STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of:	:	
LORENZO MANNINO AND GIULIO MANNINO AND IL COLOSSEO, LLC,	:	
Petitioners,	:	DOCKET NO. PR 17-120
To Review Under Section 101 of the Labor Law: Orders to Comply with Articles 19 and 6 and an Order Under Articles 5, 6, and 19 of the Labor Law, both dated June 1, 2017,	:	RESOLUTION OF DECISION
- against -	:	
THE COMMISSIONER OF LABOR,	:	
Respondent.	:	

APPEARANCES

Strazzullo Law Firm, P.C., Brooklyn (*Maria Patelis and Salvatore Strazzullo* of counsel), for petitioners.

Pico Ben-Amotz, General Counsel, NYS Department of Labor, Albany (*Steven J. Pepe* of counsel), for respondent.

WITNESSES

Giulio Mannino and Salvatore Geraci for petitioners.

Labor Standards Investigator Alexa Espinal, Senior Labor Standards Investigator Gerard Capdevielle, Luis Anzures and Vicente Alvarado for respondent.

WHEREAS:

Petitioners filed a petition in this matter on August 1, 2017, pursuant to Labor Law § 101, seeking review of orders issued against them by respondent Commissioner of Labor on June 1, 2017. Respondent filed her answer to the petition on September 25, 2017.

Upon notice to the parties a hearing was held in this matter on June 21, 2018 and July 24, 2018 in New York, New York before Molly Doherty, Chairperson, 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 minimum wages to Luis Anzures and Jesus Miguel Hernandez in the amount of $33,591.88 for the time period from May 1, 2013 to May 29, 2016, interest continuing thereon at the rate of 16% calculated to the date of the order in the amount of $5,577.55, liquidated damages in the amount of $33,591.88, and assesses a civil penalty in the amount of $33,591.88, for a total amount due of $106,353.19.

The order to comply with Article 6 of the Labor Law (unlawful deductions order) demands that petitioners pay $135.00 in unlawful deductions from wages due and owing to Luis Anzures for the period from October 21, 2015 to April 24, 2016, interest at the rate of 16% calculated to the date of the order in the amount of $23.85, 100% liquidated damages in the amount of $135.00, and a 100% civil penalty in the amount of $135.00. The total amount due is $428.85.

The order under Articles 5, 6 and 19 (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 1, 2013 to May 29, 2016; a $1,000.00 civil penalty for violating Labor Law § 661 and 12 NYCRR 146-2.3 by failing to provide each employee with a wage statement from on or about May 1, 2013 to May 29, 2016; a $1,000.00 civil penalty for violating Labor Law § 191 (1) (a) by failing to pay wages weekly to manual workers no later than seven calendar days after the end of the week in which the wages were earned from on or about May 1, 2013 to May 29, 2016; and a $1,000.00 civil penalty for violating Labor Law § 162 by failing to provide employees with at least thirty minutes off for the noon day meal when working a shift of more than six hours extending over the noon day meal period from on or about May 1, 2013 to May 29, 2016. The total amount due in the penalty order is $4,000.00.

Petitioners allege that the orders are invalid and unreasonable because (1) the individual petitioners were not employers; (2) Hernandez was not an employee of Il Colosseo; (3) Anzures did not work for the period that he claims to have worked and he did not work for the hours that he claimed to have worked; (4) employees were paid at least the statutory minimum wage and were paid weekly; and (5) there were no unlawful deductions taken from wages.

SUMMARY OF EVIDENCE

Testimony of Giulio Mannino

Petitioner Giulio Mannino (Mannino) testified that he owns a small percentage of Il Colosseo, LLC, (Il Colosseo) a thirteen-table restaurant in Brooklyn, NY. His father, Lorenzo Mannino, is also a part owner of the restaurant. Mannino manages the daily operations of the restaurant, including hiring and firing employees, determining their schedules and setting their rates of pay. Mannino testified that Lorenzo Mannino is not involved in the daily operations of the restaurant at all and that he was not involved in decisions about hiring or wages and he did not supervise any of the employees. He would come by the restaurant occasionally and have a meal, and if he saw a problem, he would tell Mannino about it.

