STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of: KONG MING LEE, FEE YIN LEE and BLUE BUTTERFLY FASHION, INC., Petitioners, To Review Under Section 101 of the Labor Law: An Order to Comply with Article 19, and an Order Under Article 19 of the Labor Law, both dated January 20, 2011, - against - THE COMMISSIONER OF LABOR, Respondent.	:	DOCKET NO. PR 10-293 RESOLUTION OF DECISION

APPEARANCES

Franklin N. Meyer, Esq. for petitioners.

Pico Ben-Amotz, General Counsel, NYS Department of Labor (Jeffrey G. Shapiro, of counsel), for respondent.

WITNESSES

Kong Ming Lee, Amanda Wong, for petitioners.

Investigators Jeong Lee, Grace Tai, Cloty Ortiz, for respondent.

WHEREAS:

On March 9, 2011, petitioners Kong Ming Lee, Fee Yin Lee, and Blue Butterfly Fashion, Inc. filed a petition with the Industrial Board of Appeals (Board) seeking review of two orders amended and issued by the Commissioner of Labor (Commissioner) on January 20, 2011.

The first order (wage order) requires compliance with Article 19 and demands payment of $386,819.70 in minimum wages due and owing twenty-one employees during the period December 26, 2008 to April 16, 2010, together with interest continuing thereon at the rate of 16% to the date of the order in the amount of $59,135.79, liquidated damages in the amount of $96,704.98, and a civil penalty of $386,819.70. The total amount due is $929,480.17.

The second order (penalty order) requires compliance with Article 19 and demands payment of a civil penalty of $2,000 for failure to keep and/or furnish required payroll records, and $2,000 for failure to provide wage statements to employees with every payment of wages, for the period from April 5, 2010 to April 16, 2010. The total amount due is $4,000.

As clarified at hearing, the petition alleges that: (1) petitioner Kong Ming Lee was not an employer; (2) the periods of employment listed in the wage order are incorrect; (3) the employees were paid at or above minimum wage and there were no underpayments; (4) there is no basis for interest or liquidated damages since there were no underpayments; (5) there is no basis for liquidated damages because the employer had a good faith basis to believe it was acting in compliance with law, and; (6) the civil penalties are unreasonable and those assessed in the penalty order exceed the maximum allowed for first time non-wage violations.

Upon notice to the parties, a hearing was held on November 13 and 14, 2012 in New York, New York before J. Christopher Meagher, Member of the Board and the Board's designated Hearing Officer in this proceeding. Each party was afforded a full opportunity to present documentary evidence, examine and cross-examine witnesses, make statements relevant to the issues, and file post-hearing briefs.

SUMMARY OF EVIDENCE

DOL'S Investigation

Labor Standards Investigator (LSI) Jeong Lee and Senior Labor Standards Investigators (SLSI's) Grace Tai and Cloty Ortiz testified concerning the investigation by the Department of Labor (DOL) that resulted in the orders under review. Various documents and reports from the investigative file were submitted into evidence, including a "contact log" recorded by the investigators on a daily basis and a report by LSI Lee on May 11, 2010 summarizing the investigation.

On February 25, 2010, DOL received an anonymous letter stating that its authors worked for "David" and "Jeff Lee" at a place called New Dynasty and Blue Butterfly Fashion. The business had a contract with the Nanette Lepore "company". The letter alleged that the employees had not been paid for five weeks and worked from 8:00 AM to 10:00 PM every day, seven days per week, without being paid overtime.

A corporate search revealed that Blue Butterfly Fashion, Inc. (Blue Butterfly) was registered as an active corporation with the Department of State on July 18, 2008. No corporate filing for New Dynasty was found.

On April 12, 2010, LSI's Lee, Iris Rivera and SLSI Tai performed an inspection of Blue Butterfly's premises at 244 West 39th Street, 15th Floor, New York, New York. Nine employees were observed working. Eight time cards were counted, most having only numbers without employee names. Most of the workers present spoke in Chinese.

SLSI Tai testified that she speaks Cantonese and Mandarin and that she interviewed four employees and recorded their answers in interview reports placed in the investigative file. It is

her customary practice to interview employees in private and advise them that she is from DOL, is there to protect their rights, and that any information they provide will be confidential. If an employee does not speak English she speaks with them in their native tongue, translates their answers into English, and enters the answers on the interview form. It is essential to any investigation that she accurately records what the employee tells her.

Liang Jing Dong stated that she had been employed for three months and worked Monday to Friday from 9:00 AM to 7:00 PM. Pan Kwai Fong said she started in February of 2010 and worked Monday to Friday from 9:00 AM to 5:00 PM. John Hoang said he started in July of 2009 and worked Monday to Friday from 9:00 AM to 5:00 PM. Xiao Wan Wu said she started in July of 2009 and worked Monday to Friday from 10:00 AM to 5:00 PM.

All of the employees interviewed said they were paid by check. Three of them said they did not receive a wage statement. Two employees said they had an hour for lunch and two said they had one-half hour. Three of the employees said they had a break each day ranging from fifteen to twenty minutes.

LSI Lee testified that she and LSI Rivera spoke with David Chui (David) and advised him that the company was under investigation for Labor Law violations. David identified himself as a manager but stated that he didn't "know anything about the business" and was "not involved with the financial side". David told the investigators they needed to speak with "Jeff Lee" and identified him as another manager. It is undisputed that Jeff Lee is petitioner Kong Ming Lee (petitioner).

LSI Lee spoke with petitioner on the telephone, advised him the company was under investigation, and requested the most recent payroll records and an interim bank statement. Petitioner stated that he maintained the company's payroll records with his accountant and would call and have him fax them to the premises. Petitioner said he did not have a recent bank statement, however, so LSI Lee advised him that he could provide the balance from an ATM when the investigators returned the next day. LSI Lee informed petitioner that she would leave a notice of revisit for him at the factory requesting that additional records be produced on April 13, 2010.

