STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of: ROBERTO C. GUENDJIAN A/K/A ROBERTO GUENGIN AND GRILLED STEAK, CORP. (T/A CHIVITO D'ORO), Petitioners, To Review Under Section 101 of the Labor Law: An Order to Comply with Article 19 of the Labor Law and an Order Under Articles 5 and 19 of the Labor Law, both dated August 3, 2015, - against - THE COMMISSIONER OF LABOR, Respondent.	DOCKET NO. PR 15-313 RESOLUTION OF DECISION

APPEARANCES

Moreira and Associates, PLLC, Jackson Heights (*Jorge W. Moreira* of counsel), for petitioners.

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

WITNESSES

Roberto C. Guendjian, Jorge W. Moreira, and Angel Gabriel Aramburu, for petitioners.

Alberto Wauters and Supervising Labor Standards Investigator Cloty J. Ortiz, for respondent.

WHEREAS:

On September 30, 2015, petitioners Roberto C. Guendjian and Grilled Steak Corp. filed with the Board a petition for review of two orders issued against them on August 3, 2015, by respondent Commissioner of Labor. Respondent filed her answer on November 5, 2015.

Upon notice to the parties, a hearing was held on June 28, 2016 and August 23, 2016, in New York, New York, before Administrative Law Judge Jean Grumet, the designated hearing officer in this proceeding. Each party was afforded a full opportunity to present documentary evidence, to examine and cross-examine witnesses, to make statements relevant to the issues, and to file post-hearing briefs.

The order to comply with Article 19 of the Labor Law (minimum wage order) directs payment of $23,464.50 to Vianey Aguirre for the period February 1, 2010 to February 6, 2012, $32,847.17 to Luis Calle for the period July 10, 2007 to August 7, 2011, and $44,556.49 to Alberto Wauters for the period January 6, 2009 to January 31, 2013, for a total of $100,868.16 in wages; 16% interest calculated to the date of the order in the amount of $52,938.37; 25% liquidated damages in the amount of $25,127.04; and a 100% civil penalty of $100,868.16, for a total amount due of $279,801.73.

The order under Articles 5 and 19 of the Labor Law (penalty order) imposes: (1) a $250.00 civil penalty for violating Labor Law § 661 and 12 NYCRR 137-2.1 by failing to keep and/or furnish true and accurate payroll records for each employee for the period July 10, 2007 through December 31, 2010; (2) a $250.00 civil penalty for violating Labor Law § 661 and 12 NYCRR 146-2.1 by failing to keep and/or furnish true and accurate payroll records for each employee for the period January 1, 2011 through January 31, 2013; (3) a $500.00 civil penalty for violating Labor Law § 661 and 12 NYCRR 146-2.3 by failing to furnish a wage statement to each employee with every payment of wages for the period January 1, 2011 through January 31, 2013; and (4) a $500.00 civil penalty for violating Labor Law § 162 by failing to provide employees at least 30 minutes off for the noon day meal, for the period July 18, 2007 through January 31, 2013, for a total amount due of $1,500.00.

The petition alleges that the orders are invalid and unreasonable because: (1) claimants Calle and Aguirre provided sworn statements denying or withdrawing any claims; (2) claimant Wauters was paid in full; and (3) petitioners were prevented from submitting additional evidence during the investigation. Petitioners also allege they were denied due process because DOL prevented them from submitting additional evidence during the investigation.

SUMMARY OF EVIDENCE

Testimony of Petitioner Roberto C. Guendjian

Petitioner Roberto C. Guendjian owns Grilled Steak, Corp., which operates the Chivito D'Oro restaurant in Queens, New York. Santiago Alavachin was the restaurant's manager from 2008 to 2013 and Angel Gabriel Aramburu has been manager since 2013. Guendjian, who lives in Uruguay, communicated with the manager daily by phone or computer and can watch the restaurant anytime through a video camera; both Guendjian and the manager can hire employees and determine their hours. The restaurant is open from 11:00 a.m. to 1:00 a.m. Employees work when needed, with a schedule that, in the case of all three claimants, changed over time. Employees were given 30 minutes per day to eat a meal, which petitioners provided for free. Employees punched a time clock, signed weekly time cards and were paid in cash based on figures calculated by an accountant to whom Guendjian sent the time cards.

