]), and based on that hearing, if the Board finds that the order, or any part thereof, is invalid or unreasonable, the Board is empowered to affirm, revoke or modify the order (Labor Law § 101 [3]). Petitioners have the burden to prove by a preponderance of the evidence that the orders are not valid or reasonable (Board Rules of Procedure and Practice [Board Rule] 65.30 [12 NYCRR 65.30]; State Administrative Procedure Act § 306; *Matter of Angello v Natl. Fin. Corp.*, 1 AD 3d 850, 854 [3d Dept 2003]).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

The DOL Was Not Estopped from Issuing the Orders

Petitioners argue that because UI auditor Pam concluded in 2009 that Millennium's technicians were independent contractors and because petitioners relied on Pam's Investigation Report, the DOL "should be estopped from changing its position" by now finding the claimants to be employees to whom wages are owed, and the orders must be revoked for that reason. Estoppel bars a party from making an assertion, either because a prior legal determination has already rejected the party's assertion ("collateral estoppel") or based on considerations of fairness in light of the party's own prior acts ("equitable estoppel"). As explained by the Court of Appeals, "collateral estoppel, a narrower species of *res judicata*, precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party" (*Ryan v N.Y. Tel. Co.*, 62 NY2d 494, 500 [1984]). "The purpose of equitable estoppel is to preclude a person from asserting a right after having led another to form the reasonable belief that the right would not be asserted, and loss or prejudice to the other would result if the right were asserted" (*Matter of Shondel J. v Mark D.*, 7 NY3d 320, 326 [2006]). Petitioners raised both arguments, asserting in a pre-hearing brief that the orders under review were "contrary to the doctrine of collateral estoppel and rules of equity." We do not agree, and we find that the Division of Labor Standards orders at issue in this matter were not barred by collateral estoppel or equitable estoppel by virtue of the 2009 UID Investigation Report.

Collateral Estoppel Did Not Bar the Orders

Labor Law § 623 (1) states:

> "A decision of a referee, if not appealed from, shall be final on all questions of fact and law. A decision of the [unemployment insurance] appeal board shall be final on all questions of fact and, unless appealed from, shall be final on all questions of law."

The UID Investigation Report in the instant case was neither a decision of an unemployment referee or the Unemployment Insurance Appeal Board (UIAB). Thus there was no final UI decision as defined by § 623 (1). This definition of finality is consistent with general collateral estoppel law, which only applies if there has been an actual "prior action or proceeding . . . decided against [the] party" estopped (*Ryan*, 62 NY2d at 500). As *Ryan*'s references to *res judicata* and "relitigating" underscore (*Id.*), collateral estoppel only applies to an already-litigated – not just previously investigated – issue.

Even more fundamentally, Labor Law § 623 (2), enacted in 1987,[3] states:

> "No finding of fact or law contained in a decision rendered pursuant to this article [the Unemployment Insurance Law] by a referee, the appeal board or a court shall preclude the litigation of any issue of fact or law in any subsequent action or proceeding; provided, however, that this subdivision shall not apply to causes of action which (i) arise under this article, (ii) seek to collect or challenge liability for unemployment insurance contributions, (iii) seek to recover overpayments of unemployment insurance benefits, or (iv) allege that a claimant or employer was denied constitutional rights in connection with the administrative processing, hearing, determination or decision of a claim for benefits or assessment of liability for unemployment insurance contributions."

Pursuant to Labor Law § 623 (2), determinations of the Department of Labor concerning unemployment insurance are "without preclusive effect in [an] action" like the present one (*Wooten v New York City Department of General Services,* 207 AD2d 754, 617 NYS 2d 3 [1st Dept 1994] *app denied, 84 NY2d 813, 622 NYS2d 915* [1995]). That the principle extends to proceedings before the Board is clear from *Matter of Sorsby v Commissioner*, 277 AD2d 618 (3d Dept 2000), where the UIAB had rejected an unemployment claim "on the ground that no employment relationship existed" but the Board, "following a full adversary hearing," decided "that claimant was an employee for purposes of granting her claim against the employer for back wages." *Sorsby* affirmed the UIAB's discretion to reopen its own proceeding, accept our decision in evidence, and adopt our factual findings (*Id.* at 618-619).

