STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of:	:	
ISRAEL I. BERKOWITZ AND NPI MANUFACTURING, LTD. (T/A NPI LIMITED),	:	
Petitioners,	:	DOCKET NO. PR 14-170
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 July 7, 2014,	:	RESOLUTION OF DECISION
- against -	:	
THE COMMISSIONER OF LABOR,	:	
Respondent.	:	

APPEARANCES

Hass & Gottlieb, Scarsdale (Lawrence M. Gottlieb of counsel), for petitioners.

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

WITNESSES

Petitioner Israel Berkowitz and Carlos Dowdye, for petitioners.

Claimant Jaime Tovar and Labor Standards Investigator Carla Valencia, for respondent.

WHEREAS:

On August 15, 2014, petitioners Israel I. Berkowitz and NPI Manufacturing, Ltd. (T/A NPI Limited) filed a petition with the Industrial Board of Appeals (Board) seeking review of two orders issued by respondent Commissioner of Labor (Commissioner or DOL) on July 7, 2014. The Commissioner filed an answer on September 23, 2014.

Upon notice to the parties, a hearing was held on February 5, 2015 in New York, New York before Vilda Vera Mayuga, Chairperson of the Board and designated hearing officer in this

proceeding. The parties were afforded a full opportunity to present documentary evidence, examine and cross-examine witnesses, make statements relevant to the issues, and file legal briefs.

The order to comply with Article 19 of the Labor Law (minimum wage order) directs payment of wages due and owing to claimant Jaime Tovar in the amount of $11,362.53 for the period from May 11, 2003 to January 15, 2009, interest continuing thereon at the rate of 16% calculated to the date of the order in the amount of $9,508.41, 25% liquidated damages in the amount of $2,840.63, and a 100% civil penalty in the amount of $11,362.53. The total amount due is $35,074.10.

The order under Article 19 of the Labor Law (penalty order) assesses petitioners a civil penalty in the amount of $1,000.00 for violation of Labor Law § 661 and 12 NYCRR 142-2.6 by failing to keep and/or furnish the Commissioner true and accurate payroll records for each employee for the period from on or about November 1, 2004 to November 2, 2010.

The petition alleges that the orders are invalid and unreasonable because during DOL's investigation, petitioners provided and DOL reviewed, employment records and DOL determined claimant had been paid at the correct rate. Consequently, petitioners argue that the Commissioner's imposition of interest, liquidated damages and civil penalties is invalid.

SUMMARY OF EVIDENCE

Petitioners' Evidence

Testimony of Petitioner Israel Berkowitz

Israel Berkowitz testified that he is the owner of NPI Manufacturing Limited (NPI), a company founded in 2006 that manufactures corrugated boxes in Brooklyn, New York. From 2000 to 2006, Berkowitz owned National Packaging (National), which also manufactured corrugated boxes, at the same Brooklyn location. Berkowitz employed claimant under both companies as a "general helper" and machine operator. Claimant quit over a workplace dispute.

A regular work week consisted of 40 hours with one shift from 7:00 a.m. to 3:30 p.m. at both National and NPI and an additional shift (only at National) from 3:30 to 11:00 p.m. If an employee worked more than eight hours in any given day, the employee was paid overtime at a pay rate of time and one half. Berkowitz testified that under National, employees regularly worked overtime, but that there was rarely any overtime at NPI because they changed operations.

Berkowitz paid employees using a payroll service company called Brands Services (Brands). Through Brands, petitioners remitted regular and overtime pay by check. Berkowitz did not recall if claimant was ever paid for overtime in cash, but testified that he paid claimant for every hour worked. Berkowitz introduced into evidence a collection of paystubs NPI and National issued to claimant during the claim period and produced by claimant to the DOL during its investigation of his claim. Berkowitz acknowledged that overtime pay was "sometimes" paid out in a check separate from regular payroll if the bookkeeper forgot to report the hours to Brands.