Petitioners offered in evidence time cards for claimant Alberto Wauters, who began work in 2010, covering the period April 3, 2011 through January 31, 2013 except for the weeks ending January 1 and January 8, 2012 and October 14, 21 and 28, 2012. The first card, initialed "AW," shows an "accumulated total" of 52 hours 57 minutes for five work days with individual daily hours ranging from 10 hours 20 minutes to 11 hours 18 minutes, as well as a punch-in but no punch-out for Friday. The next card shows an "accumulated total" for six work days of 60 hours

39 minutes with individual daily hours ranging from 9 hours 18 minutes to 10 hours 49 minutes. There were no cards before April 2011, but petitioners offered in evidence weekly schedule forms purporting to show Wauters' weekly schedule for August through December 2010 as 11:00 a.m. to 7:30 p.m. with half an hour off for lunch, five days a week. The forms state overtime is not allowed without prior approval and a line for "Employee Signature" is filled out only with an "/s/."

Petitioners' payroll journals for 2010, 2011 and 2012 show wages for Wauters computed separately for regular weekly hours up to 40 and overtime hours above 40. The journals for 2011 and 2012 bear a "Date" of January 13, 2015 and the one for 2010 a "Date" of March 12, 2015. For the week ending April 3, 2011, for example, the journals show Wauters was paid $290.00 in regular wages for 40 hours ($7.25 per hour) and $141.38 in overtime wages for 13 hours ($10.88 per hour), a total of $431.38 in gross wages. The next week's journal shows $290.00 in regular wages and $222.94 in overtime wages for 20.5 hours, a total of $512.94. From August 2010 through March 2011, the journals show Wauters paid $300.00 for 40 hours ($7.50 per hour) each week. Guendjian testified he received the journals from the accountant about a week before the June 28, 2016 hearing and does not know when they were created.

Time cards (but not payroll journals) for Vianey Aguirre for pay periods ending April 3, 2011 through February 5, 2012, except for the week ending September 6, 2011, and Luis Calle for pay periods April 3, 2011 through August 7, 2011 were produced by petitioners at hearing. For the week ending April 10, 2011, the cards show Aguirre working an "accumulated total" of 62 hours 9 minutes, and Calle of 60 hours 2 minutes, in each case for a six-day workweek.

Guendjian testified that Calle settled and released his claims against petitioners in exchange for $16,000.00 which was paid in the form of two checks for $8,000.00 each. The general release and stipulation of settlement, dated May 18, 2015, is written in English, signed by Aramburu and Calle, and notarized by petitioners' attorney, Moreira. Guendjian testified that Aramburu and Calle contacted him to propose the settlement and release, and Guendjian accepted the proposal.

Guendjian testified that Aguirre is currently his employee and is "happy working with us."

Testimony of Jorge W. Moreira

Petitioners' attorney, Jorge W. Moreira, testified that he prepared the July 22, 2014 affidavit in Spanish after Aguirre told him what to write. The affidavit is on the letterhead of Moreira's law firm, notarized by Moreira, and signed by Aguirre. The affidavit states that Aguirre has worked at the restaurant for approximately six and a half years, has received all wages for all hours worked, and has nothing to claim. Attorney Moreira testified that Aguirre came to his law office "and I asked him if it was true that he had any claim and if he had any evidence of what he was claiming." Aguirre responded that he knew nothing about a claim, did not go to the Department of Labor, and did not sign any papers.

Testimony of Angel Gabriel Aramburu

Aramburu became manager of the restaurant in May 2013. Aguirre's hours in 2013 were the same as in 2016 – "more or less eight hours a day" six days a week. Aguirre punched a time card, which Aramburu forwarded to petitioners' accountant, who calculated the hours. Aguirre was paid in cash, and until 2015, no wage statements or pay receipts were provided to employees.

When Aramburu learned of respondent's investigation, he deemed it his duty to try to settle Calle's claim. Aramburu telephoned Calle and told him the settlement amount, and Calle agreed to settle. Calle and Aramburu went to attorney Moreira's office, where Calle signed the paperwork Moreira prepared, and Aramburu gave Calle the checks. Although petitioners only produced an English language document at hearing, Aramburu testified that Calle, who speaks only Spanish, "signed it in Spanish and in English." Aramburu translated the stipulation for Calle, who asked no questions at the meeting.

