STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of: PANAGIOTIS KALLIGEROS A/K/A PETER KALLIGEROS AND THEODORE CALLIGEROS, AND GOLDEN DOLPHIN RESTAURANT CORP. (T/A THE GOLDEN DOLPHIN), Petitioners, 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 5 and 19 of the Labor Law, all dated July 29, 2015, - against - THE COMMISSIONER OF LABOR, Respondent.	DOCKET NO. PR 15-303 RESOLUTION OF DECISION

APPEARANCES

Paschalidis Law Offices, Elmhurst (*Konstantine G. Paschalidis* of counsel), for petitioner Panagiotis Calligeros a/k/a/ Peter Calligeros.

Pico Ben-Amotz, General Counsel, NYS Department of Labor, Albany (*Roya Sadiqi* of counsel), for respondent.

WITNESSES

Peter Calligeros, for petitioner Panagiotis Calligeros a/k/a Peter Calligeros.

Florentino Granados, Jesus Benitez, and Labor Standards Investigator Frederick Seifried for respondent.

WHEREAS:

On September 28, 2015, petitioners Panagiotis Calligeros a/k/a Peter Calligeros (Peter Calligeros),[1] Theodore Calligeros (Teddy Calligeros), and Golden Dolphin Restaurant Corp. (T/A The Golden Dolphin) (Golden Dolphin), through their then counsel Michael G. Giampilis, Esq.

[1] While throughout the record and on the petition, Peter Calligeros's surname was spelled Kalligeros, on the November 21, 2017 hearing date, Peter Calligeros signed the notice of appearance sheet spelling his surname Calligeros. Thus, throughout this decision, the Board uses the spelling of the surname that Peter Calligeros himself used.

filed a petition for review, pursuant to Labor Law § 101, of three orders issued against them by respondent Commissioner of Labor on July 29, 2015. Respondent filed her answer on October 30, 2015.

Upon notice to the parties, a hearing was held on October 11, 2017 and November 21, 2017 in Garden City, New York and on February 21, 2018 in Hicksville, 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 briefs.

The first order under review (minimum wage order) is an order to comply with Article 19 of the New York Labor Law and directed petitioners to pay a total of $125,089.83 in wages owed to five claimants (Florentino Granados, Jesus Benitez, Daniel Bardales, Marvin Javier and Miguel Vasquez) for periods from June 2, 2005 to August 1, 2014, together with interest at 16% per annum calculated to the date of the order of $43,148.88, 25% liquidated damages in the amount of $31,272.47, and a civil penalty of $41,600.00, for a total amount due of $241,111.18.

The second order under review (penalty order) is an order under Articles 5 and 19 of the Labor Law directing the petitioners to pay $2,500.00 in civil penalties based on (1) the failure to keep payroll records for each employee for the period August 1, 2008 to December 31, 2010 in violation of 12 NYCRR 137-2.1; (2) the failure to keep payroll records for each employee for the period January 1, 2011 to August 1, 2014 in violation of 12 NYCRR 146-2.1; (3) the failure to give each employee a wage statement with every payment of wages for the period June 2, 2005 through December 31, 2010 in violation of 12 NYCRR 137-2.2; (4) the failure to give each employee a wage statement for the period June 24, 2011 through August 1, 2014 in violation of 12 NYCRR 146-2.3; (5) the failure to pay employees hourly rates in violation of 12 NYCRR 146-2.5 for the period June 24, 2011 to August 1, 2014; and (6) the failure to provide employees at least 30 minutes off for the noon day meal in violation of Labor Law § 162 for the period August 1, 2008 to August 1, 2014.

A third order issued pursuant to Article 6 was also the subject of petitioners' appeal. At the November 21, 2017 hearing, respondent's counsel orally moved to withdraw the order issued against petitioners under Article 6. Petitioners did not oppose such motion.

The petition, filed by attorney Michael P. Giampilis on behalf of Peter Calligeros, Teddy Calligeros, and Golden Dolphin, challenged the orders by alleging that: (1) the DOL incorrectly calculated the alleged wage underpayments by including hours and wages the employees did not work or earn and failed to credit petitioners for vacation, sick days, absences, and breaks, and DOL did not provide a detailed breakdown of the alleged employee underpayments; (2) the relevant period for employees listed in the order is excessive; (3) the "look back period" is excessive and unwarranted; and (4) the petitioners' due process rights were disregarded by failing to request petitioners' testimony prior to the issuance of the order. The petition also contests the civil penalties, liquidated damages and interest assessed in the orders. At the hearing, Peter Calligeros alleged that he was not an employer and that his brother, Teddy Calligeros, was the employer and responsible party.

On the first day of hearing, October 11, 2017, attorney Giampilis withdrew as counsel for Golden Dolphin on the record and the hearing was adjourned until November 21, 2017. On

November 20, 2017, Giampalis wrote to the Board that he no longer represents Teddy Calligeros and he represented to the Board that Teddy Calligeros would not be appearing at the hearing scheduled for November 21, 2017. Teddy Calligeros did not appear at the November 21, 2017 hearing, and respondent moved to dismiss the petition as it pertained to Teddy Calligeros, based on his non-appearance. The hearing officer reserved decision on the motion. At the November 21, 2017 hearing, Giampilis also withdrew as counsel to Peter Calligeros on the record. Attorney Konstantine G. Paschaladis, appeared as counsel solely for Peter Calligeros at the November 21, 2017 hearing. The hearing commenced on that date and was subsequently scheduled for continuation on February 21 and 22, 2018.