While the above is enough to show that collateral estoppel does not apply, still another reason is that while "identicality" of issues is a prerequisite for collateral estoppel (*see Ryan*, 62 NY2d at 502), the factors that govern the Board's finding of independent contractor status under Article 19 of the Labor Law (the Minimum Wage Law) differ from those considered by Pam under Article 18 of the Labor Law (the Unemployment Insurance Law). In *Matter of Bartenders Unlimited, Inc. v Commissioner of Labor,* 289 AD2d 785, 736 NY2d 119 (3d Dept 2001) *app. den.*, 98 NY2d 601 (2002), the Board's conclusion that workers were independent contractors and not employees under Article 19 did not collaterally estop the UIAB from finding that the workers were employees and not independent contractors under Article 18 of the Labor Law since each tribunal can reach its own decision "on the mixed issue of law and fact regarding employment under the relevant statutes" (*Id.* at 786, 787):

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[3] The 1987 amendment to Labor Law § 623 "legislatively overruled *Ryan v New York Telephone Co.* with respect to unemployment insurance determinations . . . . Ryan otherwise remains good law" (Weinstein, Korn, Miller, CPLR Manual [Matthew Bender] § 25.04 [h] [3]).

> "The term 'employment' is not defined identically under the relevant statutes (*compare Labor Law § 651 [5], [6] with Labor Law § 511, 512*) and while the relevant statutes are all contained in the chapter known as the Labor Law (*see Labor Law § 2*), the Legislature created different administrative bodies to exercise the adjudicatory authority delegated by the statutes (*compare Labor Law § 100, 101 with Labor Law § 534, 621*). Accordingly, we conclude that the IBA and the [UIAB] can each determine which factors it considers most appropriate in reaching its conclusion on the mixed issue of law and fact regarding employment under the relevant statutes."

While the UIAB's findings of fact did not differ from those of the Board, the UIAB found that the workers in question were not independent contractors on the mixed question of law and fact, and the court concluded that the doctrine of collateral estoppel did not preclude the UIAB from doing so, citing *Matter of Guimarales v Roberts*, 68 NY2d 989, 991 (1986). Likewise, we noted in *Matter of Double R. Entertainment, LLC (T/A Rick's Tally-Ho)*, PR 08-156, pp. 11-12 and n.3 (June 7, 2011) that while we determine employee status under an "economic reality test," the Unemployment Insurance Law uses a "stricter common law definition of employment." In the present case, Pam's 2009 UID Investigative Report made no specific factual findings, and the legal standards for the ultimate conclusion that a person is an employee or contractor under the Unemployment Insurance Law and Minimum Wage Act are not identical. The Investigation Report would therefore not have had collateral estoppel effect even if Labor Law § 623 (2) had never been enacted and there had been a prior UI proceeding, neither of which is true.

Equitable Estoppel Did Not Bar the Orders

Petitioners' second estoppel argument is that it is inequitable for the DOL to change its position after petitioners acted in detrimental reliance on the Investigation Report. As explained below, this, too, is not a basis to revoke the orders. Absent collateral estoppel, a government agency is not estopped "from correcting errors, even where there are harsh results" (*Matter of Parkview Assocs. v City of New York*, 61 NY2d 274, 282 [1988]; *Matter of Schorr v N.Y. City Dept. of Housing Preserv. & Dev.*, 10 NY3d 776, 779 [2008]; *Oxenhorn v Fleet Trust Co.*, 94 NY2d 110, 116 [1999]). *Matter of Cahill v Commissioner*, 79 AD3d 1514 (3d Dept 2010), applied these principles specifically to erroneous advice from the DOL's UID, holding that "estoppel is unavailable against a government agency except in extraordinary circumstances, and receiving misinformation from a government employee does not constitute such a circumstance" (*Id.* at 1515; *see also Matter of Smith v Commissioner*, 98 AD3d 792, 792-3 [3d Dept 2012]).

