STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of:	:	
N NGUYEN A/K/A THE NGUYEN AND 374 SALON INC. (T/A ENVY NAILS),	:	
Petitioners,	:	DOCKET NO. PR 17-030
To Review Under Section 101 of the Labor Law: An Order to Comply with Article 6, an Order to Comply with Article 19, and an Order Under Articles 6 and 19 of the Labor Law, all dated January 25, 2017,	:	RESOLUTION OF DECISION
- against -	:	
THE COMMISSIONER OF LABOR,	:	
Respondent.	:	

APPEARANCES

Stephen D. Hans & Associates, P.C., Long Island City (*Stephen D. Hans* of counsel), for petitioners.

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

WITNESSES

Antonio Vasquez, Maria Martinez, and Ahn Do, for petitioners.

Senior Labor Standards Investigator Jose Medina, Senior Labor Standards Investigator Erika Castillo, and Supervising Labor Standards Investigator Jeong Lee, for respondent.

WHEREAS:

On May 17, 2017, petitioners N Nguyen a/k/a The Nguyen and 374 Salon Inc. filed a petition with the Industrial Board of Appeals pursuant to Labor Law § 101 seeking review of three orders issued by respondent Commissioner of Labor on January 25, 2017. The Commissioner filed her answer on June 16, 2017.

The order to comply with Article 19 of the Labor Law (minimum wage order) demands that petitioners pay the Commissioner $31,948.28 in unpaid minimum wages due and owing to the

Alicia Flores,[1] Alicia Punina, and Esmilda Vasquez, for the period from October 16, 2011 to October 18, 2014, interest at the rate of 16% calculated to the date of the order in the amount of $13,452.91, 100% liquidated damages in the amount of $31,948.28, and a 100% civil penalty in the amount of $31,948.28. The total amount due is $109,297.75.

The order to comply with Article 6 of the Labor Law (unlawful deductions order) demands that petitioners pay the Commissioner $3,703.85 in unlawful deductions from wages due and owing to Ester Marin for the period from September 30, 2012 to October 19, 2014, interest at the rate of 16% calculated to the date of the order in the amount of $1,336.23, 100% liquidated damages in the amount of $3,703.85, and a 100% civil penalty in the amount of $3,703.85. The total amount due is $12,447.78.

The order under Articles 6 and 19 of the Labor Law (penalty order) assesses petitioners a civil penalty of $1,000.00 for violating Labor Law § 661 and 12 NYCRR 142-2.6 by failing to keep and/or furnish to the Commissioner true and accurate payroll records for each employee for the period from October 16, 2011 through October 18, 2014; a civil penalty of $1,000.00 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 the period from October 16, 2011 through October 18, 2014; a $1,000.00 civil penalty for violating Labor Law § 195(1) by failing to provide to employees, in writing, at the time of hiring, a notice containing the employees' rate of pay and the regular payday designated in advance by the employer, or by failing to obtain written acknowledgment from the employees of receipt of such notice, during the period from October 16, 2011 through October 18, 2014; and a $1,000.00 civil penalty for violating Labor Law § 198-b by demanding and receiving a kickback of wages from employees' wages from on or about October 16, 2011 through October 18, 2014. The total amount due is $4,000.00.

Hearings were held on February 7 and 8, and May 8, 2018 in New York, New York before Devin A. Rice, Counsel to the Board and the designated hearing officer in this proceeding. Each party was afforded a full opportunity to present documentary evidence, examine and cross-examine witnesses, make statements relevant to the issues, and file post-hearing briefs.

Petitioners allege the orders are invalid and unreasonable because Alicia Flores, Alicia Punina, Esmilda Vasquez, and Ester Marin were independent contractors and petitioners were not their employers. For the reasons set forth below we find petitioners failed to prove Flores, Punina, Vasquez, and Marin were independent contractors, but that Nguyen is not individually liable as an employer under the Labor Law.

