STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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| In the Matter of the Petition of:<br><br>GIULIANA M. OSORIO AND GENARO VARA AND MEX-ITALIAN PIZZA INC. (T/A MARIO'S PIZZA),<br><br>Petitioners,<br><br>To Review Under Section 101 of the Labor Law: An Order to Comply with Article 19 and an Order Under Articles 5 and 19 of the Labor Law, both dated February 1, 2017,<br><br>- against -<br><br>THE COMMISSIONER OF LABOR,<br><br>Respondent. | : | DOCKET NO. PR 17-039<br><br>RESOLUTION OF DECISION |

**APPEARANCES**

*Law Offices of Tejal Shah, P.C.*, East Meadow (*Tejal Shah* of counsel), for petitioners.

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

**WITNESSES**

Giuliana Osorio and Genaro Vara for petitioners.

Juan Cuautle, Moises Cuautle, and Senior Labor Standards Investigator Erica Castillo for respondent.

**WHEREAS:**

Petitioners filed a petition in this matter on March 20, 2017, pursuant to Labor Law § 101, seeking review of an order issued against them by respondent Commissioner of Labor on February 1, 2017. Respondent filed her answer to the petition on April 26, 2017.

Upon notice to the parties a hearing was held in this matter on September 20, 2017, in New York, New York before Vilda Vera Mayuga, then Chairperson of the Board, and the designated hearing officer in this proceeding. Each party was afforded a full opportunity to present

documentary evidence, to examine and cross-examine witnesses, and to make statements relevant to the issues.

The order to comply with Article 19 (minimum wage order) under review directs compliance with Article 19 and payment to respondent for unpaid wages to two claimants in the amount of $71,293.00 for the time period from June 10, 2012 to June 2, 2013, interest continuing thereon at the rate of 16% calculated to the date of the order in the amount of $31,759.24, liquidated damages in the amount of $71,293.00, and assesses a civil penalty in the amount of $35,646.50, for a total amount due of $209,991.74.

The order under Articles 5 and 19 of the Labor Law (penalty order) assesses a $500.00 civil penalty for violating Labor Law § 661 and 12 NYCRR 142-2.3 by failing to give each employee a complete wage statement with every payment of wages from on or about June 1, 2012 to June 5, 2013; an $800.00 civil penalty for violating Labor Law § 661 and 12 NYCRR 142-2.1 by failing to keep and/or furnish payroll records for each employee from June 10, 2012 to June 2, 2013; a $500.00 civil penalty for violating Labor Law § 661 and 12 NYCRR 142-2.5 by paying employees on a non-hourly rate basis from June 10, 2012 to June 2, 2013; and a $500.00 civil penalty for violating Labor Law § 162 by failing to provide employees with at least 30 minutes off for the noon day meal from June 10, 2012 to June 2, 2013. The total amount due in the penalty order is $2,300.00.

Petitioners allege that the orders are invalid and unreasonable because the respondent miscalculated the wages due, failed to correctly account for wages that were paid and incorrectly assessed the hours worked. Petitioners further allege that the interest, liquidated damages and civil penalty are incorrectly calculated and excessive; the look-back period is excessive; and, the petitioners were deprived of their due process rights by respondent to present evidence to show they complied with the Labor Law.

## SUMMARY OF EVIDENCE

*Wage Claims*

In June 2013, two claimants filed claims with respondent alleging they were owed unpaid wages. Claimants worked in a pizzeria. Both claimants identified themselves in the claim forms and testified at the hearing. The claim form for Juan Cuautle asserts that he worked at the pizzeria from June 1, 2012 until June 5, 2013 and that he worked 12 hours per day, six days per week and was paid $650.00 as a weekly salary. Moises Cuautle's claim form asserts that he worked in the pizzeria from June 1, 2012 until June 5, 2013 and that he worked 12 hours per day, six days per week and was paid $500.00 per week from June 1, 2012 to October 31, 2012 and $540.00 per week from November 1, 2012 to June 5, 2013.

*Testimony of Petitioner Giuliana Osorio*

Giuliana Osorio (Osorio) is the owner and president of Mex-Italian Pizza, Inc. T/A Mario's Pizzeria (the pizzeria), located in Ozone Park, Queens, New York. She became the owner of the pizzeria in June 2012 when she was twenty-five years old. It was her first time owning her own business. The pizzeria was open Monday through Saturday from 11:00 a.m. until 10:00 p.m. and

closed on Sundays during the claim period. During the claim period, the pizzeria only had three employees working during any given time, including Osorio's husband, Genaro Ariza Vara. All the employees worked the same number of hours per week and made the same hourly rate of pay. Osorio did not know that she was required to maintain time sheets of the hours that her employees worked and had she known she was required to, she would have done so. She began keeping time sheets when she learned that she was required to do so.