Moreover, it would be not only contrary to precedent, but highly inequitable to preclude the DOL from protecting employees' earned wages because the petitioners provided materially false and misleading information to the UID, as discussed below. During the UID investigation, petitioners portrayed the claimants as certified mechanics who: (1) were required to have "all the certificates of training current"; (2) were reimbursed "for parts only"; (3) were paid for approximately 15-20 hours per week (contradicting the subsequently submitted Retainer Agreements, which specify that Huezo and Rojas worked 20-25 hours per week); (4) had their "weekly retainer agreement . . . renegotiated periodically"; and (5) performed work at other garages in the LIC area; and (6) were responsible to the customers. The UID relied on this

materially false information and issued its report without the input or knowledge of the misclassified employees.

While the petitioners portrayed the claimants to the UID as certified, highly skilled mechanics who worked on an "as needed" basis, and earned an hourly wage of $23.00 (Rojas) and $25.00 (Huezo), the credible testimony at the instant hearing indicates that this was not the case. All three mechanics credibly testified that they were not required to have certifications or licenses as a condition of employment; had no training, experience, certification, or licenses as mechanics, and learned how to hack and dehack cars on the job from other Millennium employees. The record is clear that Millennium provided all parts needed to hack and dehack taxis, and the petitioners provided no evidence that the claimants supplied any parts and "were reimbursed for parts only" as petitioners claimed to the UID. As discussed below, we credit the claimants' account of their regular shifts, claimants' six day/60 hour workweeks, and their wages. We give no credence to the petitioners' testimony that claimants worked only on an "as needed" basis for 15-20 hours per week and were required to be certified or licensed. We give no credence to the hourly wages or salaries listed in the Retainer Agreements and we find that there was no evidence that these agreements were ever negotiated, contrary to what petitioners claimed during the UID investigation. Moreover, petitioners presented no evidence that the Retainer Agreements were explained to the claimants, translated into Spanish, or that Huezo or Rojas knew what they were signing. We credit the testimony of Rojas and Huezo that they did not understand what they were signing, and we note that claimant Maldonado was never provided with a Retainer Agreement. While the petitioners told UID that the mechanics worked at other garages in the LIC area, petitioners provided no evidence that this was the case, and the claimants denied that they worked anywhere else during the relevant period. Likewise, Ljesnjanin testified that if work was performed improperly, "I," not the claimants, "would have to deal with the customer."

We find that it would be highly inequitable to preclude claimants, who were not interviewed or even aware of the 2009 UID audit, from having the Division of Labor Standards pursue their minimum wage claims because the UID concluded, based on false and misleading information, that Millennium did not owe additional unemployment insurance contributions.

The Claimants Were Employees, Not Independent Contractors

The ultimate inquiry into whether an individual is an independent contractor is whether such person depends on someone else's business or is in business for himself (*Matter of Maria Lasso and Jaime M. Correa Sr. and Exceed Contracting Corp.*, PR 10-182, p. 5 [Apr. 29, 2013], *aff'd sub nom. Matter of Exceed Contracting Corp. v IBA*, 126 AD3d 575 [1st Dept 2015]). Accordingly, we must determine whether the claimants were "wearing the hat of an independent enterprise" *(Exceed Contracting, Id.*, PR 10-182, p. 5, quoting *Boston Bicycle Couriers, Inc. v Division of Employment & Training*, 778 NE2d 964 [Mass. App. Ct. 2002]). To make this determination we must consider several factors, including (1) the degree of control exercised by the employer over the workers, (2) the workers' opportunity for profit or loss, (3) the degree of skill and independent initiative required to perform the work, (4) the permanence or duration of the working relationship, and (5) the extent to which the work is an integral part of the employer's business (*Brock v Superior Care, Inc.*, 840 F2d 1054, 1058-59 [2d Cir 1988]). No one factor is dispositive, rather the test is based on the totality of the circumstances and the ultimate concern is whether, as a matter of economic reality, the claimants depended upon the petitioners or were in business for themselves (*Id.* at 1059).

We find that the petitioners did not meet their burden to prove that Huezo, Maldonado and Rojas were independent contractors. On the contrary, we find that the evidence amply demonstrates that the claimants were petitioners' employees, and were misclassified as independent contractors.

Freidman and Ljesnjanin portrayed the claimants as: (1) highly skilled, certified and licensed professionals (2) who were paid $25.00 per hour, (3) worked on an "as needed" basis, (4) billed petitioners for 20-25 hours of work per week, (5) whose wages were based on claimants' self-reports of how long the particular jobs took, (6) were provided with IRS 1099 forms, and (7) were free to refuse particular assignments, for which Millennium was also always ready to call other independent contractors, who were first required to be licensed or certified by Millennium's meter companies and technology provider. We do not credit Freidman and Ljesnjanin's testimony.