I. SUMMARY OF EVIDENCE

Respondent's Investigation

As part of an industry-wide nail salon investigative sweep, investigators from respondent's Labor Standards and Unemployment Insurance Divisions and the Workers Compensation Board interviewed nail technicians working at Envy Nails located at 374 Fulton Street, in Brooklyn, on May 9, 2014. Investigators from the Division of Labor Standards conducted a second inspection

[1]A typo in the order incorrectly identifies her as Alicia Fulles. The order is amended to correct the typo.

on October 16, 2014. Senior Standards Investigator Jose Medina was the lead investigator and was supervised by Supervising Labor Standards Investigator Jeong Lee. Medina testified that based on an interview he conducted of an individual who identified herself as Alicia Punina whom he observed working as a nail technician at the salon on May 9, and his review of the notes of interviews conducted by other investigators on May 9 of Esmilda Vasquez, and on October 16 of Alicia Flores and Ester Marin, he concluded that the nail technicians were employees of the individual petitioner, Nguyen, and the corporate petitioner, 374 Salon Inc.

Medina testified that the nail technicians interviewed during the investigation indicated they were paid 50% commission each week in cash by "Ana," which was less than minimum wage for the number of hours they indicated that they worked each week, and that one technician mentioned that she received tips. Medina further testified that the technicians said they used tickets with the customers, but the investigators did not ask any of the technicians they interviewed for samples of the tickets, nor could he recall specifically asking petitioners during the investigation to produce the tickets. Medina believes that he heard that some technicians paid rent to petitioners for their work stations, but he never followed up on it. Medina estimated that each interview conducted on May 9 lasted ten minutes. Medina was not present at the October 16, 2014 inspection. Senior Labor Standards Investigator Erika Castillo, who was present at the October 16 inspection, testified that each interview that day lasted less than five minutes. Medina did not speak to Castillo or Verna Cheyne, the other investigator present at the October 16 inspection, about the interviews they conducted that day, nor did Medina or any other investigator contact any of the nail technicians interviewed during the investigation to verify the information they had provided or to gather additional information. Medina testified that when he tried to contact them to obtain additional information, he was unable to reach them.

The interview sheets contain the following information:

	Punina	**Vasquez**	**Marin**	**Flores**
Start time	10:00 am.	10:00 a.m.	10:00 a.m.	10:00 a.m.
End time	7:00 p.m.	7:30-8:00 p.m.	7:00 p.m.	7:30 p.m.[2]
Days	6	6	5	6
Pay rate	50% commission	50% commission	50% commission	50% commission
Paid by	Ana	Ana	Owner (not sure of name)	Ana
Hired by	Ana	Agency	Ana	Agency
Supervisor	None	Ana	Ana	N/A
Tips	N/A	N/A	$15-$20/day	$12/day
Deductions	No	N/A	No	No
Other			$150/month chair rental	

The interview sheets, which are generally consistent with each other, indicate that the nail technicians were either hired by an agency or by Ana, that Ana was the manager, that the technicians were paid weekly in cash, that no deductions were made from their pay, and that they provided their own tools. Medina testified that he did not interview the "employer," because no

[2] 5:00 p.m. on Sundays.

employer was present when the investigators were at the salon, and that he did not know who the employer was. Medina further testified that the technicians said Ana paid them, but they did not know whether she was an owner. Medina testified that none of the nail technicians mentioned the individual petitioner, Nguyen. Medina never spoke to Ana or Nguyen. Medina also testified that he sent requests for information to the employer at the salon's business address, but received no response, "[s]o we did not have anything to judge otherwise or contradict the evidence that we had gathered."

Supervising Labor Standards Investigator Jeong Lee testified that she reviewed the "service documents" prepared by the investigators. She explained that the orders were based on the information from the interview sheets since petitioners never provided information sufficient to show the technicians were independent contractors. The only information petitioners provided during the investigation was lease agreements, which Lee did not credit in the absence of area rental licenses or other information indicating the technicians were in business for themselves. Lee testified that Nguyen was never mentioned by any of the nail technicians when they were interviewed, and there is no evidence he supervised or ran the business. Because Nguyen's name appears in corporate records filed with New York Department of State as an individual to whom process can be served on the corporation, respondent assumed he was an employer.

Petitioners' Evidence

Anh Do testified that her role in the salon was limited to leasing the premises from the landlord and then finding an investor to pay for fixtures and construction to operate a nail salon at the location. Do testified that she obtained a lease from the landlord and subleased the space to 374 Salon Inc. Do further testified that Nguyen was an investor who paid for the fixtures, including the pedicure chairs and manicure stations, and any construction necessary to open the nail salon. Do explained that Nguyen incorporated the business and to her knowledge was the only officer or shareholder. Do further explained that Nguyen had no role in supervising or managing the salon and only visited the space on one or two occasions. According to Do, Nguyen lived mostly in Vietnam during the relevant time period and his only involvement in the company was to receive his investment back.