On February 20, 2018, Peter Calligeros's attorney notified the Board that his client, Panagiotis Calligeros a/k/a Peter Calligeros filed for bankruptcy, and he presumed that the hearing before the Board would be automatically stayed. The Board treated the letter as a motion seeking a stay and sent the parties a letter stating that the hearing would not be stayed as the automatic stay provision of the Bankruptcy Code does not require the Board to stay its proceedings. The letter further stated that the hearing would go forward on February 21 and February 22, 2018. Neither Peter Calligeros nor his attorney, nor any other petitioners, appeared at the hearing on February 21, 2018. Respondent moved to dismiss the petition based on petitioners' failure to appear. The hearing officer reserved decision on that motion.

SUMMARY OF EVIDENCE

Petitioner's Evidence

Testimony of Petitioner Peter Calligeros

Petitioner Peter Calligeros testified that he was a shareholder in Golden Dolphin Restaurant Corp. for about 20 years until 2014, along with his brother Teddy Calligeros. He and Teddy Calligeros each owned 50% of the business after a third owner, Peter Valendis, known as "Little Peter", resigned from ownership in the business sometime before 2011. Peter Calligeros worked at The Golden Dolphin, a Huntington, New York diner, as a cook, host, and cleaning tables. Peter Calligeros testified that he never hired, fired or paid employees, and did not know how Golden Dolphin kept records. He never had anything to do with the company's books, which were handled, along with hiring, firing, and ordering, by his brother, Teddy Calligeros. Job applicants were interviewed by Teddy Calligeros, who never consulted Peter Calligeros before hiring or firing an employee. Peter Calligeros cooked and hosted, while Teddy Calligeros cooked only if he had to. Apart from Teddy Calligeros, there was no supervisor; all employees knew their jobs. Beyond possibly telling a busboy to pick up a dirty glass, Peter Calligeros never gave orders to anyone. If something unusual happened at the diner, employees would report it to Teddy Calligeros, if necessary waiting until the next day or phoning Teddy Calligeros. Peter Calligeros never asked Teddy Calligeros how much workers were being paid, nor did Peter Calligeros consider how much the business was spending on wages. According to Peter Calligeros, there was never any profit because there was not enough business.

The diner was open from 7:00 A.M. to 11:00 P.M. 365 days a year except for half a day on Christmas or closing because of bad weather. Peter Calligeros testified that employees were paid even if the diner was closed: "That is the policy of the place. We used to pay the people." Peter

Calligeros testified that he "worked most of the week, all kinds of hours" did not have a fixed schedule and could open or close the diner, usually alternating but occasionally overlapping a few hours with Teddy Calligeros, and that he generally began work at 7:00 A.M. The diner had two shifts, each about 8 or 9 hours, based on a schedule set by Teddy Calligeros. The first shift worked from 7:00 to 3:00. All workers on both shifts had a paid meal break of between 35 minutes and 1 hour. The morning shift had a lunch break at 11:00 A.M. or 11:30 A.M., during which employees were not required to work. The diner provided free meals to employees. The business did not have a method of tracking the employees' hours of work, but Peter Calligeros kept track mentally of when employees came in each day. He did not think employees signed receipts when they were paid. Because most employees did not have their own cars, they were often dropped off or picked up at the diner half an hour or more before or after their shift began or ended, "clocking in to get paid" for time before the shift began or after it was over.

At one point, Peter Calligeros testified that employees were paid cash weekly on an hourly basis and employees' pay was never docked for lateness. At another point, he testified that he only assumes employees were paid by the hour but does not know for sure because Teddy Calligeros controlled the payroll. Peter Calligeros stated that he knows payment was in cash because he saw workers count their cash. He knows workers were paid for meal breaks, for sick days and when the diner was closed because Teddy Calligeros told him this. Teddy Calligeros also told Peter Calligeros that some workers were paid overtime, but Peter Calligeros does not know who they were. While no employee ever complained to Peter Calligeros about their wages or about non-payment of wages, employees thanked Peter Calligeros for receiving pay regularly.

According to Peter Calligeros, Jesus Benitez worked at Golden Dolphin as a salad maker, and Florentino Granados as a dishwasher and cleaner, never as a cook. Peter Calligeros does not remember the years that Granados or Benitez worked. Granados worked the day shift 5½ days a week from 7:00 or 7:30 A.M. to 3:00 P.M. Benitez and Granados never worked double shifts, which Peter Calligeros himself often did. Marvin Javier worked a couple of months as a busboy, from about 11:00 A.M. to 5:00 P.M. or 7:00 P.M. When asked if he was "familiar with" the names Daniel Bardales or Miguel Vasquez, he responded "No."