Mannino testified that during the claim period, 10 or 11 employees worked at Il Colosseo. The employees were paid in cash and they did not receive wage statements. They received wages

and tips daily and at the end of most weeks, he would give them extra money in varied amounts. Mannino would provide the information about how much cash he paid employees to the accountant who would create payroll records based on that information. The restaurant was open Mondays through Fridays from 12:00 p.m. until 10:00 p.m., Saturdays from 12:00 p.m. until 10:30 p.m. and Sundays from 1:00 p.m. until 9:30 p.m. Employees took numerous breaks throughout the day and took meal breaks that lasted anywhere from 30 minutes to an hour during which they could eat a meal provided by the restaurant.

Mannino testified that Jesus Miguel Eduardo Hernandez (Hernandez) was not an employee of Il Colosseo rather he worked for Lorenzo Mannino as a handyman for the buildings that Lorenzo Mannino owned. Il Colosseo did not employ a dishwasher during the claim period as the kitchen staff would wash the dishes in a commercial dishwashing machine. Hernandez would do some work in the restaurant at times such as organizing storage and helping with food preparation by washing vegetables. During the relevant period, they did not keep separate records of his work as a handyman for Lorenzo Mannino and his work for Il Colosseo. Mannino testified that Hernandez told him that he did not want to continue with a claim for wages with respondent. Hernandez still works for Lorenzo Mannino.

Mannino testified that Luis Anzures (Anzures) worked at Il Colosseo a few times as a bus person, when he was needed. Anzures worked some full shifts and some half-shifts, depending on what was needed. A bus person's full shift would be from 12:00 p.m. until 10:00 p.m. Monday through Saturdays and from 1:00 p.m. to 9:30 p.m. on Sundays and a half-shift would be from 12:00 p.m. to 4:30 p.m. Anzures was paid tips and cash wages daily by the wait staff and Mannino would give extra cash to Anzures and other employees weekly, which varied depending on " . . . how the week[] went." The waiters would pay the daily wages to Anzures based on the minimum wages set by Labor Law and give him daily tips. Mannino could not recall Anzures's rate of pay.

Testimony of Salvatore Geraci

Salvatore Geraci (Geraci) is the accountant for Il Colosseo and he and his assistant provided all accounting services for the restaurant, including payroll services and tax filing, during the relevant period. He testified that he does compliance work for Il Colosseo to be sure they are complying with federal and state laws, including the Labor Law. He also testified that during the claim period, Il Colosseo's employees received wage statements. Geraci does not manage the daily operations of Il Colosseo.

Petitioners's Payroll Records

Payroll records for Il Colosseo for the years 2013 through 2016 were stipulated into evidence by the parties. Neither Mannino nor Geraci testified about the information contained in the payroll records. For each year, four employees are reflected in those payroll records, none of whom are Anzures or Hernandez.

Testimony of Labor Standards Investigator Alexa Espinal

Labor Standards Investigator Alexa Espinal (Espinal) testified that she visited Il Colosseo on May 27, 2016 after she met Anzures in April 2016 at respondent's office and helped him complete a wage claim form. During her visit to the restaurant, Espinal met Mannino and saw

Hernandez washing dishes. After speaking with Hernandez for about a minute, Mannino asked Espinal to leave and then Geraci told Espinal to go to his office located across the street from Il Colosseo. Espinal did not speak to any other employees during the May 2016 visit but Hernandez did give her his phone number so she talked him on the telephone on June 10, 2016. While speaking with Hernandez on the phone, Espinal filled out an interview sheet. The interview sheet indicates that Hernandez was a dishwasher at Il Colosseo and he worked Wednesdays through Mondays for nine hours per day with a one hour break each day. Hernandez told Espinal, as indicated in the interview sheet, that he was paid $600.00 per week and received $70.00 per week in tips and he received two meals per day from Il Colosseo. Espinal never received payroll records from petitioners for Anzures or Hernandez. She based the calculations for the wages owed on the claim form filed by Anzures and the telephone interview that she did with Hernandez because she never received any records from petitioners showing hours worked or wages paid for either employee. Respondent's calculations also included a meal credit that was given to petitioners for two free meals per day for Anzures and Hernandez. Respondent also gave a tip credit to petitioners for Anzures's wages because he reported earning $500.00 in tips per week. The calculations for Anzures also included 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.