Do testified that she was not an owner, officer, shareholder or employee of 374 Salon Inc. She explained that her only contact with the salon once she subleased the space to 374 Salon Inc. was to lease space to nail technicians who wanted to work there and to collect rent once a week from the technicians who worked at the salon. Do testified that technicians came to her looking for work by word of mouth and that when space was available she vetted individuals interested in working at the salon to make sure they were "presentable", explained to them that they had to pay $300.00 a week to rent a station, told them they were not allowed to engage in any unlawful activity at the salon, and had them sign a written lease agreement.

The lease agreements state that the lessees are responsible for keeping their own materials and equipment to provide service to customers; that the lessor provides electricity and water; that the lessees agree to use the premises from 10:00 a.m. to 7:00 p.m. and must pay extra to use the premises outside of those hours; that lessees have their own keys; and that lessees will pay $300.00 rent on the first day of each month, or if lessees choose to pay weekly, the rent will be $50.00 per

week or a percent of the lessee's income, whichever is higher.[3] Do testified that she charged $300.00 a week, not $300.00 a month as written in the lease agreements. She explained that it was a typo she never corrected or worried about because she had a verbal agreement with the technicians for $300.00 a week and they understood the agreement. Do further testified that she did not charge extra if the technicians worked before 10:00 a.m. or after 7:00 p.m. She knew that the technicians sometimes did this but did not feel it was a problem.

Do testified that Esmilda Vasquez and Ester Marin did not work at the salon and that only one Alicia worked there. However, when shown a copy of a lease agreement for Esmilda Vasquez, Do agreed that it was a lease agreement from 374 Salon, Inc. but explained that she does not check the identities of individuals she leases space to and Esmilda Vasquez may not be the person's real name.

Do testified that she did not supervise or manage the technicians in any way, that she did not make their work schedules, that she did not supply any tools or materials, did not give them any instructions related to their work, and they did not contact her to mediate disputes with customers. Do further testified she was only present at the salon once a week for a brief time to collect rent from the technicians, unless she was meeting somebody new who was interested in renting a station, in which case she met the candidate at the salon to show the space and sign a lease agreement.

Do testified that she is aware that nail technicians are required to have an area renter's license to provide services to customers, but that she did not ask about this when leasing space to technicians, because she believed they were not her employees and it was their responsibility to have the proper permits. Do testified that each technician had a key to the premises and she did not know when or if the technicians showed up to work.

Do testified that she did not receive any part of the nail technicians' earnings other than the $300.00 weekly rent for the space. She provided DOL with the lease agreements during the investigation when requested, but did not provide ledgers of rents collected because "nobody asked for it."

Antonio Vasquez testified that he worked as a nail technician at 374 Salon Inc. during the relevant period. Vasquez testified that he had worked previously at another salon and was recommended to Do by a friend. Vasquez testified that he met with Do and she showed him the space, which he agreed to rent from her for $300.00 a week. Vasquez stated that Do did not tell him what hours he needed to work, how often to work, or what to wear. Vasquez testified that there was no manager or supervisor at the salon, each technician set their own prices for services, and that he bought his own equipment and supplies necessary for the work. He further testified that he had business cards with his name and personal cell phone number on them that he distributed to potential customers and could take jobs outside the salon without any requirement to notify petitioners or Do. Vasquez also testified that he did not write or provide tickets to customers and did not have an area renter's license or insurance. Vasquez testified nine technicians worked at the salon, and remembered some of their names: Michelle, Flor, Kathy, Christie, and Anna, who is not the same person as Ahn Do. Vasquez testified that he charged $25 for a color gel

[3] None of the leases in evidence has a percentage indicated. The lines are left blank. Only one lease agreement in evidence, the lease agreement of Esmilda Vasques, states that rent will be paid $50.00 per week. The other lease agreements are blank for weekly rent.

manicure and anywhere from $25 to $50 for a pedicure. He testified that he served anywhere from six to eight customers a day and earned $380 to $400 per day. Vasquez also testified that he never did pedicures and did not know anything about the pedicure chair.