All three claimants credibly testified that they worked regular 10 hour shifts six days per week assigned to them by Ljesnjanin, and performed whatever work was needed to hack or dehack vehicles without ever having received or been required to receive training, licenses or certifications. All three claimants learned their jobs (after being hired by petitioners) from other Millennium employees. Claimants testified that they did not believe that they could refuse an assignment and Ljesnjanin testified that no claimant had ever refused an assignment.

It is not credible that claimants worked on an "as needed basis" or that petitioners were, as Freidman and Ljesnjanin claimed at the hearing, paying the claimants based on their self-reports of how long particular jobs for which they were called in took them. That account is belied by the fact that the claimants' pay did not vary from week to week (except for periodic merit raises) as demonstrated by Millennium payroll registers for the pay periods ending 10/20/08 through 9/7/12. We find the uniformity of claimants' wages over a four year period renders Freidman and Ljesnjanin's testimony incredible, particularly in light of Freidman's testimony that the meter shop, which was open "24 hours, seven days a week, 365 days a year and was always behind schedule," had busy and not busy seasons. Freidman testified that when there is a rate change, 1200 meters must be changed in a three-day period. Freidman's failure to recall whether any of the claimants ever worked beyond 25 hours under these circumstances is not believable. We find that all three claimants were required to work six days a week and at least 10 hours per day, had regular shifts, and did not work 15-20 hours as petitioners reported to UID, or 20-25 hours as indicated in Huezo and Rojas's Retainer Agreements. Nor did they work at other local garages, as Freidman stated he hoped they were since "I don't know if we gave them enough hours."

As discussed above, we attach little weight to the fact that Huezo and Rojas signed Retainer Agreements, especially since it is clear that most provisions of those agreements were never followed. For example, the monthly or weekly "fees" stated in the agreements as due to the claimants were paid for at most a short time before these rates were repeatedly raised, and there is no evidence the hourly "fees" were ever paid at all. Freidman acknowledged he did not renegotiate or update the Retainer Agreements when raising their pay because "you get comfortable with them, and you value their services a lot more." Rojas testified that he signed the Retainer Agreement without reading or understanding it, because Ljesnjanin told him to, and Huezo that the document he signed was different from the one introduced in evidence at the hearing. There is no evidence that Maldonado was asked to or did sign a Retainer Agreement at all. The Retainer Agreements do not change the economic reality that the claimants were

employees, not independent contractors. Nor does the fact that petitioners considered claimants to be independent contractors and gave them 1099 tax statements rather than W-2's change the economic reality. An employer's self-serving label of workers as independent contractors is not controlling (*See Brock v Superior Care, Inc.*, 840 F2d 1054, 1059 [2d Cir 1988] [*quoting Real v Driscoll Strawberry Asso., Inc.* 603 F2d 748,755 [9th Cir 1979]).

Rojas and Huezo testified that Millennium supplied blue uniforms. Freidman, agreeing that the claimants had to wear uniforms, implausibly testified he did not know whether they were provided by Millennium, while Ljesnjanin was evasive, initially stating he was satisfied if technicians were not bare-chested but when again asked if they wore something with Millennium's name, testifying: "I might have given them a hat . . . . As long as they are working on our vehicles, at the time, yes."

While it is undisputed that claimants supplied most tools, which they kept on Millennium's premises in individual toolboxes, we credit Maldonado's testimony (partly confirmed by Freidman who stated that Millennium has "some house tools") that Millennium supplied equipment such as air compressors to fill tires. It is undisputed that Millennium supplied all parts needed to hack a taxi, including meters, vinyl, floors, partitions, roof lights, etc., and supplied necessary medallion information to the Taxi and Limousine Commission. There is no evidence that any of the claimants were in business for themselves, had business cards, workers compensation insurance, or wore the hat of an independent enterprise rather than of a Millennium employee.