Testimony of Alberto Wauters

Claimant Alberto Wauters testified petitioners hired him on January 6, 2009, to work mainly as a grill cook. Alavachin interviewed and hired Wauters and gave him a six-day per week schedule: 10 hours on four days and 11 hours on two days. Initially, petitioners paid Wauters $450.00 per week. After four months, Wauters requested a raise and petitioners increased his salary to $472.00 per week. Alavachin paid Wauters weekly, but did not give him a receipt or wage statement with his pay. Wauters punched a time card at the beginning and end of each day he worked and signed the card at the end of the week. The cards accurately reflected the hours he worked. Wauters worked with Calle and Aguirre but does not know what their hours were. Wauters worked for the restaurant until January 31, 2013, when Guendjian called from Uruguay to fire him.

Wauters completed and signed a DOL claim form dated March 15, 2013, which states that he worked for the restaurant from January 6, 2009 to January 31, 2013, and was paid $470.00 per week for 63 hours, and was given 30 minutes off per day to eat a meal provided by the restaurant. Wauters testified that while a 30-minute meal break "was the routine," there were days when he was not able to take a break because the restaurant was too busy with customers.

Testimony of Supervising Labor Standards Investigator Cloty J. Ortiz

Senior Labor Standards Investigator Cloty J. Ortiz supervised respondent's investigation of petitioners. Calle signed a sworn claim form dated August 10, 2011, which states that he worked for the restaurant from July 10, 2007 to August 7, 2011, when he resigned after being hurt on the job. The claim states that Calle was hired by Guendjian, the owner, and was paid $430.00 per week from January 1, 2009 to December 31, 2009, $460.00 per week from January 1, 2010 to January 31, 2011, and $480.00 per week from February 1, 2011 to August 7, 2011. His hours were from 10:00 a.m. to 8:00 p.m. on Sunday, Wednesday, Thursday and Friday, 10:00 a.m. to 6:00 p.m. on Monday, and 10:00 a.m. to 10:00 p.m. on Saturday for a total of 60 hours per week, with no time off for meals although the restaurant did provide one meal a day. Calle's claim stated that he did not receive a wage statement or receipt.

A February 6, 2012 "Minimum Wage Field Investigation Employee Statement" completed by DOL investigator Julie Mondragon and signed by Vianey Aguirre and investigator Mondragon states that Aguirre was paid $320.00 per week in cash for a six day 62-hour workweek, including 15 minutes off for each of two meals provided each day by the restaurant. Aguirre punched a time clock and did not receive a wage statement.

In a May 16, 2014 letter, Ortiz notified the restaurant that Calle, Wauters and Aguirre asked respondent to decide whether their wages complied with minimum wage and overtime requirements. Ortiz's letter requested time and pay records including "time cards, sign in sheets,

computer logs, payroll journals or any other material," and stated that if records were not provided by May 28, 2014, respondent would accept the employees' statements as accurate. In a June 27, 2014 letter, investigator Mondragon stated that since the restaurant neither provided requested records, nor contacted respondent, DOL made a determination based on the workers' statements. Her letter enclosed a Notice of Labor Law Violation and "Recapitulation Sheet – Preliminary Report," and stated that if the restaurant did not agree, it could request a compliance conference, which Ortiz testified is an informal procedure presided over by a DOL hearing officer to settle and resolve an investigation.

In subsequent communications, Calle informed respondent that he punched a time clock for his work as a food preparer but not when he worked for petitioners as a porter and that he was paid a flat weekly rate for all hours worked. He provided respondent with various weekly rates he received during various time periods and, based on that information, respondent notified petitioners of new calculations concerning Calle, whose underpayment was recalculated at $48,847.17, rather than the previous $22,030.59.

