STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of:	:	
CLIFTON J. MORELLO (T/A IRON HORSE BEVERAGE LLC),	:	
Petitioner,	:	DOCKET NO. PR 14-283
To Review Under Section 101 of the Labor Law: An Order to Comply with Article 19 of the Labor Law, An Order to Comply with Article 6 of the Labor Law, and an Order Under Articles 6 and 19 of the Labor Law, all dated October 17, 2014,	:	RESOLUTION OF DECISION
- against -	:	
THE COMMISSIONER OF LABOR,	:	
Respondent.	:	

APPEARANCES

Clifton J. Morello, petitioner pro se.

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

WITNESSES

Clifton J. Morello, for petitioner.

William Walsh and Labor Standards Investigator Frederick Seifried, for respondent.

WHEREAS:

On November 12, 2014, petitioner Clifton J. Morello filed a petition for review of three orders issued by respondent Commissioner of Labor (respondent, Commissioner, or DOL) on October 17, 2014 against Clifton J. Morello (T/A Iron Horse Beverage LLC). Petitioner alleges that the orders are unreasonable because claimant was an independent contractor, did not work the hours alleged in the orders, and petitioner never received a final determination from DOL prior to issuance of the orders. Petitioner also contests the civil penalties, liquidated damages, and interest assessed in the orders. Respondent filed her answer on January 16, 2015.

The order to comply with Article 6 of the Labor Law (wage order) directs payment to the Commissioner in the amount of $4,298.02 for wages due and owing to claimant William Walsh for the time period from July 1 to October 15, 2011, with interest continuing thereon at the rate of 16% calculated to the date of the order in the amount of $1,982.04 and 25% liquidated damages in the amount of $1,074.51, and a 100% civil penalty in the amount of $4,298.02, for a total amount due of $11,652.99.

The order to comply with Article 19 of the Labor Law (minimum wage order) directs payment to the Commissioner in the amount of $5,100.88 for wages due and owing to claimant for the time period from July 1 to October 15, 2011, with interest continuing thereon at the rate of 16% calculated to the date of the order in the amount of $2,561.85 and 25% liquidated damages in the amount of $1,275.22, and a 100% civil penalty in the amount of $5,100.88, for a total amount due of $14,038.83.

The order under Articles 6 and 19 of the Labor Law (penalty order) imposes a $500.00 civil penalty for violating Labor Law § 195 (1) by failing to notify employees in writing of their pay rates and other required information; a $250.00 civil penalty for violating Labor Law § 191 (1) (c) by failing to keep and/or furnish an agreement on the terms of employment signed by both the employer and a commissioned salesperson; a $500.00 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; and a $500.00 civil penalty for violating Labor Law § 661 and 12 NYCRR 142-2.7 by failing to give each employee a complete wage statement with every payment of wages; for a total owed under the penalty order of $1,750.00.

Upon notice to the parties a hearing was held on April 15, 2015 in Hicksville, New York, before Administrative Law Judge Jean Grumet, Esq. the designated Hearing Officer in this proceeding. Each party was afforded a full opportunity to present documentary evidence, to examine and cross-examine witnesses, and to make statements relevant to the issues.

SUMMARY OF EVIDENCE

Testimony of Petitioner Clifton J. Morello

Petitioner Clifton J. Morello is the owner of Iron Horse Beverage LLC, an importer of beer and non-alcoholic beverages located in Melville, New York, whose customers include beer stores, supermarkets and restaurants. Morello contracts with a warehouse to store beverage cases he imports from various countries. He notifies the warehouse when an order needs to be picked up by a driver for delivery to a customer, and a warehouse worker loads the order into the driver's truck.

Morello, salesman Bill Lang, and Morello's son Matthew Morello, solicited New York customers and generated invoices, and Matthew delivered cases in Iron Horse's truck. Walsh responded to a craigslist ad placed by Morello in July 2011 seeking a part time beverage delivery helper two to three days per week, to be paid hourly with a bonus on cases of beverages delivered. Morello interviewed Walsh on July 5, 2011 and told him that he needed a part time delivery person to pick up orders at the warehouse for delivery to customers on an as-needed basis "maybe 10 to 15 hours a week." Walsh owned a box truck and could do the deliveries, and Morello hired him as a part time delivery person. Walsh wanted to be an independent contractor in order to continue to

conduct his own business selling non-alcoholic beverages and beef jerky on the two or three days a week he was not making deliveries for petitioner. Morello and Walsh agreed that Walsh would be paid "100 percent [on] commission" ranging from $1.50 to $2.50 per case delivered, with Walsh paying for his own gas. Morello did not document this agreement in writing because he believed the claimant was an independent contractor.