While Freidman and Ljesnjanin claimed that the three claimants were certified, licensed "professionals" who used independent initiative in performing their jobs, all three claimants credibly testified that the work did not require a great deal of skill or independent initiative. Claimant Maldonado testified that the work was basically "always the same" with just the number of vehicles worked on varying. When asked how he learned his job, Maldonado testified that when he began at Millennium, other individuals at the shop showed him what to do. Huezo testified that "you only needed to know four wires . . . Evaristo told me which wire was negative and which one was positive." Rojas testified that he did not receive any training and learned it all on the job from his coworkers. Petitioners assigned claimants the hacking and dehacking work that needed to be done, and claimants did it. Such dependence on an employer to provide the opportunities for work does not reflect the skill and independent initiative of an independent contractor (*See Brock v Superior Care, Inc., supra* at 1060).

Claimant Huezo began working for petitioners on August 4, 2008, continues to work at the Millennium shop, and has worked for no one else during this period. He became an employee in late 2012, and continues to work the same schedule, and has the same amount of work that he did as when he was classified as an independent contractor. His net pay is nearly identical to what he earned when he was classified as an independent contractor. Claimant Maldonado, likewise, worked for the petitioners from September 7, 2009 to 2013, did not work for anyone else, and became an employee in 2012, working the same schedule and having the same amount of work. His earnings were the same as when he was classified as an independent contractor. Claimant Rojas worked for petitioners, and no one else, from September 15, 2008 to December 12, 2009. The length of time that claimants have worked for petitioners and the fact that claimants worked for no one else throughout the time they worked for petitioners indicates that they were employees. Likewise, the fact that they had regular shifts and were paid the same

amount every week further demonstrates that claimants were employees rather than independent contractors.

Claimants' sole investment was their time and labor. The sole source of their income was from their work hacking and de-hacking taxicabs at petitioners' shop, and claimants were economically dependent on petitioners and had no opportunity for profit and loss other than their labor.

Finally, and most important in the weighing of factors in this case, the hacking and dehacking work that claimants performed was essential to petitioners' business as a taximeter shop. When asked what Millennium Taximeter Corp. does, Freidman testified that it is called hacking and de-hacking the car and that it is licensed specifically for this purpose. The business is open 24 hours a day, 365 days a year to perform this service and the mechanics perform every task that is necessary to hack and de-hack a taxicab. This is the only service provided by Millennium, and petitioners could not run the shop without the mechanics to do the work, which was integral to petitioners' business, and the most telling evidence of claimants' status as employees. (*See Brock v Superior Care, Inc. supra* at 1060; *Matter of Jeannette Fenti and Creative Think Tank Agency, Inc.*, PR 08-107 at p 9 [October 21, 2009]). Petitioners cannot hire employees to perform the essential functions of its business and then avoid their obligation under the Labor Law to pay wages for such employment by misclassifying them as independent contractors.

Petitioner Freidman is an Employer

Under Article 19 of the Labor Law, "employer" is defined as including "any individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons acting as an employer" (Labor Law § 651 [6]). An "employee" is described in the statute as "any individual employed or permitted to work by an employer." (Labor Law § 651 [5]). Furthermore, to be "employed" means that a person is "permitted or suffered to work" (Labor Law § 2 [7]). Like the New York Labor Law, the federal Fair Labor Standards Act (FLSA) defines "employ" to include "suffer or permit to work" (29 USC § 203 [g]), and the test for determining whether an entity or person is an 'employer' under the New York Labor Law is the same test for analyzing employer status under FLSA. (*Matter of Yick Wing Chan v. N.Y. State Indus. Bd. of Appeals*, 120 AD3d 1120 [1st Dept 2014]; *Bonito v. Avalon Partners, Inc.*, 106 AD3d 625, 625 [1st Dept 2013]; *Matter of Maria Lasso and Jaime M. Correa Sr. and Exceed Contracting Corp.*, PR-10-182 [Apr. 29, 2013], *aff'd sub nom. Matter of Exceed Contracting Corp. v. Indus. Bd. of Appeals*, 2015 NY App LEXIS 2219 [1st Dept Mar. 19, 2015]; *Chung v. New Silver Palace Rest., Inc.*, 272 FSupp 2d 314, 319 n16 [SDNY 2003]).

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

> "[T]he overarching concern is whether the alleged employer possessed the power to control the workers in question with an eye to the 'economic reality' presented by the facts of each case. Under the 'economic reality' test, the relevant factors include whether the alleged employer (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate

> and method of payment, and (4) maintained employment records" (internal quotations and citations omitted).

