STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of: JAMES MICHAEL FOLEY AND REEL FAST FISHING ADVENTURES, INC. (T/A HAMPTON LADY BEACH BAR AND GRILL), Petitioners, 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 April 14, 2017, - against - THE COMMISSIONER OF LABOR, Respondent.	DOCKET NO. PR 17-097 RESOLUTION OF DECISION

APPEARANCES

James Michael Foley and Jenny Dorfman, Patchogue, for petitioners *pro se*.

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

WITNESSES

Gerber Martinez, Daniel Antonio Matamoros Rojas, Andrew Czaplick, Labor Standards Investigator Urvashi Aggarwal, and James Michael Foley, for petitioners.

Senior Labor Standards Investigator Angela Dean, for respondent.

WHEREAS:

Petitioners James Michael Foley (hereinafter "Foley") and Reel Fast Fishing Adventures, Inc. (T/A Hampton Lady Beach Bar and Grill) (hereinafter "restaurant") filed a petition in this matter on June 12, 2017, pursuant to Labor Law § 101, seeking review of orders issued against them by respondent Commissioner of Labor on April 14, 2017. Respondent filed her answer to the petition on October 5, 2017.

Upon notice to the parties a hearing was held in this matter on March 2, 2018 and March 12, 2018, in Garden City, New York, before Vilda Vera Mayuga, the then Chairperson of the

Industrial Board of Appeals 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 of the Labor Law (minimum wage order) under review directs compliance with Article 19 and payment to respondent for underpaid wages to two claimants in the total amount of $7,402.10 for the period from May 5, 2015 to August 7, 2015, interest continuing thereon at the rate of 16% calculated to the date of the order in the amount of $1,9998.77, assesses 100% liquidated damages in the amount of $7,402.10, and a 100% civil penalty in the amount of $7,402.10, for a total amount due of $24,205.07.

The order under Articles 5 and 19 of the Labor Law (penalty order) assesses a $1,000.00 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 from on or about May 5, 2015 through August 7, 2015; a $1,000.00 civil penalty for violating Labor Law § 661 and 12 NYCRR 146-2.2 by failing to give each employee at the start of employment, written notice in English and any other language spoken by the new employee as their primary language, of the employee's regular hourly rate of pay, overtime hourly rate of pay, the amount of tip credit, if taken and the regular payday from on or about May 5, 2015 through August 7, 2015; a $1,000.00 civil penalty for violating Labor Law § 661 and 12 NYCRR 146-2.3 by failing to provide each employee a statement with every payment of wages, listing the hours worked, rates paid, gross wages earned, any allowances claimed, deductions and net wages during the period from on or about May 5, 2015 through August 7, 2015; and a $1,000.00 civil penalty for violating Labor Law § 161 by failing to allow employees of factory, mercantile establishment, hotel, restaurant, or freight or passenger elevator in any building or in the care, custody or operation of any such elevator, at least twenty-four consecutive hours of rest in any calendar week during the period from on or about May 5, 2015 through August 7, 2015. The total amount due in the penalty order is $4,000.00.

Petitioners allege that the orders are invalid and unreasonable because (1) the claimants were paid in full and on time for all hours worked as documented in their payroll records and that no employee worked more than 40 hours in a given week, (2) payroll records were supplied to the respondent upon request, (3) a written notice of pay was provided to the claimants at the start of their employment, (4) wage statements were provided to the claimants, and (5) the claimants were provided with at least 24 consecutive hours of rest in each calendar week.

SUMMARY OF EVIDENCE

Wage Claims

The wage claim filed for Gerber Martinez (hereinafter "Martinez") states that he started working at the restaurant on "4/15" and ended his employment on August 7, 2015. He was paid $15.00 per hour and was never paid overtime during the relevant period. He worked seven days in each of his "last weeks" and was only paid for 40 hours of work during those weeks. The wage claim filed for Daniel Antonio Matamoros Rojas (hereinafter "Matamoros") states that he started working at the restaurant on "4/15" and ended his employment on August 7, 2015. He worked Monday to Sunday, seven days per week and was paid $14.00 per hour for every hour.