When labor standards investigator Carla Valencia met with petitioner pursuant to DOL's investigation of the claim, Berkowitz provided her with certain employment records but acknowledged that the bulk of relevant payroll records were in the factory's basement. He did not take the investigator to the basement to access the records because "it's a jungle," although he does not remember if he told her that is where he maintained all payroll records. Following their in-person meeting, petitioner mailed a letter dated November 30, 2010, reading in relevant part: "I am enclosing a print out of checks given to Mr. Tovar from 7/11/2003 to 4/24/2009." Attached to the letter is a "Register QuickReport" for NPI which listed checks disbursed to claimant by check number, date, and net payment from July 11, 2003 through April 24, 2009.

Petitioners' employment records were destroyed in 2012 by flooding related to Hurricane Sandy. These records included "all payroll records," which would have shown "[h]ours per week that the people worked, what days they got holiday, what days they got vacation, what checks I gave them, numbers of checks, copies of checks" and the punch cards employees used to clock in and out of work. At hearing, petitioners introduced an "Employee earning record" for claimant for payments made from 2006 through 2009 that petitioners' counsel received from Brands the day before hearing. When asked on cross-examination why petitioners had not previously sought records from Brands when they were put on notice of the investigation, Berkowitz responded: "Maybe I was negligent."

Testimony of Carlos Dowdye

Carlos Dowdye testified that he has been a supervisor for petitioners since 2000 first under National and currently under NPI. His duties include ensuring employees are working properly and overseeing production.

Dowdy testified that employees worked overtime at both NPI and National, "from time to time" and petitioners paid overtime at time and one half the regular pay rate. When NPI started operating in 2006, petitioners "cut" overtime hours due to loss of business.

Dowdye hired claimant in 2001. Like his peers, claimant worked eight hour days, from 7:00 a.m. to 3:30 p.m., for 40 hours per week and did not work overtime on a regular basis. As part of his duties, Dowdye was responsible for any employee complaints, including allegations of underpayment. Because NPI/National is a small business, Dowdye was able to "check the time card every single day to make sure that everybody is on time." If an employee had worked hours for which the employee was not paid, Dowdye would work with Berkowitz to "make sure that they got paid whatever they're owed." Claimant never complained of not being paid for overtime worked.

Respondent's Evidence

Testimony of Claimant Jaime Tovar

Jaime Tovar worked for NPI and National from 2000 until April 2009. He testified that NPI and National were located in the same place and were the same company that changed names. Tovar worked five days per week, from 7:00 a.m. to 7:30 p.m., Monday through Friday, and

occasionally 6:00 a.m. until around 2:00 to 2:30 p.m. on Saturdays, depending on whether there was a lunch break, which would extend the day by one half hour. Tovar recalled taking a one week vacation at some point during his work with petitioners. Tovar's rate of pay changed during the duration of his employment as he was promoted, increasing by increments of 25-to-30 cents depending upon the position to which he was promoted, but when he started his rate of pay was $7.00 per hour.

Tovar at times worked more than 40 hours per week for petitioners and was intermittently underpaid for those hours. When he was not paid for overtime hours worked, Tovar complained to his supervisor. Upon complaining, petitioners paid him $10.00 per hour in cash for the unpaid overtime.

After filing a claim with DOL, Tovar met with investigator Valencia. At this meeting, he provided her with copies of his paystubs for some but not all of the claim period and a journal where he kept a record of the hours of overtime he worked during the period at issue. He testified that he kept these records "so I didn't forget the overtime." Tovar did not seek to have his overtime journal verified by his supervisor.

Testimony of Labor Standards Investigator Carla Valencia

Carla Valencia is an investigator for DOL who was assigned to investigate claimant's case. Pursuant to her investigation, she requested payroll records from petitioners for the time period November 1, 2004 to November 2, 2010. On November 18, 2010, petitioners showed Valencia records for 2009 and 2010 which she reviewed onsite. Petitioners did not indicate to Valencia that complete payroll records were located in the basement or that she could have access to them during her visit. Valencia confirmed that she received petitioners' letter dated November 30, 2010, that included the "Register QuickReport" for NPI Manufacturing LTD, but no copies of checks as indicated in the letter.

In October 2013, Valencia met with claimant who presented her with pay stubs relevant to the claim period. Claimant also provided her with a log he kept of overtime hours he worked for petitioners. From claimant's paystubs, Valencia derived a pay-rate schedule for the claim period, and she calculated the underpayment using this schedule, the pay stubs, and claimant's overtime log. For pay periods for which claimant presented no pay stub, Valencia solely relied upon claimant's overtime log when calculating the underpayment due.