Morello e-mailed Walsh to notify him when orders were ready at the warehouse to be loaded on the truck. Walsh's duties were to drive to the warehouse, pick up the cases of beer and non-alcoholic beverages, make deliveries at three or four stops, get the invoices signed, and then return the invoices to Morello. Walsh was paid in-kind with product on the non-alcoholic beverages and also with cash. Sometimes when Walsh collected cash from customers, he would deduct his service fee. To establish that Walsh did receive compensation, Morello pointed out that the DOL's Narrative Report indicated that Walsh told DOL that he was paid $300.00 per week.

Walsh's only role in generating business was that he himself purchased non-alcoholic beverages from Morello for resale to his own customers. Morello was surprised when he saw a "Walsh Beverage/Iron Horse Bev. LLC" invoice for ten cases of beer sold to a supermarket because he had "no clue" that claimant was selling beer under petitioner's license.

Morello received a letter from Labor Standards Investigator Frederick M. Seifried (LSI Seifried) dated May 14, 2014, stating that if he did not agree with the amounts that DOL found due and owing, Morello had until June 3, 2014 to provide a statement and documentation to substantiate his position. Morello sent a letter and packet of documents to LSI Seifried on May 19, 2014, which included copies of e-mails to the warehouse authorizing release of orders to Walsh for delivery, and an excel spreadsheet summarizing Walsh's commissions. Morello's letter stated:

> "For the sake of simplicity, I used the maximum rate of [$] 2.50 to establish a total commission which totaled $3,460.00 . . . . Also be advised that work for Mr. Walsh was part time as releases would indicate and [he] only actually worked 23 days x 8 hours or a grand total of 184 hours @7.25=$1334 in hourly wages . . . . As you are aware Mr. Walsh received $3,922.81 from Iron Horse Beverage which covered his commissions and hours worked. By my own account submitted hours worked compensation was $1334 and commissions (at highest max rate) $3460 = $4794.00. This higher amount reflects all cases at highest level but most were at lower level. This is why Mr. Walsh was paid $3,922.81, which we believe covers all earned activity during the short 23 days he worked."

Morello did not receive a response from LSI Seifried prior to the issuance of the orders.

Testimony of Claimant William Walsh

Claimant William Walsh testified that he had previously worked with Morello and Iron Horse's Vice President, Bill Lang, in 1986-87 as a route salesman for a Coors/Canada Dry distributorship, and later worked as a commissioned salesman for a company called EZCard. Prior to working for Morello, Walsh was a route salesman for Baseline Beverages, a Polar Seltzer

distributorship, from whom he purchased his box truck when that company shut down. Shortly thereafter, Walsh went to work for Morello.

Walsh saw an Iron Horse craigslist ad but paid little attention to it until Lang suggested that he work for Morello and Lang as a route salesman, a job Walsh had "always" done. Lang told Walsh that they could give him a territory to build. Morello and Lang interviewed and hired Walsh on July 11, 2011, for the route salesman position. Morello described Iron Horse as a new company they were going to build together. Walsh was assigned Suffolk County as his territory and was instructed to build the customer base there. Morello agreed to pay Walsh a commission, a salary and for gas. The terms were not placed in writing, and in practice, after arguing, petitioner would sometimes give claimant gas money.

Lang gave Walsh leads to potential new customers, introduced him to existing customers, was his supervisor, and checked his work. Morello contacted the corporate headquarters of supermarket chains and chain stores to authorize Walsh to sell petitioner's products to store managers or grocery department managers. Morello provided Walsh with a "sales book" with pictures of all Iron Horse products and promotional signs to get customers to prominently display Iron Horse products. To solicit sales, Walsh showed store managers the "sales book," described Iron Horse products, and told them "the price, the percentage they are going to make on it." With existing customers, Walsh refilled product racks, met with store managers and "always ask[ed] for an extra five or ten cases and push[ed] the store manager to sell a [secondary] display . . . so the customer walks in and sees it." A secondary display is a display rack at the front of the store, containing five to ten additional cases. Before putting up a display, Walsh "had to pre-sell it" to the store manager. The following day, Walsh returned to the store with the product and built the display.