Petitioners' Evidence

Testimony of Claimant Gerber Martinez

Martinez testified that he started working at the restaurant in the beginning of May 2015. A friend told Martinez that Foley needed a worker. When Martinez met Foley, Foley told him that he needed a person to clean the restaurant from 6:30 a.m. to 9:30 a.m. and help in the kitchen after the cleaning was complete. When Martinez started working for Foley, the restaurant was not yet open for the season and he did not work a regular schedule. He worked generally from 6:30 a.m. to 4:00 p.m.

Martinez could not recall the exact date that the restaurant opened but stated that it was either the end of May or the beginning of June. When the restaurant was open for the season, Martinez initially worked seven days per week. He later worked six days per week. The restaurant was open daily from 10:00 a.m. to 10:00 p.m. except Saturday, when the restaurant closed at 11:00 p.m. He reported to work at 6:30 a.m. as instructed by Foley. Martinez had a key to the restaurant, provided by Foley, and only one other employee, Matamoros, was present at the restaurant at 6:30 a.m. When he arrived for work, he would clean the restaurant's interior and exterior as needed. General cleaning would be completed by 9:30 a.m. each morning. At 9:30 a.m., other employees of the restaurant would arrive. After he was done cleaning, he would then assist with food preparation, deliveries, cooking and servicing the outdoor bar. After the restaurant closed for the day, he would clean the outside bar, stock beer and clean the kitchen, finishing work between 11:00 p.m. and 12:00 a.m. He was not given meal breaks but testified that he did eat during short breaks. He used a punch card to enter his time.

Martinez testified that he was initially paid $12.00 per hour but was given cash payments in addition to his hourly rate which when combined he thought totaled a $15.00 per hour wage. He was later given a raise to $15.00. He was paid on Fridays by the restaurant's manager and was paid by both check and cash. He was paid straight time for all hours worked. The cash he received was payment for hours worked above 40 in each week.

When asked about a different daily start time contained in the respondent's file, Martinez testified that he told the respondent that he worked from 10:00 a.m. to 10:00 p.m. because that is when he was working in the kitchen. He started work at 6:30 a.m., however, to clean the restaurant. His last day was a Saturday. He left the restaurant after Foley started yelling at Matamoros and he did not want there to be any further confrontation with Foley.

Martinez filed a complaint with the New York State Division of Human Rights (hereinafter "DHR"). His complaint states, in relevant part, that he was not paid for all hours worked, was never paid for overtime, punched in at 7:00 a.m. or 9:00 a.m. and left work at 11:30 p.m. or 12:00 a.m., and did not receive the same breaks his "American co-workers" received.[1]

[1] According to an undated DHR Determination and Order After Investigation, the complaint was ordered dismissed and the file closed with a finding of No Probable Cause, in part because Martinez no longer wished to pursue the complaint.

Testimony of Claimant Daniel Antonio Matamoros Rojas

Matamoros did not remember the exact date he began working at the restaurant but thought that it was the last week of April 2015. When he first started, he worked seven days per week. After a new manager arrived, he worked six days per week. The manager arrived sometime in June 2015. Matamoros began work each day at 6:30 a.m. He arrived with Martinez because they commuted together, and Martinez had been provided a key by Foley. Prior to their arrival, Foley turned the restaurant's alarm off. In the morning, Matamoros assisted Martinez with cleaning the restaurant. Matamoros would clean the bar area first, clean the floors and take out garbage. After the cleaning was finished at approximately 9:30 a.m., he would then work on food preparation. Food preparation would finish at 1:00 p.m. Matamoros would then assist in the kitchen as needed and wash dishes. When the restaurant closed for the night, he would take the garbage out, wash any remaining dishes and clean the kitchen. He would leave cleaning the rest of the restaurant for the following day. He finished work at 11:00 p.m.

Matamoros testified that he was paid a rate of $12.00 per hour and was later given a raise to $14.00 per hour. Matamoros received meals at work but testified that he was not provided with breaks. He was initially paid in cash by Foley and later by check and cash after the manager arrived. Matamoros could not remember how much he was paid in cash each week but did remember that he once received $400.00, which was the highest amount of cash he ever received. Matamoros would record his time in a sign-in book kept at the restaurant. Later, when the manager arrived, they began using a punch card machine. Matamoros did testify that he worked only 18 hours during the week ending June 14, 2015 because his child was born that week, but that was the only week that he worked significantly fewer hours then his regular schedule.