Maria Martinez, another nail technician, also testified she was referred by a friend to Do and that she understood she would rent a table and not receive any salary from the salon. Do told Martinez when she signed the lease that the location was open for business from 10:00 a.m. to 7:00 p.m. Martinez, however, sometimes worked outside of these hours and was not required to pay extra rent to Do. Martinez testified that she paid $300.00 a week for a station in the salon, that she set her own prices for services, had business cards with her name and cell phone number, was paid directly by her customers for services rendered, bought her own tools and supplies, made her own schedule, did not have a manager or supervisor, could work outside the salon, and did not give Do a percentage of her earnings. Martinez further testified that although she did not have an area renter's license when she first started working at the salon, she eventually obtained one. Martinez testified that she was present when respondent's investigators visited the salon. A male investigator interviewed her, she answered truthfully, and he took notes of her responses but did not ask her to sign anything. Martinez estimated the interview took 15 minutes. There is no interview sheet in the record for Maria Martinez. Martinez testified that nine technicians worked at the salon. The names she remembered were Antonio Vasquez, Flor, Alicia, Mary, Katherine, and Anna, who is not the same person as Ahn Do. She testified that only one Alicia worked at the salon, and she does not know an Esmilda or Ester.

II. 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.

Burden of proof

The petitioners in this proceeding have the burden of proving by a preponderance of the evidence that the orders are invalid or unreasonable (State Administrative Procedures Act § 306; Labor Law § § 101 and 103; Board Rules [12 NYCRR] § 65.30).

Nguyen is not individually liable as an employer

At the outset, we find that Nguyen is not individually liable as an employer under Articles 6 and 19 of the Labor Law. Petitioners presented credible, unrebutted evidence that Nguyen, although he incorporated 374 Salon Inc., was an investor with no operational or managerial control in the business. Do credibly testified that Nguyen was an investor in the business whose role was limited to purchasing fixtures and paying for the initial construction work, that he was present at the location only on one or two occasions, and that he had no role in operating the business, managing, directing or controlling the nail technicians, or determining the rents the technicians paid to Do to lease their stations. None of the nail technicians interviewed by respondent's investigators mentioned Nguyen, and the record shows he was named as an individual employer by respondent because he appears in Department of State Division of Corporation records as an individual to whom DOS will mail process on behalf of the corporation. An individual's name listed in corporate records is not a sufficient basis for individual liability under the Labor Law, and

is not proof of employer status under Articles 6 and 19 of the Labor Law absent evidence that the individual "suffered or permitted" the nail technicians "to work" (Labor Law §§ 651[6], 190 [3], 2 [7]). An individual's status as an investor without any evidence of operational control or managerial responsibilities cannot support a determination of employer status under Articles 6 and 19 of the Labor Law (*Matter of Robert Rubin*, PR 09-227 at p6 [February 14, 2014]). For these reasons, we find Nguyen is not individually liable as an employer and the orders are revoked with respect to him.

The nail technicians are employees

Petitioners had the burden to prove by a preponderance of the evidence that the nail technicians named in the orders – Ester Marin, Alicia Flores, Alicia Punina, and Esmilda Vasquez were not employees, but were independent contractors. To meet this burden, petitioners needed to offer credible and reliable testimony that the specific nail technicians named in the orders were as a matter of economic reality in business for themselves and were not dependent upon someone else's business to render services (*Brock v Superior Care Inc.*, 840 F2d 1054, 1059 [2d Cir 1988]).

Under Articles 6 and 19 of the Labor Law, "employee" is defined as "any individual employed or permitted to work by an employer" (Labor Law § 651 [5]; *see also* Labor Law § 190 [2] [similar definition under Article 6]). "Employer" is defined as "any individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons acting as an employer" (Labor Law § 651 [6]; *see also* Labor Law § 190 [3] [similar definition under Article 6]). "Employed" is defined as "permitted or suffered to work" (Labor Law § 2 [7]). The federal Fair Labor Standards Act (FLSA) also defines "employ" to include "suffer or permit to work" (29 USC § 203 [g]). Because the statutory language is nearly 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 FSupp2d 184, 189 [SDNY 2003]).