Notwithstanding claimant's testimony that he was paid $10.00 per hour for overtime hours worked, Valencia relied upon claimant's "actual proof" of paystubs, where available, and his written account of his overtime hours. Because claimant represented to Valencia that he received his regular rate of pay in cash for overtime hours, when claimant's overtime log showed he worked overtime, but his paystub reflected no overtime pay or there was no paystub for that week, Valencia credited petitioners for the cash payment at claimant's regular pay rate. On January 17, 2014, Valencia notified petitioners by letter of the results of the investigation and indicated that claimant "specifically stated he was paid the accurate overtime wages during July 2003 to July 2004."

Valencia testified that she does not take part in the determination of the civil penalty as that is done by a supervisor, but acknowledged that at least during the initial part of the investigation Berkowitz was "very cooperative."

SCOPE OF REVIEW AND BURDEN OF PROOF

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

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

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

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

NPI is not a responsible party for wages prior to 2006

It is uncontested that NPI started doing business in 2006 after petitioner Berkowitz closed National. Since the claim period begins on May 11, 2003, we modify the wage order to remove NPI as a responsible party for wages due and owing for the period of May 11, 2003 through December 31, 2005.

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).

Petitioners failed to maintain records required by the Labor Law. When investigator Valencia met with petitioner on November 18, 2010, petitioner offered records for 2009 and 2010 notwithstanding that he was on notice that the audit was for a period of six years. The supplementary records petitioner provided DOL by mail—consisting in relevant part of the Register QuickReport—while they covered the claim period, failed to provide claimant's daily and weekly hours worked, wage rate, and gross wages paid and were therefore of little probative value. At hearing, petitioners introduced some but not all of claimant's paystubs for the claim period. While the paystubs petitioners issued contain some of the information required by statute, they are missing information that is crucial to the case before us: "the time of arrival and departure of each employee working a split or spread of hours exceeding 10," (12 NYCRR 142-2.6). The record shows that petitioners' required payroll records were incomplete with regard to both their content and the six-year retention period (*see* Labor Law § 661; 12 NYCRR 142-2.6). We therefore find that petitioners failed to maintain true and accurate payroll records required by the Labor Law.

We reject petitioners' argument that they should be excused from providing legally required payroll records because flooding related to Hurricane Sandy destroyed the records. Labor Law § 661 requires that an employer must keep payroll records open to inspection by the Commissioner or her duly authorized agent at any reasonable time. When investigator Valencia visited petitioners at their factory in November 2010, other than for a subset of records from 2009 and 2010, Berkowitz did not grant Valencia access to employment records based solely on his subjective assessment that the factory's basement, where the records were housed, was too dangerous to allow Valencia access. That same month, petitioners provided DOL with additional documents, incomplete and lacking in probative value as they were. Petitioners cannot credibly claim that payroll records were not available in 2010 when DOL sought access to them. In fact, by his own admission, Berkowitz was "negligent" in failing to request payroll records from Brands in 2010.

Petitioners' argument is also unavailing because, while Hurricane Sandy took place in 2012, petitioners' counsel obtained relevant payroll records from Brands the day before the February 2015 hearing. This fact confirms that records were readily available to petitioners as recently as the day before the hearing, had petitioner sought them. Petitioners' argument that it could not provide records to DOL is contradicted by the record evidence and lacks credibility.

We find petitioners failed to maintain required payroll records the period from November 1, 2004 to January 15, 2009 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 Modified

The minimum wage order directs payment of wages due and owing to claimant Jaime Tovar in the amount of $11,362.53 for the period from May 11, 2003 to January 15, 2009. Because petitioners failed to maintain true and accurate payroll records and produce evidence sufficient to negate inferences reasonably drawn from the Commissioner's evidence, we affirm the Commissioner's minimum wage order but direct the Commissioner to recalculate the underpayment to correct errors in the audit.