Matamoros also submitted a complaint to the DHR.[2] His complaint, in relevant part, states that he would work from 6:00 a.m. to 12:00 a.m., he was denied food, and that he was not paid for all hours worked. Matamoros's last day of work was August 7, 2015, when he was fired by Foley.

Testimony of Andrew Czaplick

Andrew Czaplick (hereinafter "Czaplick") began working at the restaurant in late May 2015. He initially was paid $12.00 per hour and was later given a raise to $14.00 per hour. He worked five days a week but would sometimes work six day per week if needed. Czaplick testified that he worked the lunch shift, from 11:00 a.m. to 6:00 p.m. or 7:00 p.m., or the dinner shift, from 4:00 p.m. or 5:00 p.m. to closing, which would be as early as 10:30 p.m. or as late as after midnight. When he started working at the restaurant, there was a notebook at the server station that was used by employees to enter their hours worked. He would enter his name, the time he arrived and the time he left. Czaplick never worked both shifts on the same day. He testified that he took a half hour meal break and was provided with a free staff meal or he could order off the menu at a 50% discount. He worked in the restaurant's kitchen alongside the dishwashers, prep cooks and line cooks. He was provided with a copy of the restaurant's rules, which contained his rate of pay, the overtime rate and kitchen rules. He testified that he was paid by check only, which was given to him as a sealed check created by a payroll company. He was never paid in cash.

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[2] According to an undated DHR Determination and Order After Investigation, the complaint was ordered dismissed and the file closed with a finding of No Probable Cause.

Czaplick testified that he never saw Martinez or Matamoros get paid in cash, only by check. He testified that he worked with both claimants and that both claimants would arrive at the same time, between 10:00 a.m. and 11:00 a.m. He would not necessarily know the start time or end time of other employees if they worked a different shift. He also testified that Martinez did not work Sundays because he played in a band in church. Czaplick recalled that Martinez and Matamoros and a third employee would arrive together in the same car but that "someone would wait in the car." Martinez's and Matamoros's last day of work was August 7, 2015.

Testimony of Labor Standards Investigator Urvashi Aggarwal

Investigator Urvashi Aggarwal (hereinafter "Aggarwal") testified that she interviewed Foley and two employees at the restaurant on May 16, 2016. Czaplick was interviewed and reported that he received a wage statement and was provided with one meal at no cost while he worked. Aggarwal also interviewed the restaurant's chef, who reported working five or six days a week, receiving a half hour meal break and a wage statement. She did not interview any other employees. Aggarwal also made a request for petitioners' records through a written notice of revisit which she personally delivered to Foley during the May 16, 2016 visit. Aggarwal sent an email follow-up, again requesting petitioners' payroll records.

Aggarwal conducted a phone interview with both claimants with the assistance of a Spanish-speaking investigator. During the interview, Martinez reported that he worked from May 4, 2015 to August 7, 2015, six days per week with a 30-minute meal break each day. Martinez reported that he was paid on the books for only 40 hours and in cash for all other hours worked. He also reported signing in and out of work on timesheets. Aggarwal's notes state that Martinez reported working 10:00 a.m. to 10:00 p.m. Aggarwal acknowledged that the case's contact log contains notes indicating that Martinez's first day of work at the restaurant was April 27, 2015. Aggarwal calculated an underpayment using May 4, 2015, however, as Martinez's start date because that was the date provided by the claimant during the phone interview. Matamoros was also interviewed by phone with the assistance of a Spanish-speaking investigator. Matamoros reported that he worked seven days per week from 10:00 a.m. to 10:00 p.m. with a start date of May 20, 2015. Aggarwal acknowledged that the case's contact log contains notes indicating Matamoros's working hours as 8:00 a.m. to 12:00 a.m. Aggarwal, however, calculated the underpayment using the hours of 10:00 a.m. to 10:00 p.m. because those were the hours provided by the claimant during the phone interview.

Aggarwal testified that respondent did eventually receive payroll records from petitioners for one claimant, Matamoros, but, she testified that they did not include daily hours worked and did not correspond with the number of hours worked as was reported by Matamoros. As such, Aggarwal computed an underpayment. Aggarwal explained that because Martinez and Matamoros reported receiving multiple breaks throughout the day, she credited petitioners with providing a 30-minute meal period for each day. She also credited the petitioners with providing two free meals each day to both claimants. The calculations also include an additional hour's pay at the legal minimum wage rate for each day of work in which the "spread of hours" was more than 10 hours.