Testimony of Senior Labor Standards Investigator Gerard Capdevielle

Senior Labor Standards Investigator Gerard Capdevielle testified that he supervised Espinal's work on the investigation of Il Colosseo. He determined that a 100% civil penalty should be assessed against petitioners in the wage order because the wage underpayment was over $33,000.00 and the investigator said that she was asked to leave the restaurant during her field visit before she could interview any employees. Additionally, the employer submitted payroll records but those records did not show daily hours worked or weekly hours worked. As noted in the respondent's issuance of order to comply cover sheet dated May 8, 2017, those records also did not include Anzures or Hernandez.

Testimony of Claimant Luis Anzures

Anzures testified that he worked as a bus boy at Il Colosseo from October 2015 to April 2016. He testified that he worked from 10:00 a.m. to 10:00 p.m., Wednesdays through Saturdays, and from 12:00 p.m. to 10:00 p.m. on Sundays. He was paid $20.00 per day but $5.00 was taken out of each day's wages to pay for glasses that broke in the restaurant. He also earned tips of about $30.00 for a lunchtime shift and about $60.00 for a dinner time shift. He was paid weekly. Anzures testified that he completed the wage claim form at the Department of Labor. Anzures also testified that a dishwasher who went by the names Jesus and Eduardo worked at Il Colosseo as a dishwasher when he worked there. Anzures testified that he appeared in photographs that were taken of him working at Il Colosseo that he gave to respondent and that were admitted as evidence at the hearing. The dishwasher who went by the names Jesus and Eduardo was also in one of the photographs.

Testimony of Vicente Alvarado

Vicente Alvarado testified that he worked at Il Colosseo from 2014 until 2017 and that he knew Luis, who was at the hearing, only by his first name because he also worked at Il Colosseo when Alvarado was working there.

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 (Board Rules) (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; *Garcia v Heady*, 46 AD3d 1088, 1090 [3d Dept 2007]; *Matter of Angello v Natl. Fin. Corp.*, 1 AD3d 850, 854 [3d Dept 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]). For the reasons discussed below, we find Lorenzo Mannino was not the employer and revoke the orders as issued against him but we affirm the orders as issued against Giulio Mannino and Il Colosseo, LLC.

Giulio Mannino and Il Colosseo, LLC Are Employers

We find that Giulio Mannino is individually liable as an employer under Articles 19 and 6 of the Labor Law. "Employer" as used in Labor Law Article 19 means "any individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons acting as an employer" (Labor Law § 651 [6]). "Employed" means "permitted or suffered to work" (Labor Law § 2 [7]). Like the New York Labor Law, the federal Fair Labor Standards Act (FLSA) defines "employ" to include "suffer or permit to work" (29 USC § 203 [g]), and the test for determining whether an entity or person is an "employer" under the New York Labor Law is the same test for analyzing employer status under FLSA (*Bonito v Avalon Partners, Inc.*, 106 AD3d 625, 635 [1st Dept 2013]; *Matter of Maria Lasso and Jaime M. Correa Sr. and Exceed Contracting Corp.*, Docket No. PR 10-182, at pp. 6-7 [Apr. 29, 2013], *aff'd sub nom. Matter of Exceed Contracting Corp. v Indus. Bd. of Appeals*, 126 AD3d 575, 576 [1st Dept 2015]; *Ansoumana v Gristede's Operating Corp.*, 255 F.Supp. 2d 184, 188 [SDNY 2003]; *Chung v New Silver Palace Rest., Inc.*, 272 FSupp 2d 314, 319 n 6 [SDNY 2003]).