LSI Lee testified that on this occasion, and in every conversation held with petitioner throughout the investigation, he spoke with her in English and never requested a translator or said he had any difficulty understanding her. When an employer or employee does not speak English it is standard practice to have an investigator present to translate who is fluent in the appropriate language or to call the office for one to perform the service. DOL employs several Chinese-speaking investigators. SLSI Tai accompanied the investigators on the initial visit in the event anyone would need Chinese translation.

Mr. Foong, an accountant from the firm of Foong & Mak, spoke with LSI Lee on the phone, identified himself as petitioner Kong Ming Lee's accountant, and faxed her three weeks of payroll registers. The summaries were titled "Employee Detail for Blue Butterfly Fashion Inc." and listed twenty workers employed at the time, all but four working exactly forty hours per week. David Chui, Andrew Chui, Kong Ming Lee, and Fee Yin Lee were listed as salaried employees but with no hours stated. Another employee who had been interviewed, Pan Kwai Fong, was not listed on payroll.

LSI Lee served a Notice of Revisit on David stating that a second inspection would be performed on April 13, 2010, at which time Blue Butterfly and "Jeff Lee" were to produce payroll records of employee hours worked and wages paid for the previous one and one-half years, together with the names, addresses, and starting dates of all employees. The records were to include time cards, piece rate cards, payroll register[s], interim bank statements, cancelled checks, and cashbooks.

On April 13, 2010, LSI's Lee and Rivera revisited the premises for a second inspection. LSI Lee stated in her report that petitioner was the person in charge and identified himself as a manager. Petitioner stated that the owner, Fee Yin Lee (Fee), was on vacation but would return the next week. Petitioner provided an account balance from an ATM that was insufficient to pay the employees on the next payday, Friday, April 16th. The investigators explained that the employees should be paid weekly and in order to meet payroll there needed to be sufficient funds in petitioner's account. Petitioner stated that he would receive a check from the manufacturer that day and deposit it to cover their pay. The investigators advised him that they would return the following Monday, April 19th, to verify that the employees had been paid and to review the time cards requested.

On April 19, 2010, the investigators performed a third inspection. In her report and contact log entry, LSI Lee stated that petitioner provided a bank account balance showing that he had made a deposit on Friday, April 16th, and that there were sufficient funds to cover the pay of the employees. Petitioner produced time cards for only three months from January 25, 2010 to April 5, 2010. The time cards were deemed inaccurate because all employees were punched in and out at the same time and no employee was shown to be working more than forty hours per week. LSI Lee questioned petitioner about Pan Kwai Fong, who was not listed on the last three weeks of payroll. Petitioner stated that she worked only two or three days per week, was paid in cash, and her pay was recorded in a cashbook. LSI Lee requested that petitioner produce the cashbook at DOL's office.

SLSI Cloty Ortiz testified that she supervised the investigation. Because petitioners' time cards differed from the hours stated in employee interviews and the anonymous letter, the investigators decided to conduct a surveillance of petitioners' premises on the evening of April 19, 2010 to substantiate whether anyone worked overtime.

SLSI Ortiz and LSI Lee testified that they arrived at the factory around 6:00 PM, stayed approximately one-half hour, and left sometime after 6:30 PM. They observed seven employees at sewing machines. Two workers immediately got up and ran out, two were eating at their machines, and three others were working on garments. The employees were not socializing with each other. Petitioner was the only other person present, was in charge, and spoke with the investigators in English. Time cards showed that all employees had punched out at 5:00 PM. SLSI Ortiz questioned petitioner why the employees were still there after 5:00 PM if their cards were already punched out. Petitioner stated that they were about to leave.

On April 20, 2010, petitioner visited DOL's office and provided a cashbook for Pan Kwai Fong. According to the cashbook, Ms. Fong worked approximately thirty hours per week and was paid in cash. During her interview, Ms. Fong stated that she worked forty hours per week and was paid by check. Petitioner clarified information concerning the meal break that he

had previously given DOL and told LSI Lee that the employees' weekly pay did not include the lunch break.

In light of its investigation and the events of April 19th, DOL determined that petitioners' payroll records were inaccurate. On April 30, 2010, LSI's Lee and Rivera served a preliminary Recapitulation Sheet on petitioner of wages and liquidated damages due and owing the employees in the amount of $623,775 for the period from July 25, 2008 to April 16, 2010. The initial calculation was based on Blue Butterfly's incorporation on July 18, 2008.

LSI Lee testified that the investigators fully explained the basis for the underpayment to petitioner and that he requested and negotiated a payment plan with DOL. She did not threaten or tell petitioner that he would go to jail if he refused to sign. Petitioner signed agreements with DOL to pay the amount in fourteen installments, along with civil penalties for records violations.[1]

On May 6, 2010, DOL received a telephone call from an attorney acting on behalf of petitioners, withdrawing the agreements because petitioner had allegedly signed them under duress. The attorney met with DOL on May 12, 2010 and disputed both the starting date for DOL's calculations and that any underpayments were owed. The attorney stated that while Blue Butterfly had been incorporated in July of 2008, it had not actually leased the premises until 2009 and started operating only after renovations. DOL requested proof of petitioners' contentions.

On June 7, 2010, the attorney submitted a print out from Consolidated Edison's website showing billing dates of service from December 17, 2008 to April 20, 2010, affidavits from seven employees stating they were not owed any back wages, and payroll summaries from petitioner's accountant for twenty-one employees from the week ending July 31, 2009 to April 30, 2010.

Based on the Con Edison billing history, DOL revised its calculations to start the underpayments from December 26, 2008. DOL did not give weight to the affidavits because they were written in English and most of the workers present during its investigation did not speak English. The payroll summaries were deemed inaccurate because they showed the employees working exactly forty hours per week, with no record of daily hours to substantiate actual hours worked.