Wages due for the time period from November 1, 2004 to January 15, 2009

As discussed above, petitioners failed to maintain legally required payroll records for the period from November 1, 2004 to January 15, 2009. In the absence of such records, an employer bears the burden of proving that the disputed wages were paid (Labor Law § 196-a [a]). Where the employer has failed to keep such records, the Commissioner may draw reasonable inferences and calculate unpaid wages based on the "best available evidence" drawn from employee statements or other evidence, even though the results may be approximate (*Matter of Mid-Hudson Pam Corp. v Hartnett*, 156 AD2d 818, 820–21 [3d Dept 1989]; *Ramirez v Commissioner of Labor*, 110 AD3d 901 [2d Dept 2010]).

In a proceeding challenging such determination, the employer must come forward with evidence of the "precise" amount of work performed or with evidence to negate the reasonableness of the inferences to be drawn from the employee's evidence (*Anderson v Mt. Clemens Pottery*, 328 US 680, 687–88 [1949]; *Mid-Hudson Pam Corp.*, 156 AD2d at 821). Given the interrelatedness of wages and hours, the same burden shifting applies to wages and requires the employer to prove the "precise wages" paid for that work or to negate the inferences drawn from the employee's credible evidence (*Doo Nam Yang v ACBL Corp.*, 427 F Supp 2d 327, 332 [SDNY 2005]; *Matter of Kong Ming Lee*, PR 10-293 at 16 [April 20, 2014]).

Because petitioners failed to offer accurate and reliable payroll records, the Commissioner was entitled to draw reasonable inferences and calculate the underpayment based on the best available evidence of employee statements and other circumstantial evidence. Claimant provided detailed and specific testimony about his regular hours of work at National and NPI being Monday through Friday from 7:00 a.m. until 7:30 p.m. and sometimes Saturdays from 6:00 a.m. until around 2:00 or 2:30 p.m. When he first started working for petitioners, he was paid between $7.00 and $7.50 per hour. Petitioners increased claimant's base rate by 25-to-30 cents per hour as he was promoted over course of his employment with petitioners. The Commissioner also offered into evidence claimant's pay stubs for some, but not all, weeks from the claim period, which reflect that he was at times paid overtime at the lawful rate of time and one half. Consistent with the overtime log claimant kept to ensure he "didn't forget the overtime," he testified that he worked overtime hours for which petitioners sometimes paid him in cash below the minimum overtime wage required by statute. In accordance with investigator Valencia's October 17, 2013 notes from a telephone call with claimant, he testified that he was paid overtime at $10.00 per hour. Contrary to petitioners' assertion, the Labor Law nowhere requires claimant to obtain independent verification of payroll records that he maintained of his own accord. "Were we to hold otherwise, we would in effect award petitioners a premium for their failure to keep proper records and comply with the statute," (*Mid Hudson Pam Corp.*, 156 AD2d at 821).

Through specific and detailed testimony, investigator Valencia explained that she based the underpayment calculation on claimant's statements made to her, in addition to claimant's paystubs and overtime log. For weeks when no paystub was available, Valencia based her calculations on claimant's overtime log and his statement that he was paid his base rate in cash, for hours worked over 40 hours per week. Although claimant testified that he was paid $10.00 per hour for overtime, Valencia relied on claimant's documentary evidence to create a schedule of claimant's base rate over the claim period, which she used to calculate and credit petitioners for

the straight time petitioners ostensibly paid claimant, thus only demanding payment for the difference between overtime paid at straight time and the statutory rate of time and one half. To the extent there is a discrepancy between claimant's testimony that he was paid overtime at $10.00 per hour and Valencia's calculations, which were sensitive to claimant's base rate as it changed over time, petitioners "cannot be heard to complain that the damages lack the exactness and precision of measurement that would be possible had [they] kept records in accordance with the requirements of [the Labor Law]," (*Mt. Clemens Pottery Co.*, 328 US at 688; *see also Tyson Foods, Inc. v Bouaphakeo*, 136 S Ct 1036, 1047 [2016] [citing *Mt. Clemens Pottery Co.*]). When an employer, such as here, fails to produce the necessary records, the Commissioner may demand payment to the employee, even though the resulting order is based on less than mathematical certainty (*see Mt. Clemens Pottery Co.*, 328 US at 688). We, therefore, find that the Commissioner was entitled to rely on the best available evidence in calculating the underpayment due and owing to claimant (*see Matter of Mid-Hudson Pam Corp. v Hartnett*, 156 AD2d 818, 820–21 [3d Dept 1989]; *Ramirez v Commissioner of Labor*, 110 AD3d 901 [2d Dept 2010]).