Walsh worked each day until the last store closed and went home and spent an hour or two e-mailing his invoices to Morello, and notifying him when he sold extra cases and was going to build displays. Morello e-mailed Walsh back when orders were ready at the warehouse to be delivered to customers. Walsh was on the phone on a daily basis with both Lang and Morello. When store managers paid Walsh in cash, Morello would sometimes meet him on the route to collect the money.

Morello repeatedly told Walsh that he would be paid when Morello had the money to pay him. Walsh did not remember how much he earned per week, but recalled that he filed claims with DOL, which he authenticated. The claims indicate that Walsh was paid $300.00 per week in cash for a 72-hour/six-day work week. Walsh was never told to keep time records, but knew how many hours he worked when filing the claims because he started at the same time every morning, and had copies of all of the e-mails that he sent to Morello each night at 8:00 or 9:00 p.m. Asked by Morello why he kept working without being paid, Walsh testified: "You kept telling me I was going to get paid . . . . I believed that you were going to make it a big company."

DOL's Investigation

LSI Seifried investigated Walsh's claim and testified about documents from DOL's investigative file. On December 1, 2011, DOL notified Iron Horse that Walsh had filed a claim for unpaid wages, and requested copies of payroll records, policies, and contracts to substantiate its

position. Morello responded by letter on December 8, 2011, stating Walsh was never an employee, and "there was never a Craigslist ad . . . for this contracted delivery work by William Walsh."

Iron Horse's then attorney, Howard E. Greenberg, wrote to DOL on December 22, 2012 that Walsh was an independent contractor introduced to Morello through "a current employee," Bill Lang, after approaching Lang to do some deliveries. According to Greenberg, Walsh had his own independent business. Greenberg attached invoices and checks payable to "Bill Walsh, Inc." and "Walsh Beverage." Greenberg's letter also stated that Walsh was paid $1.50 per case "for Home Distributor deliveries" and $2.50 per case for supermarket deliveries.

On February 29, 2012, DOL notified Walsh by letter that based on the evidence submitted by Morello, DOL agreed that Walsh was an independent contractor. The letter requested additional documentation to dispute the finding. Walsh responded on March 21, 2012 stating that he was hired by Morello to solicit alcohol sales, Morello gave him the name "Walsh Beverage," Morello told Walsh to invoice the customers himself, and that Walsh was accompanied by his supervisor, Bill Lang, when he did so. Attached to the letter were invoices showing that Walsh sold several products for Iron Horse. On December 31, 2012, Walsh faxed LSI Seifried a copy of an Unemployment Insurance Administrative Law Judge Carol A. Procopio's decision[1] which upheld Walsh's entitlement to unemployment insurance based on his testimony, corroborated at the hearing by Lang's testimony, that Walsh was employed by petitioner as a route salesman and was not an independent contractor.

LSI Seifried testified that on July 2, 2013 he spoke to Walsh, who stated that he worked Monday to Saturday from 6:00 a.m. or 7:00 a.m. to 6:00 p.m. or 7:00 p.m., did paperwork at home for an additional 1 or 2 hours, and had a 30 minute meal break. Walsh sometimes also worked Sundays to set up displays in supermarkets. Walsh said he received approximately $300.00 per week, but that was an average because every week was different.

LSI Seifried's August 8, 2013 Narrative Report indicates that Morello did not have a record of daily and weekly hours worked, that he had written statements of amounts paid totaling $3,922.81 and paid Walsh in cash and products, but did not provide cancelled checks. Walsh told DOL that he was paid $300.00 per week but was not paid owed commissions. Walsh amended his claim with a claim for unpaid commissions in the amount of $4,298.02, which was based on the invoices that Walsh provided to DOL.

On May 13, 2014, LSI Seifried wrote to Morello explaining DOL's findings. LSI Seifried noted the UI administrative law judge's finding that petitioner admitted he made up the company names, "Bill Walsh Inc" and "Walsh Beverage Inc.," rendering the contention that such names on invoices establish that claimant was in business for himself not credible. LSI Seifried's letter also noted that Walsh did not receive a pay notice when hired as required by Labor Law § 195 (1), and there was no written commission agreement as required by Labor Law § 191 (1) (c).