DOL's calculations were further revised to add Saturday hours based on a surveillance of petitioners' premises on May 8, 2010. An initial Order to Comply was issued on July 9, 2010. The weekend hours were eliminated by amended order after DOL determined that the surveillance did not substantiate that any employees were observed performing work that day.

In the absence of adequate payroll records, DOL calculated wages due twenty-one employees based on an audit performed by LSI Lee. The Commissioner issued amended orders

[1] In an entry in DOL's contact log on April 30, 2010, LSI Lee stated that the investigators explained how the underpayment was computed and why Labor Law violations were issued. Petitioner asked for a payment plan and made a phone call to SLSI Ortiz. A draft agreement was faxed to him and he negotiated the amount and due date with another supervisor. SLSI Ortiz faxed him a revised agreement and the investigators explained it and advised him that he could either mail the payments or bring them to the office. Petitioner then signed the agreement.

on January 20, 2011. Underpayments for the four employees interviewed ran from the starting dates stated in their interviews to April 16, 2010, and for all other employees from December 26, 2008 to April 16, 2010. Wage computations for each employee were based on the applicable minimum wage.

LSI Lee testified that hours for twenty of the employees were computed based on those stated in the anonymous letter, 8:00 AM to 10:00 PM, minus the lunch hour. Total hours were 13 hours per day for five days and 65 hours per week. Hours for Lian Jiang Dong were based on those stated in her interview, 9:00 AM to 7:00 PM, minus the lunch hour. Total hours were nine hours per day for five days and 45 hours per week. Asked why the hours stated by the other three employees interviewed were not similarly credited, LSI Lee explained that Ms. Dong stated that she was working past 6 o'clock each day, until 7:00 PM. The other three employees stated that they worked until 5:00 PM. Because the investigation had revealed that petitioners' time cards were inaccurate and did not show actual hours worked, DOL believed the hours stated by the other three employees were possibly "their set schedule" and not their actual hours.

SLSI Ortiz was asked whether there was a basis to believe that the employees worked 65 hours per week aside from the hours stated in the anonymous letter. She replied: "Yes ... Because we visited the establishment, the factory after business hours, the employees were still there and the time cards had been punched already at 5:00 PM. You know, how can we tell they -- we were there at 6:00 o'clock, they were still there, so who is to say they weren't supposed to leave at 10:00 anyway and that's the time they were supposed to leave. So they could have taken leave anywhere between 6:00 and 10:00. But it's the employer's burden to have proof, evidence that why is time of people [sic] come in and what is the time they go out. So I think it is a fair assumption that these individuals worked these hours."

In support of the 100 % civil penalty assessed in the wage order, SLSI Ortiz testified that she completed a report that considered the size of the employer's business, its good faith, gravity of the violation, and any recordkeeping violations disclosed during the investigation. She believed the penalty was reasonable because DOL had visited the factory after business hours and found employees still working. The records provided by the employer were false and did not reflect the actual hours worked, even if the employees were paid in cash at straight time. Liquidated damages were imposed because the credible evidence established that the employer was well aware of the labor laws but failed to comply.

In support of the civil penalties assessed in the penalty order, SLSI Ortiz completed a second report that recommended a penalty of $2,000 for failure to keep and or furnish true and accurate payroll records for the period April 5, 2010 to April 16, 2010. DOL's investigation revealed that employees worked over forty hours per week but the employer had recorded only forty hours on its payroll registers. A second penalty of $2,000 was recommended for failure to provide employees a complete wage statement because employees stated in interviews that they did not receive one with each payment of wages.

LSI Lee testified that petitioner Kong Ming Lee was determined to be an employer because he identified himself to DOL throughout the investigation as the person involved with the financial side of the business and the company's accountant; had access to petitioners' bank accounts; was in charge of payroll; provided DOL with records and information concerning the employees' wages and hours, including the employees' meal periods and a worker paid in cash;

and was the person in charge of the factory when DOL inspected on the evening of April 19, 2010.

During the course of its investigation, DOL "tagged" garments that Blue Butterfly produced pursuant to an agreement it had with Robespierre, Inc., manufacturer of Nanette Lepore apparel. An entry by SLSI Ortiz in DOL's contact log of June 6, 2010 states that an attorney for the manufacturer advised DOL that Robespierre and Blue Butterfly "first started doing business with each other in July 2009".[2]

Testimony of Petitioner Kong Ming Lee

Petitioner Kong Ming Lee testified that Blue Butterfly was owned and operated by his sister Fee Yin Lee and David Chui. David came into the business in July of 2009 and brought with him the company's only customer, Nanette Lepore apparel. The workday at the factory was from 9:00 AM to 5:00 PM, with one hour for lunch and a half hour break at 3:15 PM. Petitioner said that David told him the employees would be paid for the lunch hour and break time.

Petitioner explained that his sister hired him in 2008 and his duties were to distribute business cards to companies seeking potential customers. After David arrived his duties changed and he became an "Assistant" to the owners. He ran errands, picked up whatever the business needed from the outside, and did any tasks the owners asked him to do. When he got back at night he cleaned the floor, the bathrooms, and took out the garbage. He was paid a salary of $300 per week and did not punch a time clock because he was always out of the office

Petitioner testified that he has never been a shareholder, director, or officer of Blue Butterfly and never told anyone he was a manager or person in charge. He had no power to hire or fire employees, set their schedules, determine their pay, or maintain employment records. David hired and fired the employees, set their schedules, made sure they punched in and out, counted their hours at the end of the week to determine their pay, and maintained employment records like job applications and immigration records. Petitioner denied that he was ever in charge of the factory. On cross-examination, he acknowledged that there were times when his sister and David were not there. Asked who was in charge on those occasions, petitioner said "No one". Petitioner was asked whether any of his duties involved banking and said that the owners sometimes gave him a check to deposit.

Petitioner testified that he is a native of Myanmar, formerly Burma, and came to the United States in 1989. He speaks Burmese and Cantonese but "very little English" and cannot read or write in English. On the occasions he spoke with DOL's investigators during the investigation he told them he did not understand them. When he met with them he asked for a translator. None was ever provided.