Osorio knew the claimants before purchasing the pizzeria. She went to high school with Moises Cuautle and knew Juan Cuautle to be his brother. Juan Cuautle was employed at the pizzeria at the time that Osorio purchased the business, as was her husband, and she asked Juan Cuautle if he would continue working there after she purchased it. He worked for petitioners at the pizzeria from June 2012 until June 2013. He made pizzas, answered the phone, helped customers, took orders, washed dishes, cooked and prepared food. Juan Cuautle worked 40 hours per week, Mondays to Fridays from 11:00 a.m. until 7:00 p.m. and he occasionally worked overtime hours on Saturdays. He earned $7.15 or $7.25 per hour, whatever the minimum wage was at the time, and he was paid time and a half if he worked on a Saturday since those were overtime hours. The pizzeria was closed on holidays and for one week in August.

Moises Cuautle was an employee from March 2013 to June 2013. He worked forty hours per week, from 11:00 a.m. to 7:00 p.m., earning $7.25 per hour. Moises Cuautle never worked overtime.

The employees could eat food from the restaurant when they were hungry. There were no scheduled break times since it was a small business. The employees were given thirty-minute lunch breaks and fifteen minute breaks throughout the day.

*Testimony of Petitioner Genaro Ariza Vara*

Genaro Ariza Vara (Vara) is married to Osorio. He worked at the pizzeria for about 10 years prior to his wife purchasing it. He continued to work there after his wife purchased it. He sometimes worked more than 40 hours per week if he was needed but he was paid for a 40-hour work week. Juan Cuautle would also sometimes work more than 40 hours per week if they needed the help, but he would be paid at the overtime rate when he worked overtime. Moises Cuautle worked 40 hours per week and never worked any overtime hours while he worked at the pizzeria.

*Testimony of Claimant Juan Cuautle*

Juan Cuautle worked at the pizzeria as a general helper; he made pizza, washed dishes, helped customers, and answered phones during the claim period. He worked Mondays to Saturdays from 10:00 a.m. to 11:00 p.m. The pizzeria opened at 11:00 a.m. but he started work at 10:00 a.m. to prepare for the opening. He stayed until the pizzeria closed at 11:00 p.m. or shortly thereafter to clean up. He first earned $500.00 per week, then got an increase to $550.00 per week, and then another increase to $600.00 or $650.00 per week during the claim period, all paid in cash on Saturdays. Juan Cuautle did not take breaks and he would eat whenever he could find time.

*Testimony of Claimant Moises Cuautle Amanteca*

Moises Cuautle Amanteca (Moises Cuautle) began working for the pizzeria on June 3, 2012. Vara hired him and told him he would work a twelve-hour shift. His brother, Juan Cuautle also worked there. When he began the job, he worked from 10:00 a.m. to 11:00 p.m. but later Vara asked him to start work at 9:00 a.m. to prepare the food. He worked six days per week, Monday to Saturday, and was paid $500.00 per week. When he changed his schedule to start work at 9:00 a.m., he earned $550.00 per week. Moises Cuautle was responsible for dishwashing and helping in the kitchen. He was paid in cash on Saturdays.

*Testimony of Senior Labor Standards Investigator Erica Castillo*

Senior Labor Standards Investigator Erica Castillo (Castillo) did not have any knowledge about the respondent's investigation for this case and only looked at the documents related to the investigation prior to the hearing. She testified that respondent never received any employment records from petitioners during the investigation and she testified that based on the documents in the investigative file and the testimony that she heard at the hearing, the wage amounts that the respondent determined were owed were correct.

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Board makes the following findings of fact and conclusions of law pursuant to the provisions of the Board Rules of Procedure and Practice (12 NYCRR) § 65.39.

Petitioners' burden of proof in this matter was to establish by a preponderance of the evidence that the orders issued by the Commissioner are invalid or unreasonable (State Administrative Procedure Act § 306 [1]; Labor Law §§ 101, 103; Board Rules [12 NYCRR] § 65.30; *Matter of Angello v Natl. Fin. Corp.*, 1 AD3d 850, 854 [3d Dep't 2003]; *Matter of RAM Hotels, Inc.*, Docket No. PR 08-078, at p. 24 [October 11, 2011]). 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 [12 NYCRR] § 66.1 [c]).