LSI Seifried testified that the investigation found that Walsh was paid $300.00 per week; worked a 12 hour/6 day per week 69 hour workweek and was owed a $5,100.88 minimum wage underpayment based on the $7.25 per hour state minimum wage and $10.875 overtime rate for

[1] The record reflects that the UI hearing took place on December 4, 2012 but does not reveal the date of the decision, except that it must have been prior to December 31, 2012 when Walsh faxed the decision to the DOL.

hours over forty in effect during the relevant period. Walsh was also owed commissions in the amount of $4,298.02, which LSI Seifried computed using the invoices Walsh provided to DOL.

LSI Seifried's May 14, 2014 letter requested payment or "a full statement giving your reasons" and any substantiating documents to prove that DOL's determination was incorrect, and further stated that failure to remit payment would result in an order with interest, civil penalties and liquidated damages "without further notice." LSI Seifried testified that while Morello responded by sending documents that were reviewed by LSI Seifried and his supervisor, Senior LSI John Sarsfield, the documents were simply "a rehash of things . . . already discussed." Accordingly, DOL issued the orders under review.

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 Rules of Procedure and Practice [Board Rules] 66.1 [c], 12 NYCRR 66.1 [c]). Petitioner has the burden to prove by a preponderance of the evidence that the orders are not valid or reasonable (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 Rule 65.39 (12 NYCRR 65.39).

Due Process

At the outset, we reject petitioner's contention that he was denied due process because DOL did not make a final determination based on additional information he presented prior to issuance of the orders. LSI Seifried testified that he and his supervisor reviewed petitioner's submission but concluded that it merely restated facts that were already discussed. Furthermore, the Board has previously held that due process is satisfied by the opportunity to contest the orders at the hearing before the Board, where a petitioner has the right to present evidence and cross-examine witnesses and where the Board views the order *de novo* and renders its decision based on the evidence presented at hearing (*Matter of Angelo A. Gambino and Francesco A. Gambino [T/A Gambino Meat Market, Inc.]*, PR 10-150 [July 25, 2013] at p. 6; *Matter of Michael E. Fischer [DBA MEFCO Builders]*, PR 06-099 [April 23, 2008] at p. 6).

Claimant Was an Outside Salesman Exempt from Article 19 of the Labor Law and The Minimum Wage Order is Revoked

Article 19 of the Labor Law entitled "Minimum Wage Act" provides that every employer shall pay the minimum wage to each of its employees for each hour worked (Labor Law § 652)

and includes several exemptions from coverage (Labor Law § 651). Although not specifically raised by petitioner, Labor Law § 651 provides that "'Employee' . . . shall not include any individual who is employed or permitted to work . . . as an outside salesman (Labor Law § 651 [5] [d]). The Minimum Wage Order for Miscellaneous Industries and Occupations further provides that:

> "Employee . . . does not include any individual permitted to work in, or as . . . an outside salesman [which] means an individual who is customarily and predominantly engaged away from the premises of the employer and not at any fixed site and location for the purpose of:
>
> > "(i) making sales;
> > "(ii) selling and delivering articles or goods; or
> > "(iii) obtaining orders or contracts for service or for the use of facilities."

(12 NYCRR 142-2.14 [c] [5] [i] - [iii]).

We credit Walsh's testimony that he was employed by Morello as a route salesman and delivery driver, solicited beer and juice sales, delivered petitioner's products to customers, and was customarily and regularly engaged away from petitioner's place of business. Walsh was hired specifically to take over both Morello's and Lang's Suffolk County sales territory and build up petitioner's customer base and sales there by finding and cultivating new customers and selling more product to existing customers. Morello contacted the corporate headquarters of supermarket chains and other stores to authorize Walsh to make sales to store managers and grocery department managers, Lang introduced Walsh to these managers, and Lang and Morello provided Walsh with leads to potential new customers in his sales territory. Walsh called on customers, showed them the "sales book" of petitioner's products, told customers the profit margin they would receive on new orders, and always tried to persuade existing customers to buy an additional five or ten cases and put up secondary displays near the front of the store. After pre-selling a secondary display or additional product, Walsh would return the following day to deliver the product and assemble the display. Walsh also provided sales managers with samples of Iron Horse products, or products petitioner was considering selling. Each night when Walsh returned home, he sent Morello invoices, and Morello notified Walsh when the orders were ready to be picked up from the warehouse for Walsh to deliver to customers.