A compliance conference requested by Moreira was held on January 15, 2015. According to a "Conference Summary Record" prepared by SLSI Ortiz, Calle stated that he punched a time clock for his work as a food preparer but not as a porter and that he was paid a flat weekly rate for all hours worked. The matter was adjourned to give petitioners additional time to produce time records and records of wages paid, which were to be submitted by January 31, 2015. On January 27, 2015, Moreira wrote to SLSI Ortiz that while petitioners were unable to produce all the records by the January 31, 2015 deadline, they "hope[d] to be able to meet with [DOL]" following Guendjian's March 3, 2015 return to New York. On April 17, 2015, respondent, having received nothing further, prepared an "Issuance of Order to Comply Cover Sheet" recommending issuance of an order reflecting underpayment to all three claimants and assessing a 100% civil penalty. SLSI Ortiz testified that the penalty recommendation was based, in part, on two prior DOL investigations, closed in 2010 and 2012 when the restaurant paid moneys owed, and on an absence of good faith shown by the restaurant's continued failure to follow legal requirements of which it was aware and failure to provide promised documentation.

DOL's contact log shows that Calle called DOL on April 24, 2015 to state that petitioners' attorney had asked to meet with him to discuss a settlement, to which respondent replied that DOL had not been contacted by petitioners regarding a settlement. On May 19, 2015, Moreira informed respondent that Calle had settled his claim and signed a release. On May 30, 2015, Moreira forwarded to respondent the May 18, 2015 Stipulation signed by Calle. Moreira's letter also stated that petitioners were unable to reach a settlement with Wauters and requested "another hearing."

SLSI Ortiz wrote to Moreira on June 11, 2015 that Calle could not settle respondent's claim but "we credited your client with having paid Mr. Calle $16,000.00;" that a compliance conference "is an informal proceeding to attempt to reach an amicable resolution" and "we have chosen to continue to pursue the claims;" and that the matter was being referred to the Commissioner for issuance of an Order to Comply, which petitioners could appeal to the Board.

Respondent calculated the minimum wage and overtime underpayments in the minimum wage order based on the daily and weekly hours worked and wages reported in the claims of Wauters and Calle, the July 7, 2014 narrative report clarifying Calle's claim, and Aguirre's February 6, 2012 Field Investigation Interview Statement. DOL's calculations also included an

additional hour's pay at the legal minimum wage rate for each day of work in which the "spread of hours" (the time from when an employee starts the day's work to when the employee stops work) was more than 10 hours. A meal credit was given to petitioners for all free meals provided and petitioners were credited for any time off reported by claimants. DOL also credited petitioners with the $16,000.00 paid to Calle pursuant to the May 2015 stipulation.

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] [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 Rules [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 provisions of Board Rule (12 NYCRR) § 65.39.

Petitioners Were Not Denied Due Process

At the outset, we reject petitioners' contention that they were denied due process because they were prevented by DOL from submitting relevant or additional evidence during the investigation. The Board has previously 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 [Sept. 14, 2016] at 6; *Matter of Angelo A. Gambino and Francesco A. Gambino (T/A Gambino Meat Market, Inc.)*, PR 10-150 [July 25, 2013] at p. 6).

Petitioners Failed to Maintain Required Records

An employer's obligation to keep adequate records is found in Labor Law §§ 195 and 661 and in DOL regulations. Through 2010, 12 NYCRR 137-2.1, and commencing January 1, 2011, 12 NYCRR 146-2.1,[1] require employers in the restaurant industry to maintain and preserve for six years, and make available to the Commissioner on request, weekly payroll records of, among other things, each employee's regular and overtime hourly wage rates; number of hours worked daily and weekly, including the time of arrival and departure for each employee working a spread of hours exceeding 10; gross wages; allowances or meal credits claimed; and money paid in cash. 12 NYCRR 137-2.2 and 12 NYCRR 146-2.3 require that employees when paid be furnished a statement listing hours worked, rates paid, gross wages, credits claimed for meals, and net wages.

[1] Through 2010, regulations applicable to this case are codified at 12 NYCRR Part 137, the Minimum Wage Order for the Restaurant Industry. As of January 1, 2011, that order was replaced by the Hospitality Wage Order covering the restaurant and hotel industries, codified at 12 NYCRR Part 146.

Such required record-keeping provides proof to the employer, the employee and the Commissioner that employees were properly paid.