Respondent's Evidence

Testimony of Claimant Florentino Granados

Claimant Florentino Granados testified he was hired as a dishwasher in 2003 by Peter Calligeros, who interviewed and immediately hired him. At the start of his employment, Granados was paid around $300.00 in cash for a six-day week, with daily hours from 7:00 A.M. to 4:00 P.M. In 2005, at Peter Calligeros's direction, Granados' duties were expanded to include cooking and working as a porter, and his pay was raised to $340.00 per week for a six day workweek from 6:30 A.M. to 5:30 P.M. daily, with Tuesdays off. Four years later, Peter Calligeros raised Granados' pay to $400.00 per week. On November 25, 2010 Peter Calligeros directed Granados to stop taking Tuesdays off, and for the rest of the relevant period, Granados worked a seven-day workweek from 6:30 A.M. to 5:30 P.M. per day while his pay remained $400.00 per week. During re-direct examination, Granados stated he was paid $420.00 per week in cash. During cross-examination, Granados testified that his DOL claim form (discussed below in the summary of Investigator Seifried's testimony) correctly stated that he was paid $490.00 per week at certain periods.

According to Granados, Peter Calligeros opened the diner in the morning at 6:30 A.M. Granados began work at 6:30 A.M. and prepared soups, sauce, gravy, eggs and pancakes until 9:00 A.M. or 9:30 A.M., when he began loading the dishwasher and washing dishes until 3:00 P.M., after which, at Peter Calligeros's direction, he went to the basement to unpack and stock the freezer with food that was delivered to the diner, and then brought boxes to the dumpster until 5:30 P.M.

There was never a time clock or sign-in sheet at the diner nor was there any record of the days Granados worked. Granados was given no time off except when he requested and received permission from Peter Calligeros to go to the doctor. Granados testified that he was sick and did not work from June 4 through June 14, 2013, and was not paid for the sick days. He was never given a meal break, even though he worked 11 hours per day. When hungry, Granados ate food provided by Golden Dolphin, or sometimes ate customers' leftovers, while he continued working.

Peter Calligeros assigned Granados' hours and directed his work. Peter Calligeros and the partner known as Little Peter were in charge of day to day operations at the diner and they hired and fired employees. While Granados also saw Teddy Calligeros every day, Peter Calligeros, not Teddy Calligeros, was in charge of Granados's daily activities and Peter Calligeros, not Teddy Calligeros, paid Granados in cash once a week in an envelope, sometimes in the downstairs office and sometimes upstairs. There was no receipt or other record of the payment. Peter Calligeros and Little Peter remained in charge until Little Peter left the diner and Teddy Calligeros took charge. Granados did not remember what year this was, but it was a month before the diner closed for remodeling between March and August.[2]

On cross-examination, Granados testified that DOL investigators Armando Gonzalez and Frederick Seifried interviewed him at the diner, and that Granados' friend, Richard Gentile, suggested he file a claim with the DOL. Because Granados cannot read or write, Gentile filled out a DOL claim form for Granados, asking him questions and writing down his answers.

Testimony of Claimant Jesus Benitez

Claimant Jesus Benitez testified that Peter Calligeros hired him as a dishwasher in 1998. Two years later, Benitez became a helper in the kitchen preparing meals. Peter Calligeros paid the workers from 1998 to 2000. Thereafter, Teddy Calligeros paid the workers while Peter Calligeros continued to work in the diner 7 days a week as the manager, often working from opening in the morning to closing at night. Teddy Calligeros was at the diner approximately 3 days a week from 3:00 P.M. until closing. Both brothers gave orders and reprimanded workers.

Benitez testified that from 2006 through 2013 he worked 6 or 7 days a week. His hours were 11:00 A.M. to 9:00 P.M., sometimes working as late as 10:00 P.M. or 11:00 P.M. On Mondays, he came in at 9:00 A.M. to make soup. Peter Calligeros assigned Benitez's schedule and told him that he had to work on holidays. Benitez did not take vacations. Benitez did not receive a meal break; he cooked a hamburger or eggs or ate leftover food while working. When Benitez arrived at 11:00 A.M., he prepared cauliflower, cole slaw, tuna salad, chicken salad and potato salad, baked bread and muffins, and cooked potatoes, pasta, linguini, beans, penne, and other dishes. Teddy Calligeros taught him to cook this food. As of 2006, Benitez was paid between $400.00 and

[2] A March 16, 2015 entry in the DOL's contact log states that employees were told that week that "business will close for 2-3 months for renovations." The renovations, therefore, took place after the relevant period.

$500.00 per week, a rate set by Teddy Calligeros, who paid him in cash each week. Benitez was paid the same amount each week, regardless of whether he worked additional hours, but his pay was docked if he took a day off. Teddy Calligeros gave him a computerized receipt which stated only Benitez's name, home address, the name of the diner and the amount he was paid. After the DOL visited in 2012, the receipts also began to state that Benitez worked 40 hours each week, although in reality, he was working many more hours. Other than these receipts, there was no record of how much Benitez was paid. There was no time-keeping system, and Benitez never signed in or out. He was paid the same amount each week regardless how many hours he worked, except that if he took a day off he was not paid for that day. He did not receive tips since he worked in the kitchen.

Benitez does not know how to read but identified his signature on a DOL "Employee Statement/Minimum Wage Field Investigation" form dated March 1, 2012. He testified that someone from the DOL interviewed him at the diner and wrote down his answers.