No one of these factors is dispositive; the purpose of examining them is to determine economic reality based on a "totality of circumstances" (*Id.*). Under the economic reality test, employer status "does not require continuous monitoring of employees, looking over their shoulders at all times, or absolute control of one's employees. Control may be restricted, or exercised only occasionally, without removing the employment relationship from the protections of the FLSA, since such limitations on control 'do not diminish the significance of its existence.'" (*Herman*, 172 F3d at 139.) Under the broad New York and FLSA definitions, more than one entity or person can be found to be a worker's employer (*Id.*). Applying this test to the present case, we find that Freidman was an employer.

Freidman, Millennium's sole owner, president and secretary, satisfied all four *Herman* factors. As "Owner," he signed the Retainer Agreements initiating and setting the ostensible terms of Huezo's and Rojas's employment. According to Ljesnjanin, either he or Freidman is always at the Millennium shop during the 24-hour period. Freidman testified that "I am always looking around at everybody. Obviously I am not standing on top of them." Freidman testified that he reviews payroll and pays everyone (purportedly based on checking the mechanics' self-reports of hours worked). Either Freidman or Ljesnjanin provided the payroll service with the claimants' information to issue the payments. It is clear from his own testimony that Freidman personally made all significant decisions concerning the terms and conditions of employment including, for example, giving employees raises, requiring uniforms, and requiring certifications. The Retainer Agreements, signed by Freidman as "owner" and the Payroll Registers were the main employment records and were maintained by Freidman.

Asked to describe what made Huezo, beginning in 2013, an employee rather than an independent contractor, Freidman responded: "I get to tell him what to do . . . . What hours he works and what uniform he wears and what work he does and I get to tell him when he goes on vacation." We have found that Huezo and the other claimants were always employees whom Freidman got to tell what to do, but the significant point is Freidman's testimony that "I" was the one who directed employees. We find that Freidman, as well as Millennium, was the claimant's employer.

<u>Petitioners Were Obligated to Maintain Records</u>

An employer's obligation to keep records is found in Labor Law § 661 and the Minimum Wage Order for Miscellaneous Industries and Occupations, 12 NYCRR Part 142. 12 NYCRR 142-2.6, in effect during the relevant period, provides that an employer must maintain and preserve for a period of six years weekly payroll records showing, among other things, the employee's wage rate, daily and weekly hours worked, gross wages, deductions, any allowances claimed as part of the minimum wage, and net wages. Upon request of the Commissioner, the employer is required to make the records available at the place of employment.

Petitioners did not satisfy these obligations since the payroll register did not provide the daily and weekly hours worked or the claimants' wage rates. According to petitioners, this failure should be excused because (a) until April 9, 2011, they were obligated to keep records for only three years, and (b) relying on the DOL UID's June 9, 2009 Investigation Report, they believed claimants were independent contractors and, for that reason, records were not required.

We do not agree. Both Labor Law § 661 and 12 NYCRR 142-2.6 in effect during the relevant period required the petitioners, who we have determined were employers, to preserve payroll records for six years. Furthermore, there is no evidence that Millennium ever maintained the required records for any period of time, nor does the Payroll Register include all required information, including daily and weekly hours and wage rate. We reject petitioners' contention that record-keeping was not required.

The Underpayment Calculations in the Minimum Wage Order Are Affirmed

The recordkeeping required by Labor Law § 661 and 12 NYCRR 142-2.6 provides proof to the employer, the employee and the Commissioner that the employee has been properly paid. When an employer has failed in its statutory obligation to keep records Labor Law § 196-a provides, in relevant part:

> "Failure of an employer to keep adequate records, in addition to exposing such employer to penalties . . . . shall not operate as a bar to filing of a complaint by an employee. In such a case the employer in violation shall bear the burden of proving that the complaining employee was paid wages, benefits and wage supplements."

(See e.g. Angello v. National Finance Corp., 1 AD3d 850 [3d Dept. 2003]; *Heady v Garcia*, 46 AD3d 1088 [3d Dept 2007]).