Aggarwal testified that petitioners were noncompliant with the Labor Law in that they failed to pay overtime based on the statement of the claimants, the hours contained in the submitted payroll records were inconsistent with the claimants' statements, and petitioners failed to submit all the requested payroll records. She further testified that while the claimants acknowledged that

they were provided notice of their rate of pay it was not done so in writing nor in the primary language the claimants spoke, as was required. She testified that she issued a single violation for failing to provide a day of rest because only one claimant, Matamoros, stated that he worked seven days per week. She was unaware of any prior violations committed by the petitioners. Aggarwal testified that she had not seen the DHR documentation prior to the hearing.

Testimony of Petitioner James Michael Foley

Foley began operating the restaurant in 2014. Foley denied providing Martinez and Matamoros with a key to the restaurant because providing them with a key to a "$4,000,000.00 restaurant [would be] absolutely absurd." Foley testified that during the restaurant's operation, he kept true and accurate time sheets using time sheets, a sign-in book and an electronic time clock. The time clock was used only for a short time because the staff were not able to use it correctly. Foley, or the manager, in his absence, reported hours worked to the payroll company.

The restaurant's records of daily hours worked for the claim period were destroyed as the result of a burst pipe in the winter of February of 2016. Foley, however, had personally and separately kept track of the daily hours for the claimants, and a third employee, because he had observed all three working when they were not scheduled. This issue continued throughout their employment at the restaurant. He kept a record of their arrival and departure times in the notes section of his smartphone. He entered their hours based on personally observing the three employees or by reviewing the restaurant's records. These smartphone entries were then transcribed by Foley and his fiancée into time sheets sometime in 2016 as a result of the DHR complaints filed by the claimants. During a discussion with respondent's counsel two weeks prior to the scheduled hearing, respondent's counsel suggested Foley look for any other timesheets as they would be helpful to his case. Foley then located the transcribed time sheets for Martinez and Matamoros in a storage container. The time sheets cover weekly pay periods from May 22, 2015 through and including August 9, 2015. The week of June 1, 2015 through June 7, 2015 contains the following entry on Tuesday for both claimants note: "4P - 8P / 4 Rain." There are no other dates that contain a reference to "rain."

Foley testified that he did ultimately provide respondent with the payroll records on August 24, 2016. He acknowledged that he may not have promptly responded to the respondent but that was due to the demands of the business. He also annexed payroll records and W-2s to his petition which were admitted into evidence at the hearing. Foley provided each claimant with a notice of their rate of pay and of their payday when they were hired. He also provided the claimants with wage statements. Foley testified that there was no need for overtime and that no one worked seven days per week explaining that "[t]he claims of these individuals that they worked six or seven days as a regular schedule is false. Seasonal restaurants in general, especially those that are affected by inclement weather, make it almost impossible to provide regular and consistent schedules to employees."

Respondent's Evidence

Testimony of Supervising Labor Standards Investigator Angela Dean

Angela Dean (hereinafter "Dean") is responsible for making sure investigations under her lead are fairly investigated and concluded in a timely manner. She became involved in the instant

case when it was brought to her for review. While she did not personally prepare the referral cover sheet for the order under review, she did review it prior to its issuance. Petitioners were found to be uncooperative because they failed to provide payroll records as requested. Dean testified that in the absence of records being produced, respondent will credit the statement of the claimants as true and accurate for the purposes of computing an underpayment. A 100% civil penalty was imposed. Dean testified that in assessing a civil penalty, she would consider if an employer was cooperative and showed good faith. Dean testified that liquidated damages can be up to 100% and are required under the labor law. Dean testified that had the payroll information been timely submitted and that it had corresponded with daily time cards, petitioners may have been found to be cooperative.

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 Rules (12 NYCRR) § 65.39.

Burden of Proof

Petitioners' burden of proof in this matter is 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; *Garcia v Heady*, 46 AD3d 1088, 1090 [3d Dept 2007]; *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]).