Testimony of Labor Standards Investigator Frederick Seifried

Labor Standards Investigator Frederick Seifried conducted the investigation and testified about the documents in the DOL investigative file. Seifried visited the diner on February 1, 2012 together with a Spanish-speaking investigator, Angel Medina, who interviewed about ten employees while Seifried interviewed Teddy Calligeros and Peter Calligeros. Teddy Calligeros told Seifried that he was the corporate president and Peter Calligeros was the manager of day-to-day operations. Peter Calligeros also told Seifried that he was the manager. Seifried saw close to 30 employees working, including about 12 waiters, 5 or 6 cooks and bussers and dishwashers. Teddy Calligeros told Seifried that the United States Department of Labor (USDOL) had already audited Golden Dolphin for the period August 2008 to August 2010, and Teddy Calligeros stated that he was working on revising record-keeping procedures following the USDOL audit.

Seifried testified that after his February 1, 2012 visit, the respondent received certain records regarding Daniel Bardales from the USDOL. These records included an unsigned "claim form" and Personal Interview Statement forms which, according to Seifred's review of the document, were based on an August 17, 2012 telephone interview in which Bardales told the USDOL that he worked for the diner as a dishwasher, salad maker and general helper from June 2011 to August 3, 2012, for a 53½-hour, 6-day workweek with Thursdays off, for $420.00 per week in cash until January 2012 and $390.00 per week thereafter. The form indicates that Golden Dolphin was owned by "Peter" and "Terry;" no record was kept of Bardales's hours; and he was not allowed meal or break times.

Seifried again visited Golden Dolphin on March 1, 2012 with another Spanish-speaking investigator, Armando Gonzalez. That day, Seifried met with Teddy Calligeros, the employer's then attorney Giampilis. Gonzalez interviewed Spanish-speaking employees. Seifried testified that he prepared a November 24, 2014 narrative report, based on information including a claim and employee interview statements, which states that after the March 1, 2012 visit, the employer provided the DOL a composition book with payroll information for the period April 27, 2010 to February 28, 2011. Seifried testified that records provided by the employer were incomplete because they did not indicate daily and weekly hours, only total hours paid; and were inconsistent with information provided by employees, because the records indicated hourly pay rates while employees stated they received fixed salaries, and in some cases these records indicated 40-hour

weeks while employees said they worked more than 40 hours. For these reasons, the DOL deemed the records inaccurate and not credible.

On December 24, 2014, LSI Seifried wrote to Giampilis, with a copy to Teddy Calligeros, outlining the findings of the DOL's investigation and amounts found owed to the five claimants. The letter stated that records provided did not meet the requirements of Labor Law § 661 and were contradicted by interviews and claim forms; that DOL's investigation showed that employees consistently worked over 40 hours weekly (11 to 12 hours daily, 6 days per week) and were compensated at straight time for all hours worked; that some employees, such as kitchen workers, were paid a flat weekly rate instead of an hourly rate; and that employees stated they did not receive a free meal. The letter stated that the DOL computed underpayment for employees for the period April 7, 2007 to April 28, 2012, excluding August 2008 through August 2010 because this period was previously covered in the USDOL audit.[3] The letter also assessed penalties for record-keeping violations. Seifried testified that although a compliance conference was later held, no settlement was reached.

Seifried testified that the DOL calculated a derived hourly rate for each claimant, based on the weekly rate and number of weekly hours that claimant reported. Through 2010, the derived hourly rate was calculated by dividing the reported payment by the reported number of work hours. Beginning January 1, 2011, the derived hourly rate was calculated by dividing the reported payment by 40. The DOL then calculated how much each claimant was required to be paid at the derived hourly rate for the first 40 weekly hours, and at 1½ times that rate for reported weekly hours beyond 40; the difference between required and actual pay was the calculated underpayment. For example, Granados's derived hourly rate was $7.37 ($420.00 divided by 57) through 2010 and $10.50 ($420.00 divided by 40) beginning January 1, 2011, and the DOL calculated he was underpaid $11,677.20 for the period June 10, 2005 to December 31, 2010 (excluding August 2008 through August 2010, already covered by the USDOL audit) and $61,818.75 for the period January 1, 2011 to August 1, 2014.

Seifried further testified that the imposition of a 100% civil penalty was based on the employer's inadequate records, which impeded the investigation, the basic denial of all the allegations, that the business had about 30 employees and had been open for almost 30 years, and that petitioners did not change their timekeeping or payroll practices.

STANDARD OF REVIEW

When a petition is filed, the Board reviews whether an order issued by the Commissioner is "valid and reasonable" (Labor Law § 101 [1]). The Board is required to presume that an order of the Commissioner is valid (Labor Law § 103 [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]). Pursuant to the Board Rules of Procedure and Practice, the hearing before the Board is *de novo* (Board Rule 66.1 [c]). The petitioner has the burden to prove by a preponderance of the evidence that the orders are not valid or reasonable (Board Rule [12 NYCRR]

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[3] Although the letter referred to three employees, an enclosed "Recapitulation Sheet-Preliminary Report" showed amounts stated to be due to all five claimants.

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 provisions of Board Rule 65.39 (NYCRR 65.39).

Respondent's Motion to Dismiss the Petition as to Theodore Calligeros is Granted

Theodore Calligeros did not appear at either the November 21, 2017 or February 21, 2018 hearing dates. The Board has dismissed petitions when petitioners did not appear, presented no evidence, and, therefore, failed to meet their burden. *Matter of Joseph L. Maddi, MD*, PR 10-301, at p. 2 [Feb. 27, 2014]; *see also Matter of Ronald M. Delevan*, PR 13-016 [Mar. 2, 2016] and *Matter of Mouhammed Malik*, PR 17-102 [June 6, 2018]). For this reason, we grant the motion to dismiss the petition as to Theodore Calligeros.