We find that Walsh must be classified as an outside salesman and was not an employee for purposes of minimum wage and overtime coverage under Article 19 of the Labor Law. The minimum wage order is unreasonable and we revoke it.

Claimant Was Petitioner's Employee Under Article 6 of the Labor Law and Was Not An Independent Contractor

While we find that Walsh was an outside salesperson exempt from minimum wage under Article 19, outside salespersons such as Walsh can be employees for purposes of Article 6 of the Labor Law.

Labor Law § 190 (6) provides that a "commission salesperson" means any employee whose principal activity is the selling of any good and whose earnings are based in whole or in part on commissions. Labor Law § 190 (7) provides that the term "clerical and other worker" includes all employees "except any person employed in a bona fide executive, administrative or professional capacity whose earnings are in excess of nine hundred dollars a week." In *Pachter v Bernard Hodes Group, Inc.,* 10 NY3d 609 (2008), the court found that except where expressly excluded, executives are employees for purposes of Labor Law Article 6. Outside salespersons, likewise, are not expressly excluded and are employees under Article 6.

An "employer" is defined in Article 6 of the Labor Law as "any person, corporation, limited liability company, or association employing any individual in any occupation, industry, trade, business or service" (Labor Law § 190 [3]). "Employed" is defined as "permitted or suffered to work" (*Id.* § 2 [7]). The FLSA also defines "employ" to include "suffer or permit to work" (29 USC § 203 [g]). Because the statutory language is identical, the Labor Law and the FLSA follow the same test to determine the existence of an employment relationship (*Ansoumana v Gristede's Operating Corp.*, 255 F Supp2d 184, 189 [SDNY 2003]).

In determining whether an individual is an employee covered by Article 6 of the Labor Law or an independent contractor without wage and hour protections, "the ultimate concern is whether as a matter of economic reality, the worker depends on someone else's business or is in business himself" (*Brock v Superior Care, Inc.,* 840 F2d 1054, 1058-59 [2nd Cir 1988]; *Matter of Maria Lasso and Exceed Contracting Corp.,* PR 10-182 at 5 [April 29, 2013] [citing *Brock* factors as test to determine independent contractor status under the Labor Law], *aff'd. sub nom, Matter of Exceed Contracting Corp. v IBA*, 126 AD3d 575 [1st Dept 2015]). Several factors are considered in determining whether an individual is an employee or an independent contractor and are known as the "economic reality test." These factors include the degree of control exercised by the employer over the worker; the worker's opportunity for profit or loss and his investment in the business; the degree of skill and independent initiative required to perform the work; the permanence or duration of the working relationship; and the extent to which the work is an integral part of the employer's business. The inquiry is into the totality of the circumstances and no one factor is dispositive, nor is the "label of workers as independent contractors" controlling (*Brock v Superior Care, Inc.*, 840 F2d 1054, 1058-59 [2d Cir 1988] [citing *Real v Driscoll Strawberry Assoc., Inc.* 603 F2d 748,755 (9th Cir 1979) ("[e]conomic realities, not contractual labels, determine employment status . . . subjective intent of the parties to a labor contract cannot override the economic realities")])." The "ultimate concern is whether, as a matter of economic reality the workers depend upon someone else's business for the opportunity to render service or are in business for themselves" (*Brock v Superior Care, Inc.,* 840 F2d at 1059).

We credit Walsh's testimony establishing that he was an employee and not an independent contractor and for the reasons below find that he was a covered employee for purposes of Article 6 of the Labor Law.

Factor 1: The degree of control exercised by the employer over the worker

Morello contacted the corporate headquarters of supermarket chains and other stores to authorize Walsh to sell Iron Horse products to store managers and grocery department managers in Walsh's assigned territory. Walsh communicated with Morello on a daily basis, FAXing him invoices each night and notifying him when a customer purchased additional product or a

secondary display. Morello notified Walsh by e-mail or FAX when orders were ready to be picked up at the warehouse and delivered to petitioner's customers. Morello set the terms of Walsh's compensation and supplied all sales material including displays, promotional signs, product racks, and a sales book. Walsh was given leads to potential new customers for Morello's business and was expected to expand the client base and sales in the territory Morello assigned to him.