An Employer's Obligation to Maintain Adequate Payroll Records

The Labor Law requires employers to maintain accurate payroll records that include, among other things, their 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 § 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 and maintain them for no less than six years (*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 (Labor Law § 661; 12 NYCRR 142-2.7). The required recordkeeping provides proof to the employer, the employee, and the Commissioner that the employee has been properly paid.

First, petitioners argue that legally sufficient payroll records were kept by the restaurant at all times and were provided to respondent at various stages of the investigation and at the instant hearing. The restaurant's records of hourly records and daily time sheets, however, were lost as the result of a burst pipe in February of 2016. Petitioners offered no evidence in support of this contention beyond Foley's sworn testimony. As discussed more fully below, the daily time-sheets petitioners offered are unsubstantiated, facially inaccurate, were found by petitioners only days

prior to the scheduled hearing and were limited to only the claimants contained in the minimum wage order and not all employees during the relevant period.

Despite the loss of the restaurant's sign-in book and time sheets, petitioners presented various other sets of records at hearing in support of their challenge to respondent's determination of the hours worked. These included: (1) a set of Paychex PDF reports, which were provided to respondent via email during the respondent's investigation on August 24, 2016; (2) transcribed "time sheets" created from notes maintained in Foley's phone for both claimants for the relevant time period; (3) W-2s for each employee for 2015; and (4) wage statements covering weeks ending June 14, 2015 to November 1, 2015 for Czaplick only.

The record reveals that the only documents provided to the respondent during the investigation were the Paychex PDF reports, which were provided via email on August 24, 2016. It is undisputed that these records do not contain daily hours worked by the claimants or other employees and only serve to demonstrate what was reported to Paychex as the total hours worked by the claimants in a pay period and are not a record of the actual hours worked. (Labor Law § 661).

At hearing, petitioners presented time sheets purportedly documenting the daily hours worked for each claimant. The Board is unable to credit these records. First, the records are unsubstantiated. Foley testified that he would record the arrival times and departure times of three employees in his smartphone, including the two claimants, made either by personally observing when they arrived or departed work or by copying the information from the sign-in book into his phone for the three employees. Petitioners did not offer any evidence of those records being maintained contemporaneously in Foley's smart phone other than Foley's testimony. Moreover, the sheets conflict with Foley's account of the impact of inclement weather on the restaurant's operation. The records reveal that only a single day of rain appears to have affected scheduling in any way. Petitioners did not prove that the information in those records was sufficiently reliable.

Second, the time sheets are facially inaccurate. While they show the daily hours worked by each claimant on a weekly basis, the hours are stated in exact rounded numbers from day-to-day, across every week from May 22, 2015 through and including August 9, 2015. For example, the week of June 1, 2015 through June 7, 2015 contains the note "4P - 8P / 4 Rain." Petitioners' rounding methodology demonstrate that petitioners' records are not reliable evidence sufficient to support an accurate estimate of the hours worked (*see Matter of Longia*, Docket No. PR 11-276, at p. 10 [Sept. 16, 2010] [discrediting petitioners' handwritten payroll journals in part because "[w]hen weekly and then daily hours are listed, they are stated in exact even numbers to the minute."]).

Lastly, the time sheets are not reliable as they were admittedly not created contemporaneously with the hours they purportedly document. Moreover, despite being transcribed at some point in 2016, these time sheets were not submitted to the respondent during its investigation and were only re-discovered by petitioners prior to the scheduled hearing in a storage container only after respondent's counsel urged petitioners to search for time sheets as they would be helpful to the case. Notably, petitioners did not offer timesheets for the third employee despite Foley's testimony that he kept track of all three employees in a similar manner. For these reasons, the Board cannot credit or give any weight to the time sheets offered by petitioners.

As was the case with the Paychex PDF reports, the W-2 records also do not contain the necessary information to reflect the wage payments for the weeks at issue, the rate of pay, gross and net wages or the actual hours worked (Labor Law § 661). Petitioners also offered the wage statements of witness Czaplick, ostensibly suggesting that because he was paid in compliance with the law, petitioners paid all employees in accordance with the law. The Board does not find Czaplick's wage statements to be sufficient evidence to show claimants were paid correctly. In each instance, the records offered by petitioners lack the specificity and the reliability to establish by a preponderance of the evidence the specific hours that the claimants worked and that they were paid for these hours (*Matter of Ram Hotels, Inc.*, Docket No. PR 08-078, at p. 24). We find the testimony and payroll documents that are part of the record are insufficient evidence to meet petitioners' burden to negate the reasonableness of the respondent's determinations. As such, the Commissioner correctly determined that petitioners failed to maintain legally required payroll records.