Respondent's Motion to Dismiss the Petition as to Panagiotis Calligeros a/k/a Peter Calligeros is Denied

Peter Calligeros testified at the hearing on November 21, 2017, after which his attorney rested his case-in-chief. Neither Peter Calligeros nor his attorney appeared at the hearing on February 21, 2018, and respondent moved to dismiss the petition based on that non-appearance. The hearing officer reserved ruling on the motion, and the respondent proceeded to put in her case. We deny the respondent's motion to dismiss as to Peter Calligeros because he presented evidence in his case-in-chief and raised issues of fact at the hearing which the Board must resolve in determining whether to affirm, modify or revoke the orders (*see Matter of Young Hee Oh*, PR 11-017, at p. 2 [May 22, 2014]).

Petitioners Were Not Denied Due Process

We reject petitioners' contention that they were denied due process because the respondent allegedly failed to request petitioners' testimony before the issuance of the orders. The Board has repeatedly held that due process is satisfied by the opportunity to contest the orders at a hearing before the Board (*Matter of Clifton J. Morello [T/A Iron Horse Beverage LLC*], PR 14-283, at p. 6 [Sept. 14, 2016]; *Matter of Angelo A. Gambino and Francesco A. Gambino [T/A Gambino Meat Market, Inc.]*, PR 10-150, at p. 6 [July 25, 2013]; *Matter of David Fenske [T/A Amp Tech and Design, Inc.]*, PR 07-031, at p. 8 [Dec. 14, 2011]).

Panagiotis Calligeros a/k/a Peter Calligeros Was an Employer

The threshold issue to be determined is whether Peter Calligeros was an employer within the meaning of the New York Labor Law. "Employee" as used in Article 19 of the Labor Law means "any individual employed or permitted to work by an employer." (Labor Law § 651 [5]). "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]). Furthermore, to be "employed" means that a person is "permitted or suffered to work"

(Labor Law § 2 [7]). Under Labor Law § 2 (6), the term "employer" is not limited to the owners or proprietors of a business, but also includes any agents, managers, supervisors and subordinates, as well as any other person or entity acting in such capacity.

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]). The test for determining whether an entity or person is an 'employer' under the New York Labor Law is the same test used for analyzing employer status under the Fair Labor Standards Act. (*Matter of Yick Wing Chan v New York State Industrial Board of Appeals,* 120 AD 3d 1120, 1121 [1st Dept 2014]; *Chung v New Silver Palace Rest., Inc.,* 272 FSupp 2d 314, 319 n6 [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 broad New York and FLSA definitions of "employer," more than one person or entity can be found to be an employee's employer (*Zheng v. Liberty Apparel Co.*, 355 F3d 61, 66 [2d Cir 2003]; *Matter of Stephen B. Sacher, Travco, Inc., and Sacher & Co., CPA, P.C.*, PR 11-151, at p. 6 [April 10, 2014]; *Matter of Robert Lovinger and Miriam Lovinger and Edge Solutions, Inc.*, PR 08-059, at p. 8 [Mar. 24, 2010]).

We find that the credible evidence amply demonstrates that Peter Calligeros was the claimants' employer. Peter Calligeros acknowledged owning Golden Dolphin together with Teddy Calligeros and, for a time, Peter Valendis. We give no credence to Peter Calligeros's testimony that he merely worked as a cook, host, and cleaned tables, never gave orders to employees, never hired, fired or paid employees, and was never consulted when employees were hired. While denying that he paid employees, Peter Calligeros testified that employees thanked him for receiving their pay regularly, that employees were paid in cash, were never docked pay for being late, and were paid for sick days or days the restaurant closed. Granados, on the other hand, credibly testified that Peter Calligeros interviewed and immediately hired him, directed his work, raised his pay, gave him time off to go to the doctor, and created and changed his schedule in addition to being the person who paid him throughout the relevant period. Benitez likewise credibly testified that Peter Calligeros hired him, was in the diner as a manager 7 days a week throughout the relevant period, set Benitez's schedule, and gave orders and reprimands to workers. Their credible testimony is corroborated by Seifried's unrefuted recollection that when he and LSI Medina visited the diner on February 1, 2012, Peter Calligeros admitted that he was the manager of the diner.

Based on the totality of circumstances, we find that as a matter of economic reality, Peter Calligeros was an employer, who hired and disciplined employees, supervised and controlled their schedules, gave raises, and otherwise determined their rate and method of payment and conditions of employment. We affirm the Commissioner's determination finding that Peter Calligeros is an employer under the Labor Law.

Petitioners Failed to Maintain Required Records

An employer's obligation to keep adequate employment records is found in Labor Law § 661 as well as in the New York Code of Rules and Regulations (NYCRR). 12 NYCRR 137-2.1 and 12 NYCRR 146-2.1 provide that weekly payroll records must be maintained and preserved for six years and must show for each employee, among other things, the wage rate; number of hours worked daily and weekly, including the time of arrival and departure for each employee working a spread of hours exceeding 10; amount of gross wages; tip credit, if any, claimed as part of minimum wages; meal and lodging credits, if any, claimed as part of wages; and money paid in cash. Employers are required to keep such records open to inspection by the Commissioner at the place of employment (Labor Law § 661). 12 NYCRR 137-2.2 and 12 NYCRR 146-2.2 further provide that every employer must furnish to each employee "a statement with every payment of wages, listing hours worked, rates paid, gross wages, allowances, if any, claimed as part of the minimum wage; deductions and net wages."