In *Herman v RSR Sec. Servs. Ltd.*, (172 F3d 132, 139 [2d Cir 1999] *citing Carter v Dutchess Comm. College*, 735 F2d 8, 12 [2d Cir. 1984] and *Goldberg v Whitaker House Coop.*, 366 US 28, 33 [1961]), the Second Circuit explained the "economic reality test" used for determining employer status:

> "[T]he overarching concern is whether the alleged employer possessed the power to control the workers in question with an eye to the 'economic reality' presented by the facts of each case. Under the 'economic reality' test, the relevant factors included whether the alleged employer (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records" (internal quotations and citations omitted).

No one of these factors is dispositive; the purpose of examining them is to determine the economic reality based on a "totality of circumstances" (*id.*).

Mannino and Geraci both testified that Mannino was the general manager and that he managed the day-to-day operations of Il Colosseo. He hires and fires employees, determines their schedules of work and rates of pay. Mannino admitted that Anzures was an employee whom he scheduled for work when he was needed. Mannino also admitted that Hernandez would do work in the restaurant when needed. Anzures testified that he spoke to Mannino about his wages. Applying the economic reality test to the present case, we find that Mannino was the "employer" as a matter of economic reality and was responsible for the wages owed.

Il Colosseo, LLC is also an employer under the Labor Law. Petitioner Il Colosseo, LLC asserted in the petition that it was not the employer yet offered no evidence at the hearing to support that assertion. As such, the Board affirms the respondent's finding that Il Colosseo, LLC was also an employer.

Lorenzo Mannino Is Not an Employer Individually Liable for the Wages

We find that Lorenzo Mannino is not individually liable as an employer under Articles 19 and 6 of the Labor Law. Petitioners presented credible, unrebutted testimony that Lorenzo Mannino, a part owner of the subject restaurant, was an investor with no operational or managerial control in the business. Mannino credibly testified that Lorenzo Mannino had no role in operating the business, managing, directing or controlling the employees, or determining the wages paid to the employees. Mannino testified that during the claim period, his father would sometimes come by the restaurant to have a meal, and tell Mannino if he observed a problem while there, but this is insufficient to demonstrate Lorenzo Mannino's control over the restaurant's operations or employees. Neither Anzures nor respondent's investigators refuted this testimony. A corporate officer who does not have direct control over employees may be individually liable as an employer for unpaid wages if he exercises operational control over the daily operation of the business (*Copantitla v Fiskardo Estiatorio, Inc.*, 788 FSupp2d 253, 310-311 [SDNY 2011] *cf. Irizarry v Catsimatidis*, 722 F.3d 99, 111-117 [2d Cir 2013]). Lorenzo Mannino did not exercise sufficient operational control over the business to satisfy this test (*Matter of Wah Chan Wong and H.K. Tea and Sushi, Inc.*, Docket No. PR 12-090, at pp.7-10 [October 26, 2016]; *Matter of Dimitrios Gatanas*, Docket No. PR 13-126, at pp. 5-6 [March 2, 2016]). Because we find that Lorenzo Mannino was not an employer under the Labor Law, the orders are unreasonable and must be revoked as to Lorenzo Mannino only but remain in effect as to Giulio Mannino and Il Colosseo, LLC.

Jesus Miguel Eduardo Hernandez Was Employed by Petitioners

As discussed above, "employee" means "any individual employed or permitted to work by an employer in any occupation" (Labor Law § 651 [5]) and "employed" means "suffered or permitted to work" (Labor Law § 2 [7]). Petitioners did not meet their burden to prove that Jesus Miguel Eduardo Hernandez was not an employee of petitioners. We give little credence to petitioners' general assertions that Hernandez worked as a handyman for Lorenzo Mannino since Hernandez and Lorenzo Mannino themselves did not testify nor does the record contain any documentary evidence that Hernandez was an employee of Lorenzo Mannino and not the restaurant. Additionally, petitioners admitted that Hernandez performed some work for Il Colosseo

during the relevant period when needed. Petitioners also admitted that Hernandez was in the kitchen when respondent's investigator, Espinal, went to the restaurant. Espinal testified that she personally saw Hernandez washing dishes in the kitchen at Il Colosseo and she testified that he told her that he was a dishwasher and what hours and days that he worked and how much he was paid. Respondent based her order, in part, on an investigator witnessing Hernandez washing dishes in the kitchen and talking with him about his job and wages. Petitioners did not present sufficient evidence to show such a determination was invalid or unreasonable. We find the record supports respondent's finding that petitioners employed Hernandez in that they suffered or permitted him to work at Il Colosseo.