The Minimum Wage Order is Affirmed

Article 19 of the Labor Law, known as the Minimum Wage Act, requires employers to pay each of its covered employees the minimum wage in effect at the time payment is due (Labor Law § 652). An employer also must pay every covered employee an overtime premium of one and one-half times the employee's regular hourly rate for hours worked over 40 in a week (12 NYCRR 142-2.2).

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 (Labor Law § 196-a; *Ramirez v Commissioner of Labor,* 110 AD3d 901, 901 [2d Dept 2013]; *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 AD2d at 820-821[3d Dept 1989]). As the Appellate Division stated in *Matter of Mid Hudson Pam Corp v Hartnett*, (156 AD2d at 830-821) "[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 calculation to the employer" (*see also* 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 Joseph Baglio and the Club at Windham,* PR 11-394, at p. 7 [December 9, 2015]; *Matter of Ram Hotels, Inc.*, Docket No. PR 08-078, at p. 24).

Petitioners asserted that the Commissioner incorrectly determined that the claimants were not paid for their overtime hours because they did not work overtime. Foley testified generally and without any specificity that there was no need for overtime and that no one worked seven days per week or a regular schedule due to inclement weather at a seasonal restaurant. Foley gave no testimony about when or how often the restaurant was closed or operating at a reduced staff due to inclement weather.[3] The record did not have any evidence of days that the claimants did not

[3] As discussed above, the Board does not find the "time sheets" for the claimants that were admitted into evidence to be reliable, in part because they only reference one date where rain reduced the work hours, which is inconsistent with Foley's testimony that the restaurant would use a smaller staff whenever there was inclement weather.

work due to inclement weather other than the single date reflected in the time sheets that, as discussed above, we do not find credible.

Czaplick's testimony regarding the claimants' hours was similarly unspecific. While he testified that he did not personally work over 40 hours per week, he conceded that he was not present for each of the claimants' shifts, that it was not his responsibility to check other employee's time and that he often did not look at the sign-in or sign-out times for other employees. He also testified that he would sometimes work six day per week if needed, which is inconsistent with his and Foley's testimony that overtime was not necessary at the restaurant. The claimants' testimony was also supported by Czaplick's testimony that the restaurant's closing shift ended sometime after 10:30 and as late as midnight. Czaplick testified that he was hired and began working at the restaurant in late May of 2015 which is consistent with Martinez's testimony that he worked preparing the restaurant to open prior to other employees being hired for the season. It is also consistent with the respondent's determination of the claim period. Czaplick's testimony regarding his own daily start time is consistent with Martinez's testimony regarding the timing of other restaurant staff's arrival at the restaurant. Lastly, even had claimants not credibly testified, respondent's calculation is not inconsistent with Czaplick's testimony of the claimants' daily arrival for work at the restaurant, 10:00 a.m.

Petitioners argue that the minimum wage order under review is invalid or unreasonable because the claimants themselves are not a reliable source of information. The Board disagrees. Martinez and Matamoros provided credible, detailed and specific testimony of their hours worked and their assigned duties. Martinez testified that he was hired by Foley to clean the restaurant from 6:30 a.m. to 9:30 a.m. and to help in the kitchen after the cleaning was complete. Foley did not rebut this testimony. Martinez's DHR complaint states that he worked from 7:00 a.m. or 9:00 a.m. and left work at 11:30 p.m. or 12:00 a.m. This is consistent with his testimony at hearing. When asked about a different daily start time contained in the respondent's file, Martinez credibly testified that he told the respondent that he worked from 10:00 a.m. to 10:00 p.m. because that is the time that he was working in the kitchen but that he reported to work prior to 10:00 a.m. to clean the restaurant. Matamoros's DHR complaint similarly stated that he would work from 6:00 a.m. to 12:00 a.m. and that he was not paid for all hours worked which was also consistent with his testimony at hearing.[4] Matamoros did concede, however, in his testimony that he worked only 18 hours in the week ending June 14, 2015.