Factor 2: The worker's opportunity for profit or loss

Walsh's sole investment in his work was his time and services. His profit depended upon his sales and he had no financial stake in the business. There was no risk of loss of money since there was no investment other than time. Profit and loss accrued to Morello. Morello provided Walsh with the sales book, promotional signs, displays, and racks used to sell Morello's products.

Morello argued that invoices with the names "Bill Walsh Inc." and "Walsh Beverage Inc." prove that Walsh had his own business. Walsh testified that these names were given to him by Morello and Morello himself testified as much at a UI hearing, a finding undisputed by Morello. We credit Walsh's testimony which is corroborated by the invoices themselves. While the invoices state "Bill to Walsh Beverage," the bottom of the invoice lists Iron Horse's phone and FAX numbers, e-mail address, website, and an online payment address. Additionally, Walsh testified that customer checks were made out not to Walsh, but to petitioner, and when customers paid Walsh in cash, Morello would often meet Walsh on the road to collect the money.

Although Morello asserted that Walsh also had his own business distributing soda, snacks, beef jerky and juice, there is no credible evidence in the record to support Morello's contention that Walsh ran his own business during the relevant period. To show that Walsh had his own business, Morello submitted a Walsh Beverage invoice with handwritten notations that were not explained and a check dated outside of the relevant period that Morello claimed he received from a customer. This hearsay evidence is unreliable and does not demonstrate that claimant conducted his own business.

Factor 3: The degree of skill and independent initiative required to perform the work

While salesmanship requires skill and initiative, it is not a specialized skill, and salesmanship alone is insufficient to show independent contractor status, particularly because Article 6 specifically includes commissioned salespeople within its coverage. Walsh did not need special skills to perform the job and was required to use the materials provided by Morello including the sales book, displays, promotional signs and racks. Morello contacted the corporate headquarters of supermarket and grocery chains and liquor stores to authorize Walsh to sell petitioner's products, and Lang introduced Walsh to petitioner's customers and trained him.

Factor 4: The permanence or duration of the working relationship

Morello testified he first met Walsh in 2011 when Walsh answered a Craigslist ad[2] and was hired for occasional deliveries on an as-needed basis, and that Walsh worked only portions of 23 days and continued his own business distributing Polar sodas, beef jerky and juices he bought from Iron Horse to resell. We credit Walsh's unrebutted testimony that he, Morello and Lang knew one

[2] This contradicted Morello's December 8, 2011 letter to DOL stating that "there never was a craigslist ad."

another for almost 25 years; he was hired to grow Morello's business by finding and cultivating customers; and during the three and a half months he was employed he worked long hours every day to do so.

That Iron Horse (after he filed claims with the DOL) gave claimant a 1099 rather than a W-2 form does not alter the economic realities or override the principle that an employee's duties, "not contractual labels, determine employment status" (*Real v Driscoll Strawberry, supra*).

Factor 5: The extent to which the work is an integral part of the employer's business

Morello's business was selling beer and non-alcoholic beverages to supermarkets and liquor stores. Walsh's job as a salesman was integral to Morello's business and Walsh's work was identical to the salesman/driver work performed by Morello's son, and substantially similar to the sales work performed by Lang, both of whom were undisputedly Morello's employees.

We find based on the totality of the circumstances that Walsh was dependent on Morello's business for "the opportunity to render service" (*See: Brock v Superior Care, Inc.*, 840 F2d at 1059). Accordingly, an employment relationship existed between Morello and Walsh and Morello is liable for unpaid wages under Article 6 of the Labor Law.

An Employer's Obligation to Maintain Records and DOL's Calculation of Wages in the Absence of Employer Records

The law requires employers to maintain payroll records that include, among other things, employees' daily and weekly hours worked, wage rate, and gross and net wages paid (Labor Law § 195 and 12 NYCRR 142-2.6). Employers are required to keep such records open to inspection by the Commissioner or a designated representative.

As the Appellate Division 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:* Labor Law § 196-a; *Angello v National Finance Corp.*, 1 AD3d 850 [3d Dept 2003]).