Petitioners Were Not Denied Due Process

We reject petitioners' assertion that they were denied due process because they believe the respondent did not consider sufficient testimony or documentary evidence before issuing the orders to comply. 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]*, Docket No. PR 14-283, at p. 6 [September 14, 2016]; *Matter of Angelo A. Gambino and Francesco A. Gambino [T/A Gambino Meat Market, Inc.]*, Docket No. PR 10-150, at p. 6 [July 25, 2013]; *Matter of David Fenske [T/A Amp Tech and Design, Inc.]*, Docket No. PR 07-031, at p. 8 [December 14, 2011]).

The Lookback Period and the Relevant Period

The petition asserted that the "look back" period for determining whether there were underpaid wages was excessive. We also reject this claim. 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. The subject claims filed with the DOL are dated June 10, 2013 and the "look back" period reflected in the wage order is to June 10, 2012. Respondent only went back one year from the date that the complaint was filed, which is within the permissible six-year period that the Commissioner could have sought wages (*see e.g. Matter of Ammar A. Zabarah*, Docket No. PR 14-062, at pp. 8-9 [April 29, 2015]).

Petitioners' Failure to Maintain Payroll Records

Article 19 of the Labor Law requires employers to maintain, for six years, certain records of the hours their employees worked and the wages they paid them (Labor Law § 661). The records must show for each employee, among other things, the number of hours worked daily and weekly, the amount of gross wages, deductions from gross wages, and allowances, if any (*id.*; 12 NYCRR 142-2.1 [a]). Employers must keep such records open for inspection by the Commissioner or a designated representative or face issuance of a penalty (Labor Law §§ 661 and 662 [2]; 12 NYCRR 142-2.1 [e]). In the absence of required payroll records, the Commissioner may draw reasonable inferences and calculate unpaid wages based on the "best available evidence" drawn from employee statements or other evidence, even if results may be merely approximate (*Matter of Ramirez v Commissioner of Labor*, 110 AD3d 901, 901-02 [2d Dep't 2013]; *Matter of Mid Hudson Pam Corp. v Hartnett*, 156 AD2d 818, 820-21 [3d Dep't 1989]).

It is undisputed that the petitioners did not maintain wage and hour records for the relevant period. Petitioners' tax records for one claimant for the relevant period are insufficient to meet the records requirement under the Labor Law as they do not contain the hours worked, the rate of pay, or the gross and net wages (Labor Law § 661). As such, the Commissioner correctly determined that petitioners failed to maintain legally required payroll records.

The Wage Order is Affirmed

Article 19 of the Labor Law, entitled "Minimum Wage Act," provides that every employer must pay each of its non-exempt employees a minimum hourly wage for each hour of work (Labor Law § 652 [1]), and one and one-half of their regularly hourly wage rate for hours worked over 40 in a week (12 NYCRR 146-1.4).

In the absence of wage and hour records for the relevant period, petitioners then bear the burden of proving that the disputed wages were paid (Labor Law § 196-a; *Garcia v Heady*, 46 AD3d 1088, 1090 [3d Dept 2007]; *Matter of Angello,* 1 AD3d at 854). As the Appellate Division stated in *Matter of Mid Hudson Pam Corp v Hartnett*, (156 AD2d at 821), "[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." Therefore, the 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 the claimants worked and that they

were paid for these hours, or other evidence that shows the Commissioner's findings to be invalid or unreasonable (*Matter of Ram Hotels, Inc.*, Docket No. PR 08-078, at p. 24). Here, the Commissioner used the best available evidence, which was the claim forms filed by Juan and Moises Cuautle (*Matter of Ramirez*, 110 AD3d at 901-902; *Hy-Tech Coatings v New York State Dept. of Labor*, 226 AD2d 378, 379 [2d Dept 1996] *citing Matter of Mid Hudson Pam Corp. v Hartnett*, 156 A.D.2d at 820-821). The petitioners failed to meet their burden of proof to demonstrate that the calculations made by the respondent were unreasonable.