On April 12, 2010, petitioner received a phone call from David requesting the accountant's phone number because people from DOL were at the factory. A woman came on the phone speaking English and petitioner told her he couldn't understand her. The call got cut

[2] Pursuant to Labor Law § 341-a, the Commissioner is authorized to "tag" garments manufactured in violation of Articles 6 and 19 of the Labor Law as "unlawfully manufactured" apparel.

off and at David's direction he called the accountant and told him to call the factory and provide DOL everything they requested.

On April 13th, petitioner spoke with DOL investigators after he could not reach David to tell him they were at the factory. Petitioner told them he did not understand English and needed an interpreter. Another person present helped translate and told him they wanted a bank statement. Petitioner complied with their request by providing a statement from an ATM.

On April 19th, the investigators tried to speak with him and were showing him time cards. Petitioner told them "I don't understand" and "I need a translator". He didn't give them anything because he didn't understand them. The investigators left their business card and a list of information written in English they wanted. When David came back petitioner showed him the list and David gave him information to take to DOL.

On the evening of April 19, 2010, petitioner was at the factory at 6:00 PM. Employees sometimes stayed in the factory after work to socialize and eat meals and were often joined by friends. On this occasion there were four or five employees present and a few of their friends. Some employees were talking with each other and some were eating. None of them were working. Two DOL investigators arrived and tried to speak with him in English but petitioner told them he didn't understand them. When the investigators started pointing at people petitioner responded with hand gestures to show them that the employees were eating and talking.

On April 30th, petitioner received a phone call from an employee asking him to come back to the factory because David was not there and two people had come from DOL regarding an important issue. When petitioner arrived the investigators tried to speak with him in English. Petitioner told them he didn't understand them and "I need an interpreter". The investigators gave him two pieces of paper to sign. Petitioner did not understand what they were, told them "I don't understand", and stated that he wanted to show the papers to his accountant. The investigators told him that if he didn't sign he would have to go to jail. Petitioner was scared because in Burma if someone went to jail they would never come out. He signed the papers because he was afraid for his family.

Testimony of Amanda Wong

Amanda Wong testified that Kong Ming Lee is her husband and Fee Yin Lee her sister-in-law. From July of 2009 through April of 2010 she was living with petitioners, was being supported by them, and regularly spoke with them about Blue Butterfly's business. She also visited the factory two or three times a week and talked with David during the tea break or after work about business operations, the employees, and family matters.

Ms. Wong testified that Blue Butterfly was established in 2008. Fee rented the factory space in 2009 but did not have any customers until David joined her. A "joint venture" was created in July of 2009 where Fee provided the space and David the employees, machines, and the company's only customer, Nanette Lepore apparel. They divided the profits on a fifty-fifty basis. The business closed on or about April 30, 2010.

Ms. Wong corroborated petitioner's testimony concerning the employees' hours and break times, that employees socialized and ate meals in the factory after work with friends,

petitioner's and David's duties, and that David collected the employees' time cards at the end of the week to calculate their pay and send the information to the accountant. According to Ms. Wong, David ran the factory and was in charge of payroll. Petitioner didn't do any of the things that David did. David told her that he paid the employees for forty hours per week despite their having an hour and a half off each day as an "incentive" because it was hard to hire and keep competent sewing machine operators.

Petitioners submitted copies of time cards for fifteen of the twenty-one employees listed in the wage order during the period from July of 2009 through April of 2010. As foundation for their admission, Ms. Wong testified that the cards were made in the regular course of Blue Butterfly's business and it was the company's regular course of business to make them. No time records were submitted for David Chui, Andrew Chui, Kong Ming Lee, or Fee Yin Lee. Ms. Wong said that Andrew Chui is David's son and worked part-time. David told her that he permitted Pan Kwai Fong to keep her own time records.

Eleven of the fifteen sets of time cards are identified by a number and not by the employee's name. Ms. Wong testified that David told her he assigned employees time cards by their work stations because Cantonese and Mandarin have different styles of writing and it would be easier for the workers to identify them. Starting in January or February of 2010, he started putting names on the cards of the more recent hires. After DOL's investigators came, Ms. Wong asked him to help her prepare a list of names with corresponding numbers so the cards could be identified: "Back in May 2010 when the labor department came and the time cards only had numbers in it, I did ask David to tell me who was sitting where". Without the list she could not identify any particular time card that did not have a name on it.

Ms. Wong testified that the firm of Foong & Mak was hired to prepare Blue Butterfly's payroll records and ensure its compliance with the law. The company "strictly" complied with their instructions so that it would not get in trouble. David told her that DOL had been informed that the firm maintained all of the company's payroll records.

Petitioners submitted copies of paychecks, wage statements, and payroll summaries prepared by the accountant for the period from July of 2009 through April of 2010. Ms. Wong said she obtained the summaries from a receptionist at Foong & Mak who told her they were Blue Butterfly's payroll records. As foundation for admission of the accounting records, Ms. Wong testified that they were all prepared in the regular course of Blue Butterfly's business by the accountant, and it was the company's regular course of business to have them do so. No testimony was submitted from the accounting firm explaining their preparation.

The payroll summaries submitted at hearing show twenty employees employed during the above period. One employee shown in the payroll registers submitted to DOL during the investigation, Hui Ping Chen, is not shown in those submitted at hearing. The summaries show each employee working exactly forty hours per week, with the exception of David Chui, Andrew Chui, Kong Ming Lee and Fee Yin Lee who have no hours stated.

Questioned about the time cards and summaries for employee Yung Dong, Ms. Wong stated that her time card for the week of September 8, 2009 showed she worked 28 hours and 47 minutes that week but with the hour and one-half break each day she actually worked 21 hours and 17 minutes. The summaries show she was paid for forty hours. Questioned about employee

Yong Sheng Lee, Ms. Wong stated that her time card for the week of September 8, 2009 showed she worked 29 hours and 6 minutes that week but with the hour and one-half break she actually worked 23 hours and 6 minutes. The summaries show she was paid for forty hours. Records for the other employees reveal similar disparities between the hours stated on the time cards and those listed in the summaries.