Both Martinez and Matamoros credibly testified about their work duties in the morning before the restaurant opened and after the restaurant closed for the night. Martinez credibly testified he would clean the restaurant's interior and exterior as needed before proceeding to the kitchen to assist with food preparation, deliveries, cooking and servicing the outdoor bar. After the restaurant closed for the day, he would clean the outside bar, stock beer and clean the kitchen. This testimony was corroborated by Matamoros who similarly testified that he would clean the bar and restaurant floors in the morning, finishing at 9:30 a.m. before proceeding to assist with food preparation, assisting in the kitchen and washing dishes. When the restaurant closed, he would take the garbage out, wash any remaining dishes and clean the kitchen. Petitioners' attempt to

[4] Each claimant explained at hearing that they worked more hours each week than what was calculated by respondent. Despite their credible testimony, we are bound by the hours utilized by the Commissioner in calculating back wages, however, and may not modify the wages upward since these are the hours upon which her determination is based. (*See e.g. Matter of Beqiraj*, PR 11-393, at p. 9 n 3 [July 22, 2015] [Board precluded from modifying wages upward as the Board is bound by the hours used by the Commissioner to calculate back wages]).

discredit this testimony with the conclusory assertion that it does not make sense that the claimants would clean at night and again in the morning is insufficient to refute the claimants' specific testimony about precisely what their cleaning and stocking duties were in the morning and at night.

Both claimants also credibly testified that they used a combination of time sheets, a sign-in book and a punch-clock to record their time at the restaurant. Their testimony was corroborated by Foley in his own testimony that various time keeping methods were used.

Aggarwal testified that she was unaware of the DHR complaints during the investigation and used the information gathered in the phone interview to calculate the wages owed. Her computations were based on claimants' statements, specifically those collected in the follow-up phone interview. She credited petitioners with providing meals and meal periods based on the claimants' statements obtained during the phone interview and the restaurant employees who were interviewed during the investigation.

The Board finds the remaining alleged inconsistences, that Matamoros denied having a follow up interview with respondent after filing his wage claim, and if the claimants were fired or if they quit, unavailing.

The Board has repeatedly held that general, conclusory and incomplete testimony concerning the work schedules of employees is insufficient to satisfy the high burden of precision required to meet an employer's burden of proof in the absence of required records (*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]). Because petitioners provided no evidence of legally required records of the daily and weekly hours worked or wages paid to the claimants, and proof that they were paid for those hours, the Commissioner was entitled to use the best available evidence as a basis for her calculation of underpayment (Labor Law. §196-a; *Matter of Ramirez v Commissioner of Labor*, 110 AD3d at 901-902; *Hy-Tech Coatings v New York State Dept. of Labor*, 226 AD2d at 379 [2d Dept 1996] *citing Matter of Mid Hudson Pam Corp. v Hartnett*, 156 AD2d at 820-821; *Matter of Joseph Baglio and the Club at Windham,* PR 11-394, at p. 7; *Matter of Ram Hotels, Inc.*, Docket No. PR 08-078, at p. 24). Here, the Commissioner used the best available evidence, which was the information obtained by the respondent during the follow up phone interviews.

On the record before us, we find that petitioners have not met their burden to produce 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 Ramirez v Commissioner of Labor*, 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 AD2d at 820-821; *Matter of Joseph Baglio and the Club at Windham,* PR 11-394, at p. 7; *Matter of Ram Hotels, Inc.*, Docket No. PR 08-078, at p. 24). We therefore find the hours utilized by the Commissioner to be a reasonable approximation of the hours worked by the claimants during the relevant period and affirm the Commissioner's wage calculations in the minimum wage order, except we reduce the wages calculated due and owing as to Matamoros from $3,517.50 to $3,255.25 for the week ending June 14, 2015. The civil penalty, liquidated damages, and interest are modified proportionally.

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 claimant was not paid all wages owed and petitioner did not offer any evidence to challenge the imposition of interest. As such, we affirm the interest in the minimum wage 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.[5] Here, respondent correctly determined that claimants were not paid all wages and petitioner failed to offer any evidence challenging the imposition of liquidated damages. As such, we affirm the liquidated damages in the minimum wage order.

The Civil Penalty is Affirmed

The unpaid wages order and the minimum wage order include a 100% civil penalty. Labor Law § 218 (1) provides that when determining an amount of civil penalty to assess against an employer who has violated a provision of Article 19 of the Labor Law, respondent 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."