We find that Osorio and Vara's testimony was not credible because it was vague and conclusory (*Matter of Frank Lobosco and 1378 Coffee, Inc.*, Docket No. PR 15-287, at p. 6 [May 3, 2017] *citing Matter of Young Hee Oh*, Docket No. PR 11-017 at p. 12 [May 22, 2014] [employer cannot shift its burden to DOL with arguments, conjecture, or incomplete, general, and conclusory testimony]). Osorio and Vara both testified that the pizzeria was open from 11:00 a.m. to 10:00 p.m. and that both claimants worked from 11:00 a.m. to 7:00 p.m. Osorio's testimony about who worked in the pizzeria until it closed at 10:00 p.m. was not sufficiently specific she seemed uncertain about who worked until closing. Vara's testimony did not add any specific information to this subject. Both claimants credibly testified about beginning their work days at 10:00 a.m.[1] so that the pizzeria could have food ready for the 11:00 a.m. opening. Additionally, both claimants' testimony about working until 11:00 p.m., when the pizzeria closed, so that they could clean up each day was credible. In contrast, the petitioners' testimony that employees only worked during the open hours of the pizzeria was not credible. Osorio's testimony that the claimants did not work 72 hours per week was also just a bare assertion. Osorio and Vara testified that Juan Cuautle did work some overtime hours when he worked on Saturdays and that he was paid time and a half for those hours but neither petitioner gave any specific testimony or other evidence regarding when or how often he worked those overtime hours. Osorio testified that Juan Cuautle was paid an hourly rate which was the minimum wage rate that was in effect at the time but she could not recall precisely what that hourly rate was.[2] Osorio and Vara's testimony about Moises Cuautle was also conclusory and not credible. They testified that he never worked overtime hours and that he worked from March 2013 to June 2013, Mondays through Fridays, from 11:00 a.m. to 7:00 p.m. We give little credence to the testimony regarding Moises Cuautle's employment because Osorio and Vara described his hours, wages and responsibilities to be the same as the other employees and there were few specifics about his employment. We also give more credence to Moises Cuautle's testimony about his employment commencing in June 2012, not March 2013 as petitioners

[1] Moises Cuautle testified that he initially started his work day at 10:00 a.m. but subsequently he was asked to start working at 9:00 a.m. to do additional food preparation and that his wages were increased by $50 per week at that time. Petitioners did not refute this testimony. His claim form sets forth a 10:00 a.m. start time for the duration of his employment and the Commissioner relied on the claim form as the best evidence to assess the wages owed. While Moises Cuautle testimony may indicate that he worked even more hours than are reflected in the claim form and the order to comply, the Board may not modify wages upward (*see e.g., Matter of Beqiraj*, Docket No. 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]).

[2] Juan Cuautle testified that his wages increased from $500.00 per week to $550.00 per week, and increased again to $600.00 or $650.00 per week, but he did not testify about when those increases occurred. His claim form states that he was paid $650.00 per week and this is the amount that the Commissioner relied on to determine the wages owed. Petitioners neglected to ask Juan Cuautle questions on cross examination about when his changes in pay occurred and since it was their burden to prove the orders to comply were unreasonable or invalid, we affirm the wage calculations for Juan Cuautle as set forth in the order to comply (State Administrative Procedure Act § 306 [1]; Labor Law §§ 101, 103; Board Rules [12 NYCRR] § 65.30; *Matter of Angello*, 1 AD3d at 854; *Matter of RAM Hotels, Inc.*, PR 08-078, at p 24).

asserted, because he and his brother, Juan Cuautle, gave detailed testimony about Moises Cuautle's commencing his employment then. Moises Cuatle remembered that he started work on June 3, 2012 because that is the last day of a holiday where he is from and he recalled that the petitioners wanted to open the business before that holiday ended but they were unable to do so. Osorio, alternatively, testified that Moises Cuautle commenced employment in March 2013 because she started working somewhere else so they needed more help at the pizzeria but she gave no specifics about her other employment and precisely when she worked at the other employment. As was the case throughout her testimony, Osorio's testimony about Moises Cuautle's period of employment was vague. Vara offered no more specifics in his testimony regarding Moises Cuautle.

We also do not find the petitioners' testimony regarding break times proved that the requisite break times were provided to employees. Consistent with the claimants' testimony, Osorio testified that employees could "grab a slice" and ". . . if they felt hungry, they just grabbed something and they ate it." Her testimony that employees took thirty-minute lunches and fifteen minute breaks throughout the day was not credible because she only testified to that after her lawyer specifically asked her if the employees take more than thirty minutes for their lunch break. Prior to that question, Osorio's testimony was not that employees took thirty minutes or more for lunch but that they would "grab" food when they were hungry, which was consistent with Vara's and the claimants' testimony regarding breaks, and thus we give more credence to it. Petitioners did not meet their burden to prove that they provided required break time to the claimants.