Therefore, it was petitioners' responsibility to keep accurate records of the hours worked by and the amount of wages paid to their employees, and to provide employees with a wage statement every time they were paid. This required recordkeeping provides proof to the employer, the employee, and the Commissioner that the employee has been properly paid.

No payroll or time records were offered into evidence by petitioners at the hearing and there is no other evidence that wage statements were provided to employees. We credit Seifried's undisputed testimony that records furnished to the DOL by Golden Dolphin during the investigation were incomplete because they did not indicate daily and weekly hours, only total hours paid, and were inconsistent with information provided by employees, in that the records indicated hourly pay rates while employees stated they received fixed salaries, and in some cases records indicated 40-hour weeks while employees said they worked more than 40 hours.[4] Accordingly, it was proper for the DOL to conclude that the petitioners' records were not accurate, and that the employer failed to maintain legally required records.

The Minimum Wage Order Is Affirmed As It Relates to Granados, Benitez, Vazquez and Bardales and is Affirmed As Modified for Javier

Article 19 of the Labor Law, entitled the "Minimum Wage Act," sets forth the minimum wage that every employer must pay each of its non-exempt employees for each hour of work (Labor Law § 652 [1]), and its implementing regulations require payment of time and one-half a non-residential employee's regular hourly rate for each hour worked over 40 in a week (12 NYCRR 137-1.3; 12 NYCRR 146-1.4), and an additional hours' pay at the minimum hourly rate

[4] This is consistent with Granados' and Benitez' credible testimony that they worked far more than 40 hours per week for a fixed weekly wage far less than the amounts to which they were legally entitled for those hours.

on each day in which the employee's spread of hours exceeds 10 (12 NYCRR 137-1.7; 12 NYCRR 146-1.6[a]).

In the absence of accurate records required by the Labor Law, an employer bears the burden of proving that the disputed wages were paid (Labor Law § 196-a; *Garcia v Heady*, 46 AD3d 1088, 1090 [3d Dept 2007]; *Angello v Natl. Fin. Corp.*, 1 AD3d 850, 851 [3d Dept 1989]). As the Appellate Division stated in *Matter of Mid Hudson Pam Corp v Hartnett*, 156 AD2d 818, 821 [3d Dept 1989], "[w]hen an employer fails to keep accurate records as required by statute, the commissioner is permitted to calculate back wages due to employees by using the best available evidence and to shift the burden of negating the reasonableness of the Commissioner's calculation to the employer" (*see also Ramirez v Commissioner of Labor,* 110 AD3d 901 [2d Dept 2010]. The petitioner has the burden of proving that the minimum wage order is invalid or unreasonable by a preponderance of the evidence of the specific hours that the employees worked and that they were paid for those hours, or other evidence that shows the Commissioner's findings to be invalid or unreasonable (*Matter of Ram Hotels,* PR 08-078, at p. 24 [October 11, 2011]). Where no wage and hour records are available, or the wage and hour records are incomplete or unreliable, DOL is "entitled[d] to make just and reasonable inferences and use other evidence to establish the amount of underpayments, even though the results may be approximate" (*Ramirez v Commissioner of Labor,* 110 AD3d 901, 901 [2d Dept 2010]; *Hy-Tech Coatings v New York State Dept. of Labor,* 226 AD2d 378, 379 [1st Dept 1996] *citing Mid Hudson Pam Corp. v. Hartnett*, 156 A.D.2d 818, 820-21 [3d Dept 1989]).

The minimum wage order under review finds, based on Granados's claim and interviews with Benitez, Javier, and Vazquez, and Bardales's USDOL records, that petitioners failed to pay required minimum wages, overtime, and spread of hours pay in the amount of $125,089.83 to those five employees. Respondent's determination of the amount of minimum wages, overtime and spread of hours pay owed to the claimants is based on information contained in claim forms and interview sheets and information claimants provided or gathered during the investigation stating the number of hours they worked per week, and what they were paid. Respondent used this information to determine a derived hourly rate, which was less than what the claimants were legally entitled to be paid for their work. Respondent, therefore, found that petitioners owed the claimants the difference between what they should have been paid under Article 19 and what petitioners actually paid them.

Petitioners may meet their burden of proof that the minimum wage order was invalid or unreasonable by establishing the precise hours worked by their employees and wages paid *or* by negating "the reasonableness of the inference to be drawn from the employee's evidence" (*Anderson v Mt. Clemens Pottery*, 320 US 680, 688 [1949] [emphasis added] [*superseded on other grounds by statute*]). The Commissioner is entitled to make just and reasonable inferences in awarding damages to employees, so long as there is a "rational basis" in the record (*Matter of John Shepanski Roofing & Gutters v Roberts,* 133 AD2d 757, 758 [2d Dept. 1987]); *Matter of Kong Ming Lee et al.,* PR 10-293 at p16 [April 10, 2014]).