Petitioners argue that the civil penalty is invalid or unreasonable because they have no prior history of Labor Law violations. Petitioners were found to be uncooperative because they failed to provide payroll records upon request. The "imposition of civil penalty" worksheet indicates "no prior [h]istory" but also reflects that the respondent based their determination using each of the four statutory factors. The worksheet contains entries reflecting that the restaurant was in business for more than three years, petitioners were not cooperative, and the amount of wages owed was over $1,000.00. We affirm the civil penalties in the minimum wage order.

[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.

The Penalty Order is Affirmed

The penalty order assesses a $1,000.00 civil penalty against petitioners 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 from on or about May 5, 2015 through August 7, 2015; a $1,000.00 civil penalty for violating Labor Law § 661 and 12 NYCRR 146-2.2 by failing to give each employee at the start of employment, written notice in English and any other language spoken by the new employee as their primary language, of the employee's regular hourly rate of pay, overtime hourly rate of pay, the amount of tip credit, if taken and the regular payday from on or about May 5, 2015 through August 7, 2015; a $1,000.00 civil penalty for violating Labor Law § 661 and 12 NYCRR 146-2.3 by failing to prove each employ a statement with every payment of wages, listing the hours worked, rates paid, gross wages earned, any allowances claimed, deductions and net wages during the period from on or about May 5, 2015 through August 7, 2015; and a $1,000.00 civil penalty for violating Labor Law § 161 by failing to allow employees of factory, mercantile establishment, hotel, restaurant, or freight or passenger elevator in any building or in the care, custody or operation of any such elevator, at least twenty-four consecutive hours of rest in any calendar week during the period from on or about May 5, 2015 through August 7, 2015. The total amount due in the penalty order is $4,000.00.

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.

As set forth in more detail above, petitioners did not produce any credible evidence to show that they maintained the required payroll records. Specifically, petitioners lacked records of daily hours worked. With respect to the required written notice of pay rates, tip credit and pay day, petitioners presented copies of staff rules allegedly provided to the claimants upon their hire. There is no evidence, however, that these notices were provided to either claimant in their primary language, Spanish, as is required. Respondent determined the wage statements provided to the claimants were inaccurate in so far as they differed from the statements made by the claimant with respect to the number of hours worked. We find the respondent's determination reasonable. Petitioners failed to provide any persuasive evidence that such wage statements were complete and accurate. Lastly, petitioners allege each employee was given at least 24 consecutive hours of rest. Respondent based her determination on information obtained during the phone interview wherein Matamoros stated that he worked seven days per week. Matamoros also credibly testified that he worked seven days per week during some parts of the claim period. Petitioners failed to offer any persuasive evidence sufficient to contest respondent's determination. The penalty order is affirmed.

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NOW, THEREFORE, IT IS HEREBY RESOLVED AND ORDERED THAT:

1. The minimum wage order is affirmed with respect to Gerber Martinez; and

2. The minimum wage order is modified to reduce the wages calculated due and owing as to Daniel Antonio Matamoros Rojas from $3,517.50 to $3,255.25, and the civil penalty, liquidated damages, and interest are modified proportionally;

3. The minimum wage order as modified is affirmed;

4. The penalty order is affirmed; and

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

Molly Doherty, Chairperson

J. Christopher Meagher, Member

Michael A. Arcuri, Member

Gloribelle I. Perez, Member

Dated and signed by the Members
of the Industrial Board of Appeals
in New York, New York, on
January 30, 2019.

NOW, THEREFORE, IT IS HEREBY RESOLVED AND ORDERED THAT:

1. The minimum wage order is affirmed with respect to Gerber Martinez; and

2. The minimum wage order is modified to reduce the wages calculated due and owing as to Daniel Antonio Matamoros Rojas from $3,517.50 to $3,255.25, and the civil penalty, liquidated damages, and interest are modified proportionally;

3. The minimum wage order as modified is affirmed;

4. The penalty order is affirmed; and

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

Molly Doherty, Chairperson

J. Christopher Meagher, Member

Michael A. Arcuri, Member

Gloribelle J. Perez, Member

Dated and signed by a Member
of the Industrial Board of Appeals
in Utica, New York, on
January 30, 2019.