Ms. Wong testified that she compiled a list of starting and ending dates of the employees drawn from the payroll records submitted at hearing. The list shows fifteen employees employed from on or about July 20, 2009 to on or about the middle of April of 2010. Six employees are shown employed for shorter periods of time, including two of the employees interviewed by DOL, Lian Jing Dong and Pan Kwai Fong.

Ms. Wong said David told her that after DOL visited the factory some of the employees became concerned about being paid and asked that they be paid in cash instead of by check. David told Fee to pay all the employees in cash from that point forward. No payroll was prepared for the period of April 5th through April 16th, 2010.

GOVERNING LAW

Standard of Review and Burden of Proof

The Labor Law provides that "any person ... may petition the board for a review of the validity or reasonableness of any ... order made by the commissioner under the provisions of this chapter" (Labor Law § 101[1]). An order of the Commissioner shall be presumed "valid" (Labor Law §103 [1]). If the Board finds that the order, or any part thereof, is invalid or unreasonable it shall revoke, amend, or modify the same (Labor Law § 101[3]).

A petition filed with the Board challenging the validity or reasonableness of any order issued by the Commissioner shall "state in what respects [the order] is claimed to be invalid or unreasonable" (Labor Law § 101[2]). The Board's Rules provide that "[t]he burden of proof of every allegation in a proceeding shall be upon the person asserting it" (12 NYCRR § 65.30). The burden is by a preponderance of evidence (State Administrative Procedure Act § 306[1]).

An Employer's Obligation to Keep Records

An employer's obligation to keep adequate employment records is found in Labor Law § 661 and the New York Code of Rules and Regulations (NYCRR). Specifically, Title 12 of the NYCRR § 142-2.6 provides, in pertinent part:

> "(a) Every employer shall establish, maintain and preserve for not less than six years, weekly payroll records which shall show for each employee:
> [1] name and address;
> [2] social security number;
> [3] wage rate;
> [4] the number of hours worked daily and weekly, including the time of arrival and departure for each employee working a split shift or

spread of hours exceeding 10;
[5] when a piece-rate method of payment is used, the number of units produced daily and weekly;
[6] the amount of gross wages;
[7] deductions from gross wages;
[8] allowances, if any, claimed as part of the minimum wage; ..."

***

"(d) Employers ... shall make such records ... available upon request of the commissioner at the place of employment.

§ 142-2.7 further provides:

"Every employer ... shall furnish to each employee a statement with every payment of wages, listing hours worked, rates paid, gross wages, allowances, if any, claimed as part of the minimum wage, deductions and net wages."

It is therefore an employer's responsibility to keep accurate records of the hours worked by its employees and the amount of wages paid and to provide them with a wage statement every time the employee is paid. This required recordkeeping provides proof to the employer, the employee, and the Commissioner that the employee has been properly paid.

Definition of Employer

"Employer" as used in Articles 6 and 19 of the Labor Law means "any person, corporation, limited liability company, or association employing any individual in any occupation, industry, trade, business or service" (Labor Law §§ 190 [3] and 651 [6]). "Employed" means "suffered or permitted to work" (Labor Law § 2 [7]).

The federal Fair Labor Standards Act (FLSA), like the New York Labor Law, defines "employ" to include "suffer or permit to work" (29 USC § 230 [g]). It is well settled that "the test for determining whether an entity or a person is an employer under the New York Labor Law is the same test ... for analyzing employer status under the Fair Labor Standards Act" (*Chu Chung v The New Silver Palace Rest, Inc.*, 272 FSupp 2d 314, 319 n.6 [SDNY 2003]).

In *Herman v RSR Security Services, Ltd.*, 172 F3d 132, 139 [2d Cir 1999], the Second Circuit articulated the test for determining employer status:

" ... the 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 include 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."

When applying this test "no one of the four factors standing alone is dispositive. Instead, the 'economic reality' test encompasses the totality of circumstances, no one of which is exclusive" (*Id*).

Under the economic reality test, the power to "control" does not require continuous monitoring of employees, looking over their shoulders at all times, or absolute control of one's employees. "Control may be restricted, or exercised only occasionally, without removing the employment relationship from the protections of the FLSA, since such limitations on control 'do not diminish the significance of its existence'"] (*Herman* at *139*; *Carter v Dutchess Community College,* 735 F2d 8, 11-12 [2d Cir 1984] [fact that control may be "qualified" is insufficient to place employment relationship outside statute]; *Moon v Kwon,* 248 FSupp 2d 201, 237 [SDNY 2002] [fact that hotel manager may have "delegated or shared" control with other managers, or exercised control infrequently, is of no consequence]).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Board makes the following findings of fact and conclusions of law pursuant to the provisions of Board Rule 65.30 (12 NYCRR § 65.39).

Petitioner Kong Ming Lee Is An Employer Under the Labor Law

Petitioner testified that he speaks very little English and whenever he spoke with DOL's investigators he told them he could not understand them and requested a translator. His requests were consistently ignored. When he met with them on April 30, 2010, they ignored his request for a translator, ignored his request to speak with his accountant, and threatened him with jail if he did not sign papers agreeing to pay back wages. Petitioner's testimony buttressed his claims that David was in charge of payroll and employee matters in the company, that he was merely an assistant who ran errands for David and Fee, and that he lacked any authority over the employees' wages, hours, and conditions of employment.