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, 901-902 [2d Dep't 2013]; *Matter of Mid Hudson Pam Corp. v Hartnett*, 156 AD2d 818, 820-821 [3d Dep't 1989]).

Mannino testified that Geraci maintained the payroll records for Il Colosseo. Geraci testified that Il Colosseo did have payroll records that his office created for the claim period yet no payroll records were offered into evidence through his testimony. Geraci's testimony lacked any specific details about payroll records for the relevant period and, instead, asserted general conclusions that Il Colosseo had legally compliant payroll records. We give Geraci's testimony no weight because it was too conclusory and vague. Payroll records for part of the claim period were admitted into evidence on consent during Espinal's testimony on cross-examination, yet those records do not include Anzures or Hernandez and in fact, only represent four employees during any given period despite Mannino's testimony that the restaurant had 10 or 11 employees during each of the relevant years. Additionally, the payroll records do not include required information such as hours and days worked or hourly rate of pay (Labor Law § 661). 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 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 at 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). Respondent can determine that wages are owed without a formal complaint having been filed by an employee and can rely on other sources of information, such as an employee interview (*Garcia v Heady*, 46 AD3d at 1090; *Matter of Aldeen and Island Farm Meat Corp.*, Docket No. PR 07-093, at pp. 11-12 [May 20, 2009] *aff'd Matter of Aldeen v Industrial Appeals Bd.*, 82 AD3d 1220, 1221 [2d Dep't 2011]). Here, the Commissioner used the best available evidence, which was the claim form for Anzures and the telephone interview with Hernandez, to make her determination (*Hy-Tech Coatings v New York State DOL*, 226 AD2d 378, 379 [2d Dept 1996]; *Matter of Aldeen*, Docket No. PR 07-093 at pp. 11-12). The petitioners failed to meet their burden of proof to demonstrate that the calculations made by the respondent were unreasonable.

We find that Mannino'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 Department of Labor with arguments, conjecture, or incomplete, general, and conclusory testimony]). Mannino testified that Anzures only worked when needed but offered no specifics as to dates and hours that he worked. Mannino also could not recall what wages Anzures was paid and only said that the wait staff paid him a daily wage and tips in cash and that he would give him extra money each week. He testified that the wait staff paid Anzures the legal minimum wage but he could not state what the rate was. Mannino testified that the shifts for bus persons were either from 12:00 p.m. to 10:00 p.m. for a full-shift or 12:00 p.m. to 4:30 p.m. for a half-shift except on Sundays when the shift was from 1:00 p.m. to 9:30 p.m. Mannino did not testify about what Anzures's schedule was or which days he worked a full shift or half-shift. Anzures testified that he worked twelve hours a day from Wednesday to Saturday from 10:00 a.m. to 10:00 p.m. and on Sundays he started work at 12:00 p.m. His claim form also reflected that he worked twelve hour shifts from Wednesday to Saturday, though the claim form states that he worked from 11:00 a.m. to 11:00 p.m. This discrepancy is insignificant as the total hours worked does not change as a result of it and we find that Anzures's testimony about the total hours that he worked to be credible. Petitioners did not put forth any specific evidence to refute the hours set forth in Anzures's claim form that respondent relied on as the best evidence to determine the wage underpayment.

Petitioners also did not offer any evidence to challenge the amount of wages respondent determined were owed to Hernandez as they only asserted that Hernandez was not an employee. We do not give any weight to Mannino's testimony that Hernandez did not want to pursue a claim for wages from petitioners. Petitioners presented no explanation for their failure to call Hernandez as a witness, even though he was still employed by Lorenzo Mannino and was still performing work for Il Colosseo at the time of the hearing. It was reasonable for the Commissioner to determine that Hernandez is owed unpaid wages.