To determine whether an individual is an "employee" covered by the Labor Law, or an independent contractor excluded from its protections, "the ultimate concern is whether, as a matter of economic reality the workers depend upon someone else's business for the opportunity to render business or are in business for themselves" (*Brock v Superior Care Inc.*, 840 F2d at 1059). Factors to be considered in assessing such "economic reality" include: "(1) the degree of control exercised by the employer over the workers; (2) the workers' opportunity for profit or loss; (3) the degree of skill and independent initiative required to perform the work; (4) the permanence or duration of the working relationship; and, (5) the extent to which the work is an integral part of the employer's business" (*Id.* at 1058-59). "No one of these factors is dispositive; rather, the test is based on the totality of the circumstances" (*Id.* at 1059).

Petitioners failed to prove by a preponderance of the evidence that Marin, Flores, Punina, and Vasquez did not work at the salon or were independent contractors. We do not credit the testimony offered by petitioners' witnesses that Marin and Vasquez did not work at the salon and that only one Alicia worked there. Do denied that Vasquez worked at the salon despite a lease agreement in evidence for "Esmilda Vasquez" and provided no credible explanation for the existence of a lease agreement for an individual who did not work at the salon but was observed working there by respondent's investigators. Petitioners' witnesses claimed only one Alicia worked at the salon, but said a person named "Flor" worked there. It is not unreasonable to find that "*Flor*" is Alicia *Flor*es where the record shows that relationships were informal and full names

were not known or used. We do not credit petitioners' evidence of who worked at the salon. Respondent's evidence, however, is reliable. Respondent's investigators observed Marin, Flores, Punina, and Vasquez working at 374 Salon, Inc. and interviewed them. Petitioners presented no credible evidence to rebut that they worked there, and failed to provide names for all the technicians who worked at the salon during the claim period.

While petitioners may have exercised minimal control over the nail technicians, the lease agreements state the hours during which the technicians may work and that they must pay extra if they work outside of those hours. We do not credit the testimony offered by petitioners that Do did not enforce the leases as written. Her explanation that the leases contained typos she never corrected and were superseded by a verbal agreement was not credible. We also do not credit the testimony of Antonio Vasquez and Maria Martinez that the leases were not enforced as written. Their explanation that they paid $300.00 per week to rent a table at the nail salon when the lease states $300.00 per month was not credible. Vasquez's testimony about how much he charged customers, how many customers he generally had per day and how much he earned each day was also not credible as those quantities were inconsistent with each other. Further, Vasquez testified about the prices he charged for pedicures and then testified that he never did pedicures so couldn't testify about how technicians shared the use of the pedicure chair. We give little weight to his testimony because it was too inconsistent. That the nail technicians may have had an opportunity for profit and loss in that they provided their own supplies at minimal expense, set their own prices for services to the extent the market would bear, and paid monthly rent to secure a space, does not, by itself, indicate they were independent contractors, where the work was an integral part of the petitioners' business. We find that unlicensed nail technicians do not have sufficient skill or independent initiative to be considered separate business entities from the salon where they work. Petitioners presented no evidence that Marin, Flores, Punina, or Vasquez had an area renter's license that would indicate they were in business for themselves in the appearance enhancement industry, which includes nail salons (*see* General Business Law § 400, 12 NYCRR 160.1 [d]). Petitioners also failed to produce any evidence that Marin, Flores, Punina, or Vasquez held insurance or paid self-employment taxes. We find under the totality of the circumstances that Marin, Flores, Punina, and Vasquez were not as a matter of economic reality in business for themselves, rather they were dependent on petitioners to render services. Marin, Flores, Punina, and Vasquez are employees under the Labor Law.