LSI Lee testified that when an employer or employee does not speak English it is customary to have an investigator present to translate who is fluent in the appropriate language or to call for one to provide the service. DOL employs several Chinese-speaking investigators. SLSI Tai accompanied the investigators on the initial visit in the event anyone would need Chinese translation and translated the interviews of several Chinese-speaking employees. In every conversation held with petitioner throughout the investigation, petitioner spoke with her in English, never requested a translator, and never said he had any difficulty understanding her. On April 30, 2010, investigators Lee and Rivera explained an initial recapitulation of wages to petitioner and he requested and negotiated a payment plan with DOL. LSI Lee testified that they did not threaten him with jail if he refused to sign. [3]

We credit LSI Lee's testimony concerning the investigation, as it was credible and corroborated by SLSI Ortiz and numerous entries and reports in the investigative file. Petitioner

[3] As the payment agreement was later withdrawn, its validity is irrelevant to the legal issue of petitioners' responsibility for an underpayment of wages and we need not address it. However, petitioner's claims that the investigators ignored his requests and threatened him with jail *are* relevant to the factual issue of whether he testified truthfully about his dealings with the investigators.

spoke with investigators on six different occasions at the factory and DOL's offices. Given the availability of a translator if petitioner had been unable to communicate with them, petitioner's testimony is simply incredible. Petitioner's lack of candor about his dealings with the investigators undermines the credibility of his testimony concerning his role and authority in the company.

We do not credit the corroborative testimony of Ms. Wong concerning petitioner's and David's duties. Ms. Wong said she talked with petitioner and Fee Yin Lee about business during the period from July of 2009 through April of 2010. As Fee did not testify and petitioner was not a credible witness, her testimony drawn from these hearsay conversations has little probative value. Ms. Wong also acknowledged that petitioner is her husband, Fee her sister-in-law, and that she was living with and being supported by them at the time. As such, she was not an independent witness.

Ms. Wong said she also visited the factory two or three times a week and spoke with David about business operations, employees, and family during the tea break or after work. She was not an employee of the company. We give little weight to hearsay testimony drawn from these social conversations. Indeed, her testimony that David was in charge of payroll in the company is inconsistent with David's contrary statements to the investigators. LSI Lee testified that when they informed him the company was under investigation for Labor Law violations, David told them they needed to talk with petitioner because he "didn't know anything about the business" and "was not familiar with the financial side".

We find the credible evidence from DOL's investigation supports three of the four factors of the "economic reality" test and that petitioner was properly deemed an employer under the Labor Law. First, when the investigators inspected the premises on April 13, 2010, petitioner was in charge of the factory and identified himself as a manager. When they visited at 6:00 PM on April 19, 2010, they observed seven workers at sewing machines. The circumstances show the employees were on work time and that petitioner was in charge. When questioned why employees were still working if their time cards were already punched out at 5:00 PM, petitioner told SLSI Ortiz that they were about to leave.

Petitioner's admission that he was a manager and evidence that he was in charge of the factory and supervising employees support the inference that he had authority to supervise or control employee work schedules and conditions of employment. The evidence belies petitioner's implausible testimony that when David and Fee were not in the factory "No one" was in charge. While petitioner may have exercised his authority "only occasionally" or shared it with David or Fee is of no consequence, as limitations or restrictions on control "do not diminish the significance of its existence" (*Herman* at 139).

Second, LSI Lee testified that petitioner was deemed an employer in large part because he represented himself throughout the investigation as the person involved with the financial side of the business and the company's accountant, had access to petitioners' bank accounts, was in charge of payroll, and provided DOL with records and information concerning the employees' wages and hours, including an employee who was paid in cash.

We find it telling that when the investigators advised petitioner there were insufficient funds to pay the company's employees, he assured them that he would receive a check from the

manufacturer on the following payday and make a deposit to cover their pay. When the investigators returned, petitioner produced a bank statement showing that he had made the deposit and that the employees were fully paid. The record clearly establishes that petitioner was a manager, was in charge of payroll, and had authority to control the employees' means and method of payment.

Third, it is self evident that payroll records required by the Labor Law are employment records for purposes of employer status. During the course of the investigation petitioner provided DOL with employee time cards, a cashbook showing the hours and wages of an employee paid in cash, and authorized his accountant to provide the investigators with payroll summaries showing employee names, social security numbers, wages, and hours. The accountant provided the records and identified himself as petitioner's accountant. His statements may be deemed an admission against petitioner *(Restatement of the Law of Agency* § 286 [if a party "authorizes an agent to make statements to third persons on his account, such statement may be introduced against the principal"]). That petitioner may have delegated his authority to maintain employment records to his accountant is of no consequence, as it is the employer's responsibility to maintain them. It is clear that petitioner had requisite authority to maintain employment records within the company.

Based on the totality of circumstances, we affirm the Commissioner's determination finding that petitioner Kong Ming Lee is an employer under the Labor Law.

Petitioners Failed to Produce Reliable and Accurate Payroll Records

In the absence of accurate records required by the Labor Law, the Commissioner may draw reasonable inferences and calculate unpaid wages based on the "best available evidence" drawn from employee statements or other evidence, even though the results may be approximate (*Matter of Mid-Hudson Pam Corp. v Hartnett,* 156 AD2d 818, 820-21 [3d Dept. 1989]; *Ramirez v Commissioner of Labor,* 110 AD3d 901 [2d Dept. 2013]).

In a proceeding challenging such determination, the employer must come forward with evidence of the "precise" amount of work performed or with evidence to negate the reasonableness of the inferences to be drawn from the employee's evidence (*Anderson v Mt. Clemens Pottery,* 328 U.S. 680, 688 [1949]; *Mid-Hudson Pam Corp.* at 821). Given the interrelatedness of wages and hours, the same burden shifting applies to wages (*Doo Nam Yang v ACBL Corp.,* 427 FSupp2d 327, 331 [SDNY 2006]).

The Court in *Mt. Clemens Pottery* described the nature of evidence the employer must provide to meet its burden to establish the "precise" amount of work performed: "Unless the employer can provide *accurate estimates* [of hours worked], it is the duty of the trier of facts to draw whatever reasonable inferences can be drawn from the employees' evidence as to the amount of time spent in these activities in excess of the productive working time" (*Id.* at 693 [emphasis added]; *Matter of Mohammed Aldeen, et al,* PR 07-093 [May 20, 2009] [employer burden to provide "accurate estimate" of hours worked to overcome approximation drawn by Commissioner], *aff'd. sub nom, Matter of Aldeen v Industrial Board of Appeals,* 82 AD3d 1220 [2d Dept. 2011]).