In *Anderson v Mt. Clemens Pottery Co.*, 328 US 680, 687-88 (1949), superseded on other grounds by statute, the U.S. Supreme Court opined that a court may award damages to an employee, "even though the result be only approximate . . . [and] [t]he employer cannot be heard to complain that the damages lack the exactness and precision of measurement that would be possible had he kept records in accordance with the [recordkeeping] requirements of . . . the Act" Id. at 688-89. New York courts following *Mt. Clemens Pottery Co.* have consistently held that when only incomplete or unreliable wage and hour records are available, DOL is "entitle[d] to make just and reasonable inferences and use other evidence to establish the amount of underpayments, even though the results may be approximate." *Hy-Tech Coatings v New York State Dept. of Labor*, 226 AD2d 378 (1st Dept 1996), citing *Matter of Mid-Hudson Pam Corp. v Hartnett*, 156 AD2d 818, 821 (3d Dept 1989); see also *Matter of Bae v Industrial Board of Appeals*, 104 AD3d 571 (1st Dept 2013); *Matter of Ramirez v Commissioner of Labor*, 110 AD3d 901 (2d Dept 2013). Wages may be found due even if based on an estimate of hours. *Reich v Southern New*

England Telecommunications Corp., 121 F.3d 58, 70 (2d Cir 1997) (finding no error in damages that "might have been somewhat generous" but were reasonable in light of the evidence and "the difficulty of precisely determining damages when the employer has failed to keep adequate records").

Commissions due to Walsh

Walsh was paid on a commission basis, and a commission is considered a wage under § 190 (1) of the Labor Law (*Pachter v Bernard Hodes Group, Inc., supra,* 10 NY3d at 617-18). Labor Law § 191 (1) (c) requires that commission salespersons be paid "commissions and all other monies earned or payable in accordance with the agreed terms of employment, but not less frequently than once in each month and not later than the last day of the month following the month in which they are earned."

> "The agreed terms of employment shall be reduced to writing, signed by both the employer and the commission salesperson, kept on file by the employer for a period not less than three years and made available to the commissioner upon request . . . . Such writing shall include a description of how wages, salary, . . . commission and all other monies earned and payable shall be calculated . . . . The failure of an employer to produce such written terms of employment, upon request of the commissioner, shall give rise to a presumption that the terms of employment that the commissioned salesperson has presented are the agreed terms of employment."

Commissions are, therefore, determined based on the agreement of the parties. It is undisputed that there was no commission salesperson written agreement between the parties and Walsh was paid in cash. Pursuant to Labor Law § 191 (1) (c), since petitioner cannot provide a written contract provision, there is a presumption that the terms presented by the claimant are the agreed upon terms. Morello did not rebut this presumption.

At hearing, Morello testified that Walsh was hired after he responded to a craigslist ad setting the terms of Walsh's compensation as 'hourly with bonus on delivered cases." On May 14, 2014, Morello wrote to DOL that Walsh was paid a commission of $2.50 to $1.50 per case delivered as well as an hourly wage. According to this letter, "for the sake of simplicity" Morello used the maximum rate of $2.50 per case to establish a total commission owed of $3,460.00, based on a spreadsheet Morello created for the DOL investigation. The May 14, 2014 letter further states that Walsh worked "23 days x 8 hours or a grand total of 184 hours @ 7.25 = $1334 in hourly wages." Morello's letter further stated,

> "By my own account submitted hours worked compensation was $1334 and commissions (at highest max rate) $3460=$4794.00. This higher amount reflects all cases at highest level but most were at lower level. This is why Mr. Walsh was paid $3,922.81 for 23 days."

Morello provided no proof of payment, however, such as signed receipts or cancelled checks. At hearing, Morello relied on Walsh's testimony that he was paid $300.00 per week but was never

paid commissions to prove that he received some payment, but Morello did not testify that Walsh was ever paid the agreed upon commission in addition to the $300.00 he was paid each week.