The minimum wage order is affirmed

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 142-2.2). The minimum wage order finds based on interviews with three employees that petitioners failed to pay minimum wages in the amount $31,948.28 to those employees. Respondent believed based on employee interviews that petitioners paid each employee 50% commission on fees collected from for services provided. An employer must pay its employees at least minimum wage and overtime for each week worked when wages are paid on a commission basis (12 NYCRR 142-2.9), and an employee's regular rate of pay when paid on a commission basis is derived by dividing the total hours worked during the week with the employee's total earnings (12 NYCRR 142-2.16). Tips may be considered part of the minimum wage under certain circumstances (12 NYCRR 142-2.5), but no allowance is available where the employer does not

maintain weekly records of the claimed allowance (*id*; *Matter of Nick Malegiannakis et al.*, PR 09-254 at p9 [May 30, 2012]). A tip allowance was nonetheless included in respondent's calculations for those technicians who stated they received tips. Respondent's determination of the amount of minimum wages owed to Alicia Flores, Alicia Punina, and Esmilda Vasquez is based on information contained in their interview sheets stating the number of hours they worked per week, that their basis of pay was 50% commission, and stating the amount of commissions they typically earned per week. Respondent used this information to determine a derived hourly rate, which was below minimum wage. Respondent, therefore, found that petitioners owed Flores, Punina, and Vasquez, the difference between what they should have been paid under Article 19 and what petitioners actually paid them in commissions.

The Labor Law requires employers to maintain payroll records that include, among other things, its employees' daily and weekly hours worked, wage rate, gross and net wages paid, and any allowances claimed as part of the minimum wage (Labor Law §§ 195 and 661, 12 NYCRR § 142-2.6). Employers are required to keep such records open to inspection by the Commissioner or a designated representative at the place of employment (*Id.*). Employers are further required to furnish each employee a statement with every payment of wages listing the hours worked, rates paid, gross and net wages, and any allowances claimed as part of the minimum wage (*Id.*). The Labor Law also requires employers to provide employees written notice at the time of hiring of their rates of pay, and the basis thereof, along with other relevant information and to obtain a written acknowledgement of receipt of the notice from the employee (Labor Law § 195 [1]). The petitioners, who did not consider the nail technicians to be employees, did not maintain or produce any of the records required by law. In the absence of these required records, petitioners bear the burden of proving that the disputed wages were paid (Labor Law § 196-a; *Angello v Natl. Fin. Corp.*, 1 AD3d 850, 851 [3d Dept 1989]; *Heady v Garcia*, 46 AD3d 1088 [3d Dept 2007]). 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 Matter of Bae v Industrial Board of Appeals*, 104 AD3d 571 [1st Dept 2013], *cert denied* 21 NY3d 858 [2013]). The petitioners have the burden of showing 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 [October 11, 2011]). Where no wage and hour records are available, 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" (*Hy-Tech Coatings v New York State Dept. of Labor,* 226 AD2d 378 [1st Dept 1996] *citing Mid Hudson Pam Corp. v. Hartnett*, 156 A.D.2d 818 [3d Dept 1989]; *see also Matter of Bae v Industrial Board of Appeals*, 104 AD3d 571).

Petitioners may meet their burden of proof 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]). Petitioners failed to establish the precise hours worked by the nail technicians. Do testified that she did not

know when the technicians worked or have any way to track their time since, according to her, they worked for themselves. Petitioners also produced no records of any wages paid to the employees, or, even, of the rents Do alleged she collected from them. The testimony of Antonio Vasquez and Maria Martinez offered by petitioners was not sufficiently specific or reliable on the hours worked by or wages paid to Alicia Flores, Alicia Punina, and Esmilda Vasquez to meet petitioners' burden of proof to show the *precise* hours they worked or to negate the reasonableness of respondent's determination. While respondent's investigation was flawed in many respects, petitioners cannot meet their burden of proof solely by attacking respondent's investigation (*see Angello v National Finance Corp.*, 1 AD3d at 853 [assertions that Commissioner's order was not based on "credible proof" does not shift burden from employer with inadequate records]; *Matter of Mohammed Aldeen et al.*, PR 07-093 p15 [May 20, 2009], *aff'd Matter of Aldeen v Industrial Bd of Appeals*, 82 AD3d 1220 [2011]). In the absence of contemporaneous payroll records for its employees, it was petitioners' burden to submit sufficient affirmative evidence to negate the Commissioner's determination of wages owed.

We find that the observation of respondent's investigators that Alicia Flores, Alicia Punina, and Esmilda Vasquez worked in the nail salon 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. As discussed above, we do not credit petitioners' testimony that Vasquez did not work for petitioners or that only one Alicia worked there. In the absence of any credible evidence to the contrary, we affirm the minimum wage order.

Civil penalty

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 that civil penalty was unreasonable.

Liquidated Damages

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 100% were assessed against petitioners in this matter[4]

[4] 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.