In challenging the Commissioner's calculation of wages, petitioners submitted over 800 pages of time cards, paychecks, wage statements, and payroll summaries. Foundation for admission of a business record is established by testimony of its author, an employee of the business or custodian of the record, or some other witness familiar with the recordkeeping procedures of the particular maker of the record (CPLR § 4518 (a); *Prince, Richardson on Evidence* § 8-306; *People v Kennedy*, 68 NY2d 569, 578-79 [1986]). An accounting firm is a distinct business entity for purposes of the business records exception (CPLR § 4518 (a) ["The term business includes a business, profession, occupation and calling of every kind"]).

As foundation for admission of the time cards, Ms. Wong testified in conclusory fashion that they were made in the regular course of Blue Butterfly's business and it was the company's regular course of business to make them. As foundation for the accounting records, she stated that they were prepared in the regular course of Blue Butterfly's business by its accountant, and it was the company's regular course of business to have them do so.

Ms. Wong was not employed by Blue Butterfly, was not a custodian of its records, and her knowledge of the company's time records was based on hearsay social conversations with David a few times a week. She was not employed by the accounting firm, was not a custodian of its records, and obtained the payroll summaries from a receptionist at the firm who told her they were Blue Butterfly's payroll records. Like the time records, Ms. Wong's knowledge of the accounting records came from hearsay social conversations with David a few times per week. No testimony from the accounting firm was submitted explaining their preparation of these payroll documents.

In the circumstances of this case, we find Ms. Wong's association with the company and the accounting firm simply too attenuated for these records to have any probative value as business records establishing the employees' hours worked and wages paid.

Even if the records were considered, they bear other irregularities making them unreliable to support an accurate estimate of hours worked or wages paid. Petitioners failed to submit most of their time records to the Commissioner during the investigation. In response to DOL's notice to provide payroll records for the previous one and one-half years, petitioners provided time cards for only the period from January 25 to April 5, 2010. Petitioners argue that the records were maintained with their accountant and were available if the investigators had simply asked for them. However, 12 NYCRR § 142-2.7 requires employers to make such records available to the Commissioner at "the place of employment." Petitioner's failure to provide most of their time records, without credible explanation, suggests they were created after the fact and were not contemporaneously recorded (*Matter of Aldeen,* at 12-13 [payroll records produced for first time at hearing unreliable]). Furthermore, DOL visited the factory after business hours on April 19, 2010 and found seven employees still working but with their time cards already punched out. The lack of correlation to actual hours worked, uniformity of hours, and incompleteness of petitioners' records demonstrate that they are unreliable as accurate estimates of actual hours worked and wages paid.

The Wage Order Is Affirmed But Modified as to the Calculation of Wages Owed

Petitioners may meet their burden of proof by establishing the precise hours worked by their employees *or* by negating "the reasonableness of the inference to be drawn from the

employee's evidence" (*Mt. Clemens Pottery* at 687-88). While the Commissioner is entitled to make just and reasonable inferences in awarding damages to employees, nevertheless "the approximation must at least have some rational basis" in the record (*Matter of John Shepanski Roofing & Gutters v Roberts,* 133 AD2d 757, 758 [2d Dept. 1987]).

Petitioners challenged the reasonableness of the Commissioner's calculation based on the allegations in the anonymous letter. Since the authors of the letter were not identified, petitioners argue that it cannot support a reasonable inference that employees worked overtime or the number of hours worked. Petitioners challenge the period of the underpayment, arguing there is no evidence that employees were employed before July of 2009 when David joined the company and brought its only customer, Nanette Lepore apparel.

We affirm the Commissioner's determination finding that employees worked overtime hours but find the inferences supporting the calculation unreasonable in several respects. We modify the calculation as to the number of overtime hours worked, number of employees, and period of underpayment.

First, LSI Lee testified that hours for twenty of the twenty-one employees were computed based on those stated in the anonymous letter, 8:00 AM to 10:00 PM, minus the lunch hour. Total hours were 13 hours per day for five days and 65 hours per week. Asked whether there was a basis to believe that employees worked 65 hours per week aside from the hours stated in the letter, SLSI Ortiz testified that since employees were still there after 6:00 PM on the evening of April 19, 2010 "who is to say they weren't supposed to leave at 10:00 anyway and that's the time they were supposed to leave". She added that "they could have taken leave anywhere between 6:00 and 10:00" and it was a "fair assumption" that they worked the hours found by the Commissioner.

The authors of the anonymous letter were unknown and were never interviewed by DOL. While the letter may have triggered the investigation, as an evidentiary matter it is anonymous hearsay and has no probative value. Any inferences drawn from the letter are speculation or rumor and are insufficient to support the Commissioner's determination (*Matter of 300 Gramatan Avenue Associates v State Division of Human Rights,* 45 NY2d 176, 180 [1978] [substantial evidence supporting an administrative determination "does not arise from bare surmise, conjecture, speculation or rumor"]).

DOL interviewed four employees during the course of its investigation. One of them stated that she worked until 7:00 PM. On the evening of April 19, 2010, investigators observed seven employees and one manager still working at or around 6:00 to 6:30 PM. While the employees "could have" left anytime up to 10:00 PM, DOL's assumption that employees did work until the latter hour is pure speculation. We find the record evidence supports a reasonable approximation of two overtime hours up to 7:00 PM, minus the lunch hour, resulting in one hour of overtime.