In the absence of accurate payroll records for the period from November 1, 2004 to January 15, 2009, petitioners failed to meet their burden by offering credible evidence of the "precise" amount of work claimant performed and wages petitioners paid. It is undisputed that claimant worked overtime hours. Petitioners, however, dispute that claimant was underpaid for the hours he worked. First, petitioners offered incomplete payroll records that fail to account for the full claim period. Claimant's paystubs in evidence, for instance, do not account for any payments made in 2005 or 2009 and only account for 4 paychecks from 2006, 11 from 2007, and 3 from 2008. Even if a complete set of paystubs was in evidence, paystubs show only whether claimant was paid for overtime hours worked, but do not account for when he was paid separately in cash. Berkowitz testified that the paystub for November 28, 2003 reflects an overtime payment for 11 hours, but testimony that petitioners paid claimant overtime in one payroll period does little to rebut Tovar's claim that he was underpaid for overtime hours worked over a period of 6 years. The Register QuickReport is similarly unhelpful for petitioners as it only shows net wages. Like paystubs, net wages alone tell us nothing about what hours were worked or petitioners' payment methodology, if any.

Second, petitioners offered testimonial evidence that fails to adequately rebut the Commissioner's method of calculation. Berkowitz and Dowdye testified that petitioners used time clocks and paid overtime at time and one half. Dowdye testified that employees worked fewer overtime hours at NPI because of lost business and damage from Hurricane Sandy. He also testified that claimant never complained to him of not being paid properly. We have repeatedly held that general and unsubstantiated testimony is insufficient to meet an employer's burden of proof (*see, e.g., Matter of Young Hee Oh*, PR 11-017 at 12 [May 22, 2014] [employer cannot shift its burden to the Commissioner with arguments, conjecture, or incomplete, general, and conclusory testimony]). Furthermore, Berkowtiz acknowledged that there were at times errors in reporting overtime hours to Brands, and he could not rule out the possibility that claimant was sometimes paid in cash. This evidentiary gap leaves open the distinct possibility that petitioners at times paid claimant lawfully by check but, at other times, paid him in cash below the lawful rate, which would not be reflected in the paystubs in evidence. Accordingly, we find that petitioners have not met their burden to produce evidence of the "precise" work performed and wages paid to claimant (*see Anderson v Mt. Clemens Pottery*, 328 US 680, 687–88 [1949]; *Mid-Hudson Pam Corp.*, 156 AD2d

at 821; *Doo Nam Yang*, 427 F Supp 2d at 332; *Matter of Kong Ming Lee*, PR 10-293 at 16; *see also* Labor Law § 196-a [a]).

Wages due for the time period May 11, 2003 to October 31, 2004

As discussed above, petitioners were required to maintain payroll records for no less than six years. Respondent first requested records from petitioners on November 2, 2010 for the time period from November 1, 2004 through November 2, 2010, although the order requires payment of unpaid overtime wages for a claim period of May 11, 2003 to January 15, 2009. Although it is reasonable for respondent to find wages due for the period from May 11, 2003 to October 31, 2004 since those dates are within six years of the filing of Tovar's claim (*see* Labor Law § 663 [3] [six year statute of limitations tolled from date claim is filed]), petitioners were under no legal duty on November 2, 2010 to maintain payroll records for the time period from May 11, 2003 to October 31, 2004, which was more than six years from the date of respondent's request for records. Because petitioners were not required to have records available for this time period, Labor Law § 196-a's presumption against petitioners does not apply. However, even absent this presumption, petitioners failed to meet their burden to show Tovar was properly compensated.