Peter Calligeros testified that Granados worked the day shift from 7:00 A.M. to 3:00 P.M. 5½ days per week for an unspecified time, that Benitez worked at the diner for an unspecified time, that neither Granados nor Benitez worked double shifts, and that Javier worked a couple of months as a busboy from about 11:00 A.M. to 5:00 or 7:00 P.M. He denied knowing Vazquez or Bardales. He stated that he did not know how much the claimants were paid, and provided no payroll records

showing the specific hours worked by any of the claimants throughout the period of their claims and he could not specify, among other things, the time periods the claimants worked, their daily or weekly hours, their rates of pay, or that they were paid for those hours, nor did he provide any evidence contesting the DOL's calculation of the claimants' wages.

Peter Calligeros's scant testimony was not sufficiently specific or reliable on the hours worked by or wages paid to the claimants to meet petitioners' burden of proof to show the *precise* hours they worked or to negate the reasonableness of respondent's determination. The Board has repeatedly held that such general, conclusory, and incomplete testimony concerning the work schedules of employees is insufficient to satisfy the high burden of precision required to meet an employer's burden of proof (*Matter of Fred Barthelman III and North Coast Sealing, Inc.*, PR 14-114, at p. 18 [Dec. 13, 2017]; *Matter of Alberto Baudo,* PR 15-007, at p. 8 [September 14, 2016], *aff'd sub nom, Matter of Baudo v New York State Industrial Board of Appeals,* [1st Dept 2017]; *Matter of Young Hee Oh,* PR 11-017, at p. 12 [May 22, 2014] [employer cannot shift burden with arguments, conjecture, or incomplete, general, and conclusory testimony]).

Because petitioners provided no evidence of legally required records of the daily and weekly hours worked or wages paid to the claimants, and proof that they were paid for those hours, the Commissioner was entitled to use the best available evidence as a basis for her calculation of underpayment (Labor Law. §196-a; *Matter of Mid Hudson Pam Corp. v Hartnett,* 156 AD2d 818, 821 [3d Dept 1989]; *Matter of Joseph Baglio and the Club at Windham,* PR 11-394, at p. 7 [December 9, 2015]). The best available evidence in the instant case was Granados and Benitez' testimony, Granados's claim and information he provided during the investigation, and Benitez, Javier and Vazquez's signed interview statements taken during investigator Seifried and Medina's February 1, 2012 visit to the diner, which were contemporaneously recorded in DOL's investigative file and the records received by the respondent from the USDOL regarding Daniel Bardales. We find that the observation of respondent's investigators that Javier and Vazquez worked in the diner and the answers they freely provided during the interviews was a rational basis for respondent's determination of the amount of minimum wages owed where petitioners provided no records or other credible, reliable and specific evidence of the hours worked and wages paid to show otherwise. We do not credit petitioners' testimony that Vazquez did not work for petitioners since he was working at the diner when he was interviewed. The USDOL records that respondent relied on to determine the unpaid wages due to Bardales were also sufficient here where petitioners presented no evidence to challenge the respondent's determination regarding such. (*See e.g., Matter of Karl Geiger and Geiger Roofing Co.*, PR 10-303, at p. 8 [Jan. 16, 2014], *aff'd sub nom., Matter of Geiger v DOL,* 131 AD3d 887 [1st Dept 2015]; *Matter of Hy-Tech Coatings v New York State Dept. of* Labor, 226 AD2d 378 [1st Dept 1996], citing *Mid Hudson Pam,* 156 AD2d at 821).

12 NYCRR 146-1.6(a) states: "On each day on which the spread of hours exceeds ten, an employee shall receive an additional hour of pay at the basic minimum hourly rate." Javier's hours equaled but did not exceed 10 hours per day as required by the implementing regulations. The DOL audit on which the minimum wage order was based, calculated 6 hours of spread of hours pay per week at the then minimum wage of $7.25 for a total of 57 weeks for the weeks ending January 7, 2011 to February 3, 2012 in the amount of $2,479.50. We find that the minimum wage order must be reduced by $2,479.50, and accordingly, the minimum wage order as modified is affirmed.

The Lookback Period and the Relevant Period

The petition asserted that the relevant period for employees listed in the order and the "look back" period for finding underpaid wages were excessive. For reasons explained below, we reject these claims. Labor Law § 663 [3] provides that the Commissioner may bring administrative action to recover back wages within six years and the statute of limitations shall be tolled from the date an employee files a claim or the Commissioner commences an investigation, whichever is earlier. Granados' complaint to the DOL was dated June 2, 2011 and the "look back" period reflected in the minimum wage order for him is to June 2, 2005, while Benitez was interviewed by DOL on March 1, 2012 and the "look back" period reflected in the order for him is to March 1, 2006. According to Seifried's testimony, the DOL did not contact Golden Dolphin until February 2, 2012.

In *Matter of Ammar A. Zabarah*, (PR 14-062, at pp. 8-9 [Apr. 29, 2015]), the Board, while finding it proper for the DOL to go back six years from the filing of a claim, also found that an employer which is only obligated to maintain records for six years cannot fairly be penalized for not maintaining records longer if there has been no inquiry from the Commissioner within that time. For this reason, the burden-shifting discussed above, in which an employer that failed to keep required records must negate the reasonableness of the Commissioner's underpayment calculation, is only applicable to the period after February 2, 2006, not to the previous eight months for which underpayment to Granados was also found. As in *Zabarah*, we find that as to this earlier period, the DOL "met the burden of showing by a preponderance of the evidence that the Commissioner's underpayment calculation was reasonable," and thus reject altogether the petition's claim that the order went back too far to be upheld.