Not only did petitioners fail to offer any documentary evidence showing when the claimants worked, but petitioners' testimony was also insufficiently detailed regarding the claimants' work schedule, rate of pay, and wages paid. It is well established that such general and conclusory testimony regarding the amount of work performed by an employee is insufficient to meet the employer's burden of proof. (*Matter of Frank Lobosco and 1378 Coffee, Inc.*, Docket No. PR 15-287, at p. 6 *citing Matter of Young Hee Oh*, Docket No. PR 11-017, at p. 12). Petitioners' vague testimony that Juan Cuautle did work overtime and that he was paid for it without any specific details about when or how much overtime and their similarly bare statements that Moises Cuautle did not work any overtime are insufficient to shift the burden to respondent (*Matter of Frank Lobosco*, Docket No. PR 15-287, at p. 6 *citing Matter of James A. Kane*, Docket No. PR 11-092, at p. 7 [April 29, 2015]). Petitioners failed to meet their burden to produce evidence of the "precise" work performed and wages paid to claimants (*Anderson v Mt. Clemens Pottery*, 328 US 680, 687 [1949] [*superseded on other grounds by statute*). We, therefore, affirm the Commissioner's wage calculation in the unpaid wages order.

## Interest

Labor Law § 219 (1) provides that when the Commissioner determines that wages are due, then the order directing payment of those wages 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." Here, respondent correctly determined that claimants were not paid all wages owed and petitioners did not offer any evidence to challenge the imposition of interest. We affirm the interest imposed in the unpaid wages order.

Liquidated Damages

Labor Law § 218 (1) also requires respondent to include liquidated damages in the amount 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.[3] Here, respondent correctly determined that claimants were not paid all wages owed and petitioners' only evidence challenging the liquidated damages was testimony that Osorio was a young, first-time business owner, and was not aware of her legal obligations. We are not compelled that Osorio's age nor the fact that she had not previously owned a business relieve her of her obligations to comply with the Labor Law. We affirm the liquidated damages imposed in the unpaid wages order.

The 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." A civil penalty of up to 200% shall be assessed 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 50 % civil penalty against petitioners, which did not exceed the amount allowed by the statute. We affirm the civil penalty because petitioners presented no evidence that the civil penalty was unreasonable.

The Penalty Order is Affirmed

Labor Law § 218 (1) provides that where a violation is for a reason other than an employer's failure to pay wages, the order shall direct payment to respondent of a civil penalty in an amount not to exceed $1,000.00 for a first violation. In this case, respondent assessed a $500.00 penalty against petitioners for failure to furnish each employee with a wage statement for the relevant period, which petitioners conceded. Respondent assessed an $800.00 penalty against petitioners for failing to keep and/or furnish true and accurate payroll records for each employee for the relevant period, which petitioners also conceded. Thus, we affirm those two counts of the penalty order since petitioners did not present any evidence challenging the validity or reasonableness of those counts. Respondent assessed a $500.00 penalty against petitioners for failing to pay employees an hourly rate. As discussed above, petitioners merely testified that they paid an hourly wage without providing any other evidence. We were unpersuaded by that testimony and, thus, affirm the third count of the penalty order. Respondent assessed a $500.00 penalty against petitioners for failing to provide employees at least thirty minutes off for the noon day meal when working a shift of six hours or more. As discussed above, we did not find Osorio's

[3] 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.

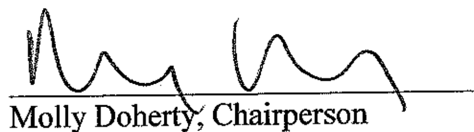
testimony that the claimants received thirty minutes for their lunch breaks credible. Thus, we affirm the fourth count of the penalty order.

**NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:**

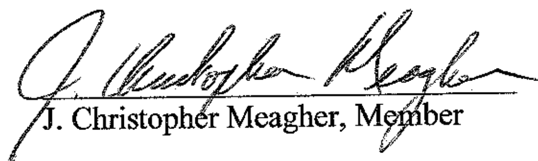
1. The unpaid wages order is affirmed; and

2. The penalty order is affirmed; and

3. The petition for review be, and it hereby is, denied.



Molly Doherty, Chairperson



J. Christopher Meagher, Member

Michael A. Arcuri, Member

Gloribelle J. Perez, Member

Date and signed by the Members
of the Industrial Board of Appeals
in New York, New York, on
December 12, 2018.

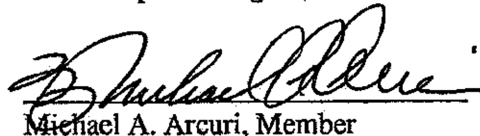
testimony that the claimants received thirty minutes for their lunch breaks credible. Thus, we affirm the fourth count of the penalty order.

**NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:**

1. The unpaid wages order is affirmed; and
2. The penalty order is affirmed; and
3. The petition for review be, and it hereby is, denied.

Molly Doherty, Chairperson

J. Christopher Meagher, Member



Michael A. Arcuri, Member

Gloribelle J. Perez, Member

Date and signed by a Member
of the Industrial Board of Appeals
in Utica, New York, on
December 12, 2018.