Aramburu confirmed that petitioners did not begin providing wage statements until 2015, two years after the relevant period. It is undisputed that petitioners kept time cards that recorded employees' arrival and departure times, beginning on April 3, 2011, although they are missing for some weeks, and Calle did not punch in or out for hours worked as a porter. While petitioners did not produce the time cards to the Commissioner when so requested during the investigation, the evidence at hearing establishes them as a valid record of employees' arrival and departure times from April 3, 2011 until the end of the claim period.

We reject as an accurate record the weekly schedule forms for Wauters for August through December 2010. The forms are all identical and a line for "Employee Signature" is filled out only with an "/s/." Petitioners did not produce these forms until the hearing, long after respondent requested records, and provided no explanation of how and why the forms were supposedly created and used, why the line for "Employee Signature" was filled out only with an "/s/," or why the forms ceased to be used after December 2010. Even on their face, the forms were prepared in advance of work performed and were not a contemporaneous record of how many hours Wauters or anyone else spent working in a given week. Moreover, time cards for Wauters and the other two claimants beginning in April 2011 show that they routinely worked six days per week for hours which varied from day to day, often for over 60 hours per week, while the weekly schedule forms purport to show that Wauters worked five days per week for the same hours each day and that no employee was allowed to work overtime without specific authorization. There was no testimony or other evidence that petitioners changed their basic approach between December 2010 and April 2011 from a rigid 40-hour, five-day workweek that was identical each day and limited or barred overtime, to a schedule that was variable, had employees routinely work six days per week and required many hours of overtime. For these reasons, we conclude that the weekly schedule forms, even if they existed in 2010 and were not created later, were never more than fictional.

For similar reasons, we reject the payroll journals offered by petitioners as an accurate record of wages paid to Wauters, including purported overtime. These journals do not include all required information including money paid in cash. Petitioners never explained why they were kept only for Wauters and not the other two claimants. Guendjian obtained the journals from an unnamed accountant a week before the June 28, 2016 hearing and did not know when the records were created. The journals for 2011 and 2012 bear a "Date" of January 13, 2015 (two days before the compliance conference) and the one for 2010 a "Date" of March 12, 2015, which was soon after the date Moreira stated Guendjian would return from Uruguay, indicating that they were not contemporaneously maintained and created only for the DOL investigation. There was no further evidence about the journals, petitioners did not supply the "actual record of wages paid" requested at the January 15, 2015 conference, and all other credible and reliable evidence contradicts the notion that there were different rates for Wauters' regular and overtime hours.

Wauters credibly testified that Alavachin set his pay rate and paid him in cash, which was not disputed by petitioners. Although Wauters testified there were weeks when he worked fewer or more than 62 hours, petitioners did not prove that his wages also varied. Petitioners did not deny that they paid a flat weekly salary irrespective of the number of hours worked, nor did they claim Wauters was told he had different rates for regular and for overtime hours. Moreover, it is

undisputed that petitioners never provided Wauters with wage statements, which would provide verifiable proof of payment.

Petitioners failed to prove they maintained legally required payroll records throughout the relevant time period, and we credit claimants' testimony concerning the manner in which they were paid and wage rates.

DOL's Calculation of Wages in the Absence of Employer Records

Article 19 of the Labor Law, entitled "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]). The applicable minimum wage during the claim period was $7.15 an hour from July 10, 2007 to July 23, 2009, and $7.25 an hour from July 24, 2009 to January 31, 2013 (12 NYCRR 137-1.2). Article 19 also requires payment of time and one-half the regular wage rate for hours worked over 40 in a work week (12 NYCRR 137-1.3 and 12 NYCRR 146-1.4).

Labor Law § 196-a provides that when an employer fails to keep adequate records, the employer bears the burden of proving that wages were paid. 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 calculations to the employer" (See *Matter of Garcia v Heady*, 46 AD3d 1088 [3d Dept 2007]; *Matter of Bae v IBA*, 104 AD3d 571 [1st Dept 2013]; *Matter of Ramirez v Commissioner*, 110 AD3d 901 [2d Dept 2013]; *Matter of Mohammed Aldeen*, PR 07-093 [May 20, 2009], *aff'd sub nom, Matter of Aldeen v Industrial Appeals Bd.*, 82 AD3d 1220 [2d Dept 2011]).