Second, DOL's determination that the hours stated by three of the four employees interviewed were possibly "their set schedule" and not their actual hours is unwarranted speculation. Each of these employees was interviewed under conditions identical to those in the interview of Ms. Dong. Each employee stated that they worked forty hours per week or less. SLSI Tai testified that it is essential to any investigation that she accurately records what the

employee tells her. DOL's determination to disregard the hours stated by these employees and to impute overtime hours to them is unreasonable.

As to the number of employees owed underpayments, the investigation revealed one named employee who stated she regularly worked overtime. Three of the four employees interviewed said they did not. DOL observed seven unnamed employees and Kong Ming Lee, who is listed in the order as an employee, working after hours on April 19th. There simply is no record evidence supporting a reasonable approximation that all twenty-one employees were working more than forty hours per week, aside from the allegations of the anonymous letter.

We therefore affirm the wage order for Lian Jing Dong, vacate the order as to Pan Kwai Fong, John Hoang, and Xia Wan Wu, and find that the evidence supports a finding that an additional seven employees, besides Ms. Dong, worked one hour of overtime five days per week. We modify the order for the remaining employees in the fashion described below.

Third, petitioners' witnesses testified that while petitioner and Fee started the company in 2008 and the factory space was rented in 2009, the company did not start producing apparel until July of 2009 when David joined and brought its only customer, Nanette Lepore apparel. An attorney for the manufacturer that owns Nanette Lepore advised DOL that it had been in business with Blue Butterfly since July of 2009. Two of the four employees interviewed said they had been employed since July of 2009. While an attorney for petitioners submitted a Con Edison billing statement showing service from December of 2008, the fact that space was rented and utilities were on is insufficient to draw a reasonable inference that the employees named in the order were employed, much less working overtime. DOL's determination must be based on more than suspicion, surmise, or speculation (*300 Gramatan Avenue Associates* at 180). We find DOL's determination to start the underpayments from December of 2008 unreasonable and that the evidence supports a reasonable approximation of July of 2009.

In light of the above, we affirm the wage order for employee Lian Jing Dong, vacate the order as to Pan Kwai Fong, John Hoang, and Xiao Wan Wu, and modify the order to direct the Commissioner to recalculate a total underpayment equal to one hour of overtime for five days per week at minimum wage for an additional seven employees from July 1, 2009 to April 16, 2010. The Commissioner shall distribute the underpayment to the remaining employees in equitable fashion, together with liquidated damages and interest to be reduced proportionally.

Liquidated Damages

Labor Law § 663 (2) provides that the Commissioner may collect liquidated damages for violations of the Minimum Wage Act in an amount up to 25% of the unpaid wages, unless the employer "proves a good faith basis for believing that its underpayment of wages was in compliance with the law".

We affirm the Commissioner's assessment of liquidated damages, as petitioners failed to meet their burden of proof to establish that they had a good faith basis to believe their underpayment was in compliance with law. The wage order is modified as to the total amount of wages owed and the amount of liquidated damages shall be reduced proportionally.

Interest

Labor Law § 219(1) provides that when the Commissioner determines that wages are due, the order directing payment shall include "interest at the rate of interest then in effect as prescribed by the superintendent of banks 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 percent per centum per annum."

We find that the computations to be made by the Commissioner in assessing interest in the wage order are valid and reasonable in all respects. The order is modified as to total amount of wages owed and the interest shall be reduced proportionally.

Civil Penalty

The wage order imposes a 100% civil penalty against petitioners. SLSI Ortiz testified that in determining the penalty, she completed a report that considered the size of the employer's business, its good faith, gravity of the violation, and any recordkeeping violations disclosed during the investigation (*See* Labor Law § 218). She believed the penalty was reasonable because DOL had visited the factory after business hours and found employees still working. The records provided by the employer were false and did not reflect the actual hours worked, even if the employees were paid in cash at straight time.

We find that the considerations to be made by the Commissioner in connection with the imposition of the civil penalty in the wage order are reasonable and valid in all respects. The order is modified as to the total amount of wages owed and the civil penalty shall be reduced proportionally.

Penalty Order

The penalty order assesses civil penalties against petitioners of $2,000 for violation of Labor Law § 661 and 12 NYCRR § 137-2.1 by failing to keep and/or furnish true and accurate payroll records for each employee, and $2,000 for violation of Labor Law § 661 and 12 NYCRR § 137-2.2 by failing to give each employee a complete wage statement with every payment of wages, for the period from April 5, 2010 to April 16, 2010. The total civil penalty is $4,000.

The record establishes that petitioners did not maintain and/or furnish the Commissioner true and accurate payroll records for their employees for the above period. Petitioners concede that they did not provide wage statements to their employees for this period, but claim their actions were justified because were paid in cash from April 5, 2010 forward. However, 12 NYCRR § 137-2.2 requires that wage statements be provided each employee "with every payment of wages". It does not provide an exception for cash payments.

We find that the considerations to be made by the Commissioner in connection with the imposition of the civil penalties in the order are reasonable and valid in all respects. As Labor Law § 218 provides that the maximum penalty for a first time non-wage violation is $1,000, we modify the order to reduce the penalties to $1,000 for each violation, for a total penalty of $2,000.

NOW, THEREFORE IT IS HERBY RESOLVED THAT:

1. The wage order is affirmed as to employee Lian Jing Dong, vacated as to employees Pan Kwai Fong, John Hoang, and Xiao Wan Wu, and modified as to the remaining employees in the manner described in this decision; and

2. The Commissioner is directed to recalculate and distribute the wages owed to the remaining employees in the fashion described in this decision, together with liquidated damages, interest, and civil penalty reduced proportionally; and

3. The penalty order is affirmed but modified to reduce the penalties to an amount of $1,000 for each violation, for a total amount of $2,000; and

4. The petition is and shall be otherwise dismissed.

Anne P. Stevason, Chairperson

J. Christopher Meagher, Member

Jean Grumet, Member

LaMarr J. Jackson, Member

Jeffrey R. Cassidy, Member

Dated and signed in the Office
of the Industrial Board of Appeals
at New York, New York, on
April 10, 2014.