There is no dispute that employees under National regularly worked overtime and that petitioners at times erred in reporting compensable time to Brands for payment. As discussed, above, Berkowitz's and Dowdye's testimony that petitioners always paid employees for overtime hours worked is too general and conclusory to rebut claimant's detailed and specific testimony that he was not paid overtime, which was corroborated by his own credible and contemporaneous records of the unpaid overtime hours he worked. We find respondent's determination that petitioners failed to pay overtime to Tovar during the period from May 11, 2003 to January 15, 2009 is reasonable.

Mathematical errors in audit must be corrected

Petitioners, however, did meet their burden of proof that the order must be modified to correct mathematical errors found in five weeks of the 312 week audit period as discussed in their post-hearing brief. The audit entry for February 6, 2004 shows an underpayment of $115.90 for 24 hours of compensable overtime. The corresponding pay stub shows that claimant was paid at $14.487, or one and one half his regular rate, for 23.5 hours of overtime, totaling $340.45. Claimant's overtime log states that he worked 24 hours overtime, which would total $357.00 in overtime pay. The correct underpayment is $16.55. The audit entry for February 20, 2004 shows 24 uncompensated overtime hours, yet claimant's overtime log shows 14 hours overtime, which is consistent with the corresponding paystub. The audit entry for June 25, 2004 shows 21 uncompensated overtime hours, yet claimant's overtime log shows 16 hours overtime, which is consistent with the corresponding paystub. The audit entry for October 29, 2004 shows 12 uncompensated hours, yet claimant's overtime log shows 10 hours overtime. The audit entry for August 13, 2004 shows 20 uncompensated hours, which is consistent with claimant's records and the corresponding paystub, which shows payment at the lawful overtime rate, yet the audit shows an underpayment of $96.58. The order must be modified to correct these errors.

Interest

Labor Law § 219 (1) provides that when the Commissioner determines that wages are due, the order directing payment shall include "interest at the rate of interest then in effect as prescribed by the superintendent of financial services pursuant to section fourteen-a of the banking law per annum from the date of the underpayment to the date of payment." Banking Law § 14-A (1) sets the "maximum rate of interest" at "sixteen per centum per annum." Petitioners failed to submit evidence at hearing challenging the interest assessed in the wage and minimum wage order and the issue is thereby waived pursuant to Labor Law § 101 (2), but we direct respondent to recalculate this amount based on what the new principal due will be once she recalculates consistent with this decision.

Liquidated Damages

Labor Law § 663 (2) provides that when wages are found to be due, the Commissioner shall assess against the employer the full amount of the underpayment "and an additional amount as liquidated damages, unless the employer proves a good faith basis for believing that its underpayment of wages was in compliance with the law." Such damages shall not exceed 100% of the total amount of wages found to be due. Petitioners failed to submit evidence at hearing challenging the liquidated damages assessed in the minimum wage order and the issue is thereby waived pursuant to Labor Law § 101 (2), but we direct respondent to recalculate this amount based on what the new principal due will be once she recalculates consistent with this decision.

Civil Penalty

Labor Law § 218 (1) provides that when determining the amount of civil penalty to assess against an employer who has violated a provision of Article 19 of the Labor Law, the Commissioner shall give:

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

Valencia testified that she did not take part in the determination of the civil penalty, but acknowledged that at least during the initial part of the investigation Berkowitz was "very cooperative." Under the circumstances of this case, we find the Commissioner failed to duly consider the required statutory factors. We therefore revoke the civil penalty.

The Penalty Order is Affirmed

The 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 November 1, 2004 through November 2, 2010. As discussed above, we find that

petitioners did not provide respondent with the required payroll records. We therefore affirm the penalty order.

NOW, THEREFORE IT IS HEREBY RESOLVED THAT:

1. Respondent is directed to issue a modified minimum wage order consistent with this decision and file proof of service with the Board within 30 days of the date of this decision;

2. The penalty order is affirmed; and

3. The petition for review is otherwise hereby dismissed.

Vilda Vera Mayuga, Chairperson

J. Christopher Meagher, Member

Michael A. Arcuri, Member

Molly Doherty, Member

Gloribelle J. Perez, Member

Dated and signed by the Members
of the Industrial Board of Appeals
in New York, New York, on
September 14, 2016.

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Dated and signed by a Member
of the Industrial Board of Appeals
in Syracuse, New York, on
September 14, 2016.