As stated in *Matter of Mid-Hudson Pam Corp. v Hartnett*, 156 AD2d 818, 821 (3rd 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 calculations to the employer." (*See also Matter of Garcia v Heady*, 46 AD 3d 1088 [3d Dept 2008]; *Matter of Bae v IBA*, 104 AD3d 571 [1st Dept 2013]; *Matter of Ramirez v Commissioner*, 110 AD3d 901 [2d Dept 2013]; *Matter of Mohammed Aldeen*, PR 07-093 [May 20, 2009], *aff'd sub nom, Matter of Aldeen v Industrial Appeals Bd.*, 82 AD3d 1220 [2d Dept 2011]). In the absence of required records, the Commissioner may draw reasonable inferences and calculate unpaid wages based on the "best available evidence" drawn from employee statements or other proof, even though the results may be approximate. (*Matter of Ramirez v Commissioner*, 110 AD3d 901 [2d Dept 2013]). The employer challenging the order must come forward with evidence of the "precise" amount of work performed, or to negate the reasonableness of the inferences. *Anderson v Mt Clemens Pottery Co.*, 328 US 680, 688 (1949); *Matter of Bae v. IBA*, 104 AD3d 571 (1st Dept 2013); *Matter of Kong Ming Lee, Fin Yin Lee and Blue Butterfly Fashion, Inc.*, Board Docket No. PR 10-293 at 14 (Apr. 10, 2014).

Petitioners argue that the calculations of underpayment in the Minimum Wage Order are mistaken in that (a) it was wrong for the DOL to rely solely on the workers' statements in calculating wages and (b) the calculations supposedly failed to take into account vacation and other time off taken by the workers. The DOL, however, did not rely solely on the workers' statements, and consulted petitioners' payroll registers to determine what claimants were paid. Moreover, we have discredited petitioners' version of claimants' hours and the circumstances in which they worked and have credited the claimants' testimony, which is the best available evidence in this matter. It was valid and reasonable to base underpayment calculations on the

claimants' statements, which were corroborated by their testimony. As for time off taken by the claimants, SLSI Liu credibly testified that the DOL's calculations were adjusted to take into account this very minimal time off based on the claimants' statements during the compliance conference. We find that petitioners did not meet their burden to show that the underpayment calculations in the minimum wage order were invalid or unreasonable.

The Minimum Wage Order's Award of Liquidated Damages Is Affirmed

At the time the minimum wage order was issued, Labor Law § 663 (2) provided that the Commissioner could collect liquidated damages for violations of the Minimum Wage Act in an amount up to 100% of the unpaid wages, unless the employer "proves a good faith basis for believing that its underpayment of wages was in compliance with the law." The present minimum wage order awarded 25% of the wages found due, $9,660.09. We find that the petitioners acted willfully and in bad faith by providing false and misleading information to the UID and continued to rely on false information to defend their case during the investigation by the Division of Labor Standards. Accordingly, we affirm the imposition of liquidated damages in the minimum wage order.

The Minimum Wage Order's Award of Penalties Is Affirmed

The minimum wage order assessed a civil penalty of 100% of the wages found due, $38,640.31, based on the provision of Labor Law § 218 (1) for assessment of such penalties. SLSI Liu testified that he recommended the 100% civil penalty based on the size of the firm, the bad faith of the employer, including petitioners' continued argument that claimants were independent contractors, and the failure to provide payroll records with daily and weekly hours. We find that the computations and considerations used to determine the 100% civil penalty were reasonable and valid in all respects.

Interest

Labor Law § 219 (1) specifically requires an award of interest. It 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." We therefore affirm the interest imposed in the minimum wage order.

The Penalty Order is Affirmed

Inasmuch as petitioners failed to maintain required records and Labor Law § 218 (1) authorizes a penalty of up to $1,000.00 for a first such violation, we find that the $1,000.00 civil penalty in the penalty order was reasonable and valid in all respects.

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NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The minimum wage order is affirmed;

2. The penalty order is affirmed; and

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

Vilda Vera Mayuga, Chairperson
At Albany, New York

J. Christopher Meagher, Member
At Albany, New York

Absent
LaMarr J. Jackson, Member
At Rochester, New York

Michael A. Arcuri, Member
At Albany, New York

Dated and signed by the Members
of the Industrial Board of Appeals
on October 28, 2015.