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.

Interest

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

The unlawful deductions order is affirmed

Labor Law § 193 (1) prohibits employers from making any deduction from the wages of an employee or requiring a payment by separate transaction, except deductions or payments that are made in accordance with the provisions of any law, rule or regulation or are authorized in writing by the employee and are for the benefit of the employee, and are limited to payments for insurance premiums, pension or health and welfare benefits, contributions to charitable organizations, payments for United States bonds, payments for dues or assessments to a labor organization, and similar payments for the benefit of the employee. The unlawful deductions order determined that petitioners illegally deducted $3,703.85 from Ester Marin's wages from September 30, 2012 to October 19, 2014. Respondent based this determination on Marin's statement to investigators that petitioners charged her $150.00 a month to rent a work station in the salon. Rental of a work space is not a deduction authorized by law (*Id.*). As discussed above, we find that Ester Marin was an employee of 374 Salon, Inc. Do admitted that she charged rent to employees. The unlawful deductions order is affirmed.

Civil penalty

Labor Law § 218 (1) provides that if respondent determines an employer has violated certain provisions of Article 6, including making unlawful deductions from wages, 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 that civil penalty was unreasonable.

Liquidated Damages

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 100% 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.

Interest

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

The penalty order is affirmed

Pursuant to Labor Law § 218 (1), the penalty order assesses civil penalties of $1,000.00 each against petitioners for the following counts.

Count one, for failing to maintain required records (Labor Law § 661; 12 NYCRR 142-2.6); count two, for failing to give each employee a complete wage statement with every payment of wages (Labor Law § 661; 12 NYCRR 142-2.7); count three for failing to provide to employees, in writing, at the time of hiring, a notice containing the employees' rate of pay and the regular payday designated in advance by the employer (Labor Law § 195 [1]); and count four, for demanding and receiving a kickback from employees' wages (Labor Law § 198-b). Petitioners presented no evidence that they maintained required records, provided wage statements with each payment of wages, or provided employees at the time of hiring with a notice of pay rate and designated pay day. The first three counts of the civil penalty are affirmed.

Do denied that petitioners demanded or received kickbacks, and respondent presented no credible or reliable information to sustain the assessment of a civil penalty against petitioners for violating Labor Law § 198-b, which defines a kickback in relevant part as:

> "Whenever any employee who is engaged to perform labor shall be promised an agreed rate of wages for his or her services, be such promise in writing or oral . . . it shall be unlawful for any person, either for that person or any other person, to request, demand, or receive, either before or after such employee is engaged, a return, donation or contribution of any part or all of said employee's wages, salary, supplements, or other thing of value, upon the statement, representation, or understanding that failure to comply with such request or demand will prevent such employee from procuring or retaining employment. Further, any person who directly or indirectly aids, requests or authorizes any other person to violate any

[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.

of the provisions of this section shall be guilty of a violation of the provisions of this section."

(Labor Law § 198-b [2]). While demanding or requiring that an employee pay rent in order to stay employed may be a kickback, respondent did not produce evidence that all the elements of the statute were met. Count four is revoked.

NOW, THEREFORE IT IS HEREBY RESOLVED THAT:

1. The orders are revoked with respect to N Nguyen a/k/a The Nguyen; and
2. The minimum wage order is affirmed with respect to 374 Salon Inc. and amended to change the name of Alicia Fulles to Alicia Flores; and
3. The unlawful deductions order is affirmed with respect to 374 Salon Inc.; and
4. Counts one through three of the penalty order are affirmed with respect to 374 Salon Inc.;
5. Count four of the penalty order is revoked; and
6. The petition for review be, and the same hereby is, granted in part and denied in part.

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
at New York, New York,
on August 8, 2018.

of the provisions of this section shall be guilty of a violation of the provisions of this section."

(Labor Law § 198-b [2]). While demanding or requiring that an employee pay rent in order to stay employed may be a kickback, respondent did not produce evidence that all the elements of the statute were met. Count four is revoked.

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4. Counts one through three of the penalty order are affirmed with respect to 374 Salon Inc.;
5. Count four of the penalty order is revoked; and
6. The petition for review be, and the same hereby is, granted in part and denied in part.

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
at Utica, New York,
on August 8, 2018.