Therefore, petitioners have the burden of showing that the Commissioner's order is invalid or unreasonable by a preponderance of the evidence of the specific hours that claimants worked and that they were paid for those hours, or other evidence that shows the Commissioner's findings to be unreasonable (*Matter of Ram Hotels, Inc.*, PR 08-078 [October 11, 2011]). When incomplete or unreliable wage and hour records are provided, 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" (*Matter of Hy-Tech Coatings v New York State Dept. of Labor*, 226 AD2d 378 [1st Dept 1996] *citing Mid-Hudson Pam Corp.*, 156 AD2d 818). The employer "cannot be heard to complain that the damages lack the exactness and precision of measurement that would be possible had he kept records" as required (*Anderson v Mt Clemens Pottery Co.*, 328 US 680, 688-89 [1949]; *see also Mid-Hudson Pam Corp.*, 156 AD2d at 821; *Matter of Mohammed Aldeen et al*, PR 07-093 [May 20, 2009], *aff'd sub nom, Matter of Aldeen v IBA*, 82 AD3d 1220 [2d Dept 2011]). Even if DOL estimates based on employee claims are imprecise, "reasonable estimates are allowed since it is the employer's burden to maintain accurate records" (*Matter of Karl Geiger and Geiger Roofing Co.*, PR 10-303 p 8 [Jan. 16, 2014], *aff'd sub nom., Matter of Geiger v DOL*, 131 AD3d 887 [1st Dept 2015]; *Reich v Southern New England Telecommunications Corp.*, 121 F.3d 58, 67 [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"]).

The Minimum Wage Order Is Modified Based on Petitioners' Time Cards

Alberto Wauters

Alberto Wauters credibly testified that he was hired January 6, 2009; typically worked a six-day week of approximately 62 hours with a half hour daily meal break; was paid $450.00 per week for four months beginning January 6, 2009 and $472.00 per week thereafter; and was provided one free meal a day. The time cards produced by petitioners at hearing, which Wauters agrees are accurate, generally support Wauters' estimate of the hours he worked. Wauters' statement is the best evidence for the time-period for which no time cards were available. The order must be modified, however, based on the accurate time cards provided by petitioners at hearing which show that petitioners owe Wauters $22,909.90[2] for the weeks ending April 3, 2011 through February 3, 2013. DOL's determination of the amount owed for the periods for which petitioners did not provide time cards is affirmed.

Luis Calle

Petitioners' principal challenge to the minimum wage order with respect to Luis Calle rests on an alleged settlement and release they executed with Calle and the $16,000.00 they paid him as a settlement of his claim during DOL's investigation. Although DOL subsequently credited petitioners with the $16,000.00 payment towards the amount due in the minimum wage order, petitioners cite *Rubycz-Boyar v Mondragon*, 15 AD3d 811 (3d Dept 2005), alleging that the settlement is an enforceable contract and no further monies are owed to claimant. That decision, however, bars further claims by the person who agreed to the release, but not a government agency not a party to the agreement. Calle's agreement to release petitioners and discontinue and terminate his DOL claim was not an agreement with DOL capable of binding respondent. The U.S. Supreme Court in *EEOC v Waffle House, Inc.*, 534 US 279 (2002) confronted a claim like petitioners' that a contract between an employer and an employee also bound the Equal Employment Opportunity Commission, to which the employee had complained, and found that: "It goes without saying that a contract cannot bind a nonparty" (*Id.* at 294).

Similarly, the New York Court of Appeals held in *People v Coventry First LLC*, 13 NY3d 108, 114 (2009) that "[l]ike the EEOC, the [New York] Attorney General should not be limited, in his duty to protect the public interest, by an arbitration agreement he did not join. Such an arrangement between private parties cannot alter the Attorney General's statutory role or the remedies that he is empowered to seek." The principle applies even more strongly to government enforcement of minimum labor standards. In that context, courts applying federal law have refused to bind even a private party to a settlement not first approved by a court or government agency, noting "the potential for abuse in such settlements" (*Cheeks v Freeport Pancake House, Inc.*, 796 F3d 199, 206 [2d Cir 2015]).