The petition's other contention, that the relevant period used in the order was excessive, is also rejected. The relevant periods for which the order found underpayment were June 2, 2005 through August 1, 2014 for Granados and March 1, 2006 through March 1, 2013 for Benitez. Seifried testified that in calculating their underpayments, he did not include the two-year period from August 6, 2008 to August 6, 2010, which was covered by a USDOL audit. In both cases, the reason underpayment was found for such a long period was that even after petitioners' violation of the law was called to its attention by the DOL investigation, the employer continued to underpay employees on a going-forward basis. The record indicates that underpayment to Granados and Benitez continued through August 1, 2014 and March 2, 2013 respectively.

The Civil Penalties, Liquidated Damages and Interest in the Minimum Wage Order Are Affirmed

Labor Law § 218 (1) provides that if respondent determines an employer has violated certain provisions of Article 19, including failure to pay minimum wages and overtime, she must assess an "appropriate civil penalty." The civil penalty assessed must be 200% if respondent finds the violation was willful or egregious, or if the employer has previously violated the Labor Law. Otherwise, in assessing the amount of the penalty, the respondent must "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 . . . the failure to comply with recordkeeping or other non-wage requirements" (Labor Law § 218 [1]). Respondent assessed a 100% civil penalty against

petitioners, which did not exceed the amount allowed by the statute. We uphold the civil penalty, because petitioners presented no evidence it was unreasonable.

Labor Law § 218 (1) also requires respondent to include liquidated damages of 100% of the wages found due with the order. Liquidated damages must be paid by the employer unless the employer "proves a good faith basis to believe that its underpayment was in compliance with the law." Liquidated damages in the amount of 25% were assessed against petitioners in this matter[5] We uphold respondent's assessment of liquidated damages. Petitioners presented no evidence to show a good-faith basis to believe the underpayment was in compliance with the law.

Labor Law § 219 (1) provides that when the Commissioner determines that wages are due, the order directing payment shall include "interest at the rate of interest then in effect as prescribed by the superintendent of financial services pursuant to section fourteen-a of the banking law per annum from the date of the underpayment to the date of payment." Banking Law § 14-A sets the "maximum rate of interest" at "sixteen per centum per annum." The Commissioner's determination of interest due was required by statute and did not exceed the statutory limit, and is therefore not unreasonable or invalid.

Because we have modified the minimum wage order, the civil penalties, liquidated damages, and interest must be reduced proportionally.

The Penalty Order Is Revoked

The penalty order includes six counts for $500 each for a total of $2,500, but six counts at $500 each is $3,000. While this appears to be a simple mathematical error, it is an error nonetheless that can only be corrected by increasing the total amount in the penalty order. The Board cannot modify an order upward. (*See e.g., Matter of Beqiraj*, PR 11-393, at p. 9 n 3 [July 22, 2015] [Board precluded from modifying wages upward as the Board is bound by the hours used by the Commissioner to calculate back wages]). Accordingly, the entire penalty order is revoked.

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[5] While Labor Law § 218 (1) requires the Commissioner to include 100% liquidated damages in her orders to comply, Labor Law § 663 (2) provides that liquidated damages shall be calculated by the Commissioner as "no more than" 100% of the underpayments found due.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The petition for review as to petitioner Theodore Calligeros is dismissed;

2. The unpaid wages order pursuant to Article 6 is withdrawn;

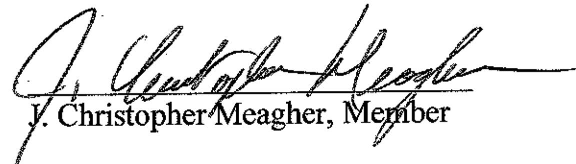
3. The minimum wage order is modified to revoke the $2,479.50 in spread of hours pay to Marvin Javier, reducing the total amount in the order from $125,089.83 to $122,610.33, and the civil penalty, liquidated damages, and interest are modified proportionally;

4. The minimum wage order as modified is affirmed;

5. The penalty order is revoked; and

6. The petition for review be, and the same is, otherwise denied.

Molly Doherty, Chairperson



J. Christopher Meagher, Member

Michael A. Arcuri, Member

Gloribelle J. Perez, Member

Dated and signed by the Members of the Industrial Board of Appeals in New York, New York, on October 24, 2018.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The petition for review as to petitioner Theodore Calligeros is dismissed;

2. The unpaid wages order pursuant to Article 6 is withdrawn;

3. The minimum wage order is modified to revoke the $2,479.50 in spread of hours pay to Marvin Javier, reducing the total amount in the order from $125,089.83 to $122,610.33, and the civil penalty, liquidated damages, and interest are modified proportionally;

4. The minimum wage order as modified is affirmed;

5. The penalty order is revoked; and

6. The petition for review be, and the same is, otherwise denied.

Molly Doherty, Chairperson

J. Christopher Meagher, Member

Michael A. Arcuri, Member

Gloribelle J. Perez, Member

Dated and signed by a Member
of the Industrial Board of Appeals
in Syracuse, New York, on
October 24, 2018.