We credit Walsh's testimony as to his $300.00 weekly earnings and commission rate and that he was not paid owed commissions. Given the lack of specificity and the inconsistencies in Morello's testimony, we find that it was simply too contradictory and conclusory to overcome the presumption favoring the Commissioner's order and meet petitioner's burden. "Petitioner cannot shift its burden to DOL with arguments, conjecture or incomplete, general and conclusory testimony." *Matter of Young Hee Oh,* PR 11-017 (May 22, 2014) p. 12; *Matter of Angela Jay Masonry & Concrete, Inc.,* PR 06-073 (September 24, 2008) p.5. In the absence of contemporaneous payroll records, an accurate estimate of hours worked and wages paid, or other credible evidence showing the Commissioner's estimates, even if imprecise, to be invalid or unreasonable, an order must be upheld. *Young Hee Oh, supra.*

We find that it was reasonable and valid for the Commissioner to find that Walsh was owed commissions and to calculate his unpaid commissions based on invoices Walsh provided to DOL.

Civil Penalty Assessed in the Wage Order

The wage order assessed a civil penalty in the amount of 100% of the wages due. We find that the considerations and the computations the Commissioner used in connection with the civil penalty set forth in the wage order are proper and the penalty is reasonable in all respects.

Liquidated Damages Assessed in the Wage Order

The wage order assessed liquidated damages in the amount of 25% of the wages due. Labor Law § 198 (1-a) 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. Morello failed to prove that he had a good faith basis to believe that he did not have to pay Walsh agreed-on commissions, and we affirm the Commissioner's imposition of 25% liquidated damages.

Interest Assessed in the Wage Order

Labor Law § 219 (1) provides that when the Commissioner determines that wages are due, the order directing payment shall include "interest at the rate of interest then in effect as prescribed by the superintendent of financial services pursuant to section fourteen-a of the banking law per annum from the date of the underpayment to the date of payment." Banking Law § 14-A sets the "maximum rate of interest" at "sixteen per centum per annum." Accordingly, we find the interest assessed in the wage order valid and we affirm it.

The Penalty Order is Affirmed

Labor Law § 218 authorizes the Commissioner, "in addition to and . . . concurrently with any other remedy or penalty provided for in this chapter," to impose on employers that violate any

of the above requirements "a civil penalty in an amount not to exceed one thousand dollars for a first violation." For the reasons set forth below, we affirm all four counts of the penalty order.

Count 1: Failure to keep a written commission sales agreement

Labor Law § 191 (1) (c) requires employers to keep on file for at least three years, and make available to the Commissioner on request, a reduction to writing of "the agreed terms of employment . . . signed by both the employer and the commission salesperson . . . . Such writing shall include a description of how wages, salary, drawing account, commissions and all other monies earned and payable shall be calculated." The penalty order assessed a $500.00 penalty for petitioner's failure to keep a written commission sales agreement. Morello testified that he "didn't find it necessary" to have a written agreement, and we affirm this count of the penalty order.

Count 2: Failure to provide written notice of rates of pay at hiring

Labor Law § 195 (1) (a) requires employers to provide employees, at the time of hiring, with written notice of their "rates of pay and basis thereof, whether paid by the hour, shift, day, week, salary, piece, commission or other." The penalty order assessed a $250.00 penalty for this violation. Morello testified that he "didn't find it necessary" to have a written agreement, and we affirm this count of the penalty order.

Count 3: Failure to maintain payroll records

Labor Law § 661 and 12 NYCRR 142-2.6 require employers to keep and/or furnish true and accurate payroll records for each employee. The penalty order imposed a $500.00 penalty for violation of count 3. Morello provided no evidence that records of daily and weekly hours worked or wages paid to all employees were maintained. We affirm this count of the penalty order.

Count 4: Failure to provide wage statements

Labor Law § 661 and 12 NYCRR 142-2.7 require employers to provide employees with a complete wage statement with each payment of wages. The penalty order assessed a $500.00 penalty for this violation. Morello provided no evidence that wage statements were provided to employees. We affirm this count of the penalty order.

//////////////////////

//////////////////

//////////////

//////////

////////

/////

//

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The wage order is affirmed; and

2. The minimum wage order is revoked; and

3. The penalty order is affirmed; and

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

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
at New York, New York, on
September 14, 2016.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The wage order is affirmed; and

2. The minimum wage order is revoked; and

3. The penalty order is affirmed; and

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

Vilda Vera Mayuga, Chairperson

J. Christopher Meagher, Member

Michael A. Arcuri, Member

Molly Doherty, Member

Gloribelle J. Perez, Member

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