Petitioners argue that respondent should be bound because it was aware that an offer had been made, but declined to participate, and because settlements of disputes ought to be encouraged under Board Rules (12 NYCRR) § 65.42 (a). SLSI Ortiz testified without contradiction, however,

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[2] Our calculations were done based on the hours indicated in the time cards, claimant's statement that his weekly salary was $472.00 a week, that he generally received a 30-minute meal period and at least one free meal per work day, and includes one additional hour at minimum wage for each day the time cards show claimant worked more than 10 hours in a day during weeks where claimant's salary was less than he was entitled under the Minimum Wage Act.

that petitioners never sought respondent's participation. In any event, declining to participate in settlement would not bar respondent from enforcing the law (*see e.g.* Labor Law § 21 [Commissioner of Labor authorized to enforce Labor Law]).

A final argument by petitioners is that since Calle did not appear at the Board hearing as he did at the earlier compliance conference, his earlier statements are hearsay on which it is improper to rely. However, the "residuum rule" mentioned by petitioners, said to require first-hand testimony, "no longer obtain[s]" (*300 Gramatan Ave. Assocs. v N.Y. State Div. of Human Rights*, 45 NY2d 176, 180 [1978]; and *Matter of Aldeen v Indus. Appeals Bd.*, 82 AD3d 1220, 1221 [2d Dept 2011] [holding that hearsay can be sufficient proof in an administrative proceeding]).

We affirm respondent's determination of wages due to Calle for the period from July 10, 2007 through January 1, 2011, because respondent used the best available evidence, Calle's statement, and petitioners did not keep records for that time-period to show respondent's determination was unreasonable. We find that from the period from January 2, 2011 to April 2, 2011, petitioners owe Calle $4,504.25. We base this calculation on the hours and salary from indicated in Calle's claim form, including that he had no meal break and worked one day per week more than ten hours for which he is owed an additional hour's wage at the minimum wage for each week in which his salary was less than he was entitled under the Minimum Wage Act. We find that for the period from April 3, 2011 to August 7, 2011, the period for which time cards are available, petitioners owe Calle $5,843.05.[3]

Vianey Aguirre

Petitioners' challenge to the minimum wage order with respect to Aguirre is similar to their allegation with respect to Calle, except that petitioners rely on Aguirre's July 22, 2014 affidavit which was handwritten and notarized by Moreira on Moreira's law firm's stationery. The affidavit's statement "that I have received all the wages for the hours worked and that I have nothing to claim" says nothing specific about Aguirre's actual hours or pay, does not deny having given a specific statement concerning his hours and pay to DOL, and does nothing to dispute that statement. The time cards offered in evidence by petitioners for the period beginning April 3, 2011, themselves show Aguirre working hours similar to the 62-hour workweeks reflected in Aguirre's February 6, 2012 Field Investigation Interview Statement.

Petitioners presented no explanation for their failure to call Aguirre as a witness, even though Guendjian testified that Aguirre was still working for petitioners at the time of the June 28, 2016 hearing. We give no weight to the affidavit in the absence of a valid reason for not presenting testimony.

While petitioners allege that no claim was filed by Aguirre, a claim filed with DOL by a particular worker is not a necessary predicate for DOL investigation or Board affirmance of an order finding underpayment with respect to that worker (*Matter of Mohammed Aldeen et al*, PR

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[3] Based on the hours worked indicated by the time cards and the salary Calle indicated in his form. No meal break is included because Calle indicated in his claim that he did not have a 30-minute uninterrupted meal break. We find the meal credit given by DOL was reasonable, and our calculation includes one additional hour at minimum wage for each day the time cards show claimant worked more than 10 hours in a day during weeks where claimant's salary was less than he was entitled under the Minimum Wage Act.

07-093, at p. 13, *aff'd sub nom., Matter of Aldeen* 82 AD3d at 1220-1221; *See Matter of Mid-Hudson Pam Corp. v Hartnett,* 156 AD 2d at 821).

We find based on the accurate time cards provided by petitioners at the hearing that petitioners owe Aguirre $10,516.40 for the weeks from April 3, 2011 to February 5, 2012.[4] For weeks for which petitioners did not offer time cards, respondent's determination is affirmed in the absence of required records.

The Civil Penalty Assessed in the Minimum Wage Order is Affirmed

The minimum wage order assessed a civil penalty in the amount of 100% of the wages due. 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.*).