We also do not find Mannino's testimony regarding break times sufficiently specific to prove that the requisite break times were provided to Anzures, particularly since there was nothing else in the record supporting his testimony. Mannino's general testimony that he never timed breaks and that employees could take as much time as they wanted during breaks was too vague to establish that Anzures was provided required break times pursuant to the Labor Law. Petitioners did not meet their burden to prove that they provided required break time to Anzures.

Not only did petitioners fail to offer any documentary evidence showing when Anzures and Hernandez worked, but Mannino's testimony was also insufficiently detailed regarding Anzures's 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 failed to meet their burden to produce evidence of the "precise" work performed and wages paid to the employees (*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 wage order.

The Unlawful Deduction Order is Affirmed

The unlawful deduction order finds that petitioners deducted $5.00 from Anzures wages each week for broken glassware in violation of Labor Law § 193. Petitioners failed to offer any evidence to challenge the unlawful deduction order thereby waiving their right to challenge it pursuant to Labor Law § 101 (2). We affirm the unlawful deduction 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 the employees were not paid all wages owed and that unlawful deductions were taken from Anzures and petitioners did not offer any evidence to challenge the imposition of interest. We affirm the interest imposed in the orders.

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.[1] Here, respondent correctly determined that the employees were not paid all wages owed and that unlawful deductions were taken from Anzures and petitioners did not offer any evidence

[1] 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.

to challenge the imposition of the liquidated damages. We affirm the liquidated damages imposed in the orders.

The Civil Penalty

Labor Law § 218 (1) provides that if respondent determines an employer has violated certain provisions of the Labor Law, 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 100 % 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 in Part and Revoked in Part

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 $1,000.00 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 1, 2013 to May 29, 2016. Petitioners did not offer payroll records that included Anzures and Hernandez nor did the payroll records in evidence contain all the legally required information, such as days and hours worked and hourly rate of pay. Thus, we affirm the first count of the penalty order for failure to keep and/or furnish payroll records. Respondent also assessed a $1,000.00 civil penalty for violating Labor Law § 661 and 12 NYCRR 146-2.3 by failing to provide each employee with a wage statement from on or about May 1, 2013 to May 29, 2016, which Mannino conceded. Thus, we affirm count two of the penalty order. Respondent assessed a $1,000.00 civil penalty for violating Labor Law § 162 by failing to provide employees with at least thirty minutes off for the noon day meal when working a shift of more than six hours extending over the noon day meal period from on or about May 1, 2013 to May 29, 2016. As discussed above, we did not find Mannino's testimony that the employees received thirty minutes or more for their lunch breaks sufficiently specific to be credible. Thus, we affirm the fourth count of the penalty order.

Respondent assessed a $1,000.00 civil penalty for violating Labor Law § 191 (1) (a) by failing to pay wages weekly to manual workers no later than seven calendar days after the end of the week in which the wages were earned from on or about May 1, 2013 to May 29, 2016. Petitioners asserted that they timely paid wages weekly. Mannino testified about some wages being paid daily while other money was paid weekly. Anzures's testimony supported petitioners' assertion when he repeatedly testified he was paid weekly. Based on the evidence presented at the hearing, we find that the respondent's determination with respect to count three of the penalty order was unreasonable and we revoke that count of the penalty order.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The orders are revoked as to petitioner Lorenzo Mannino; and

2. The wage order and unlawful deduction order are affirmed as to petitioners Giulio Mannino and Il Colosseo, LLC;

3. The penalty order is affirmed as to counts one, two and four and revoked as to count three; and

4. The petition for review is granted in part and denied in part.

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.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The orders are revoked as to petitioner Lorenzo Mannino; and

2. The wage order and unlawful deduction order are affirmed as to petitioners Giulio Mannino and Il Colosseo, LLC;

3. The penalty order is affirmed as to counts one, two and four and revoked as to count three; and

4. The petition for review is granted in part and denied in part.

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.