SLSI Ortiz testified that she assessed the 100% civil penalty based on petitioners' continued bad faith in failing to follow record keeping requirements after two previous investigations in 2010 and 2012 when petitioners paid monies owed, as well as petitioners' failure to provide promised documentation during the investigation of this matter. The Board finds that the considerations and computations the Commissioner was required to make in connection with the imposition of the civil penalty amount set forth in the minimum wage order were valid and reasonable. The civil penalties in the minimum wage order, however, must be modified proportionally based on the modified wages due discussed above.

Liquidated Damages Assessed in the Minimum Wage Order Are Affirmed

The minimum wage order assessed liquidated damages in the amount of 25% of the wages owed. Labor Law § 218[5] provides that when wages are found to be due, respondent shall assess against the employer the full amount of the underpayment or unpaid wages and an additional amount as liquidated damages, unless the employer proves a good faith basis for believing that its underpayment or nonpayment of wages was in compliance with the law. Petitioners offered no evidence to prove that they had a good faith basis to believe their underpayment was in compliance with the law. We therefore affirm the imposition of 25% liquidated damages in the minimum wage

[4] Based on the hours worked indicated by the time cards, and the salary information contained in Aguirre's interview sheet. Our calculations do not include a meal period because the interview sheet indicates two 15-minute breaks instead of one 30-minute break. We find the one meal credit per day given by DOL was reasonable, and include one additional hour at minimum wage for each day the time cards show claimant worked more than 10 hours in a day during weeks where claimant's salary was less than he was entitled under the Minimum Wage Act.

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

order. The liquidated damages in the minimum wage order must be modified proportionally based on the modified amount of wages due.

The Interest Assessed is Affirmed

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." Petitioners did not challenge the interest assessed in the minimum wage order. The issue is thereby waived pursuant to Labor Law § 101 (2), but the interest in the minimum wage order must be modified proportionally based on the modified principal.

The Penalty Order is Affirmed

Counts 1 and 2 of the penalty order assess a $250.00 civil penalty for violating Labor Law § 661 and 12 NYCRR 137-2.1 and a $250.00 civil penalty for violating Labor Law § 661 and 12 NYCRR 146-2.1, both for failing to keep and/or furnish true and accurate payroll records for each employee. Labor Law § 661 and 12 NYCRR 137-2.1 and 146-2.1 require employers to keep wage and hour records, including daily and weekly hours worked by each employee for a period of six years. As discussed above, we have found that petitioners failed to keep and/or furnish true and accurate payroll records as required by the Commissioner and we affirm counts 1 and 2 of the penalty order.

Count 3 of the penalty order assesses a $500.00 civil penalty for violating Labor Law § 661 and 12 NYCRR 146-2.3 by failing to give each employee a complete wage statement with every payment of wages. It is undisputed that wage statements were never provided to employees. We affirm this count of the penalty order.

Count 4 of the penalty order assesses a $500.00 civil penalty for violating Labor Law § 162, which requires employers to allow each employee a 30-minute uninterrupted meal break when working a shift of more than six hours extending over the noon day meal period. Petitioners argue that Calle's claim form stating "that he had no time for meals, but that he received one free meal each day" is contradictory. It is not. There is no discrepancy between finding that an employer provides a free meal (which respondent credited petitioners for doing, thereby reducing the total underpayment finding for all three claimants) and finding that employees are not accorded an uninterrupted 30-minute period during which to eat it. While Guendjian testified that employees were always provided an uninterrupted break, Wauters credibly testified that although breaks were the routine, on busy days, especially the weekends, they were not always provided. Aguirre and Calle indicated they were not given a 30-minute meal break. We affirm this count of the penalty order.

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NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. Respondent is directed to issue an amended minimum wage order based on our decision that may in no event exceed $23,464.00 due to Vianey Aguirre, $32,847.17 due to Luis Calle, and $44,556.49 due to Alberto Wauters; the civil penalty of 100 % must be recalculated based on the amended amount due and may not exceed $100,868.16; liquidated damages of 25% must be recalculated based on the amended amount due and may not exceed $25,127.04; and interest must be recalculated on the amended principal amount; and

2. The penalty order is affirmed; and

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

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
July 26, 2017.