STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of: ALBERTO BAUDO, Petitioner, To Review Under Section 101 of the Labor Law: An Order to Comply with Article 19 and an Order Under Articles 5 and 19 of the Labor Law, both dated November 14, 2014, - against - THE COMMISSIONER OF LABOR, Respondent.	DOCKET NO. PR 15-007 RESOLUTION OF DECISION

APPEARANCES

Meyers Fried-Grodin, LLP (Jonathan Meyers, Esq. of counsel), for petitioner.

Pico Ben-Amotz, General Counsel, NYS Department of Labor (Fredy J. Kaplan, Esq. of counsel), for respondent.

WITNESSES

Alberto Baudo, Daria Spieler, and Dimitri Lodico for petitioner.

Zenaido Castaneda, Paulino DeJesus, Margarito-Many Cordero, and Joyce Chan, Senior Labor Standards Investigator for respondent.

WHEREAS:

On January 8, 2015, petitioner Alberto Baudo filed a petition with the Industrial Board of Appeals (Board) seeking review of two orders issued against him and Rosso Enterprises Corp. (T/A Acqua Restaurant & Wine Bar) by respondent Commissioner of Labor on November 14, 2014. Rosso Enterprises Corp. did not file a petition for review. The Commissioner filed her answer on February 26, 2015.

Upon notice to the parties, a hearing was held on September 28, 2015 in New York, New York before Board member and designated hearing officer J. Christopher Meagher, Esq. Each party was afforded a full opportunity to present documentary evidence, examine and cross-examine witnesses, make statements relevant to the issues, and submit post-hearing briefs.

The first order (minimum wage order) demands that petitioner comply with Article 19 of the Labor Law and pay the Commissioner unpaid minimum wages due and owing to claimant employees Zenaido Castaneda, Paulino De Jesus, Clemente Garcia, and Margarito Many-Cordero in the amount of $107,944.74 for the overall time period from July 15, 2006 to April 28, 2011, interest continuing at the rate of 16% calculated to the date of the order in the amount of $61,324.45, liquidated damages in the amount of $26,986.19, and a civil penalty in the amount of $107,944.74. The total amount due is $304,200.12.

The second order (penalty order) under Articles 5 and 19 of the Labor Law assesses petitioner civil penalties of: (1) $250.00 for violation of Labor Law § 661 and 12 NYCRR 137-2.1 by failing to keep and/or furnish the Commissioner true and accurate payroll records for each employee during the period from July 15, 2006 to December 31, 2010; (2) $250.00 for violation of Labor Law § 661 and 12 NYCRR 146-2.1 for the same violation during the period from January 1, 2011 to April 28, 2011; (3) $500.00 for violation of Labor Law § 661 and 12 NYCRR 146-2.3 by failing to furnish each employee a complete wage statement with every payment of wages during the period from January 1, 2011 to April 28, 2011; (4) $500.00 for violation of Labor Law § 661 and 12 NYCRR 146-3.2 by failing to pay employees hourly rates of pay during the period from January 1, 2011 to April 28, 2011, and; (5) $500.00 for violation of Labor Law § 162 by failing to provide employees at least 30 minutes off for the noon day meal period from July 18, 2007 to April 28, 2011. The total amount due is $2,000.00.

The petition alleges that the orders should be dismissed because petitioner was not the claimants' employer, the alleged violations occurred outside the statute of limitations, each of the employees was fully paid at minimum wage and was provided a 30 minute meal period, and the civil penalties assessed by the Commissioner are excessive and unreasonable. Petitioner did not submit evidence at hearing concerning his status as an employer and the issue is thereby waived pursuant to Labor Law § 101 (2).

SUMMARY OF EVIDENCE

The Wage Claims

In August 2011 and March 2012 claimants Zenaido Castaneda, Paulino De Jesus, Clemente Garcia, and Margarito Many-Cordero filed claims with the Department of Labor (DOL) alleging that they were employed at petitioner's restaurant during the period from July 2006 through April 28, 2011 and were not paid overtime for the hours they worked over 40 per week.[1]

Castaneda claimed that he was employed as a "food prep/dishwasher" from June 15, 2007 through April 28, 2011, worked from 6:00 a.m. to 3:00 p.m. each day over six days per week, and ate "on the run" without a meal period. He was paid in cash at the rate of $360.00 per week from June 15, 2007 to December 31, 2007 and $420.00 per week from January 1, 2008 through April 28, 2011.

[1] Claimants stated that they were employed at the restaurant through August 2011 and March 2012. DOL determined that petitioner sold the business in May 2011 and capped the wages owed by petitioner under the minimum wage order as of April 28, 2011.

De Jesus claimed that he was employed as a "salad man" from July 15, 2006 through April 28, 2011, worked from 11:30 a.m. to 11:00 p.m. each day over six days per week, and received a 10-minute meal period. He was paid in cash at the rate of $480.00 per week.

Garcia claimed that he was employed as a "cook/pasta maker" from July 15, 2006 through April 28, 2011, worked from 11:30 a.m. to 11:00 p.m. each day over six days per week, and received a 10-minute meal period. He was paid in cash at the rate of $480.00 per week from July 15, 2006 to December 31, 2007, $590.00 per week from January 1, 2008 to December 31, 2010, and $600.00 per week from January 1, 2011 through April 28, 2011.

Many-Cordero claimed that he was employed as a "cook" from September 15, 2006 through April 28, 2011, worked a varied schedule of hours each day over six days per week, and received a one-hour meal period. On Monday and Wednesday he worked from 12:00 p.m. to 11:00 p.m., Tuesday and Friday from 6:00 a.m. to 3:00 p.m., Saturday from 12:00 p.m. to 11:30 p.m., and Sunday from 12:00 p.m. to 10:30 p.m. He was paid in cash at the rate of $580.00 per week from September 15, 2006 to December 31, 2009 and $600.00 per week from January 1, 2010 through April 28, 2011.

Testimony of petitioner Alberto Baudo

Petitioner Alberto Baudo testified that he and a partner were co-owners of Rosso Enterprises Corp., the company that owned and operated "Acqua Restaurant & Wine Bar" in New York City from August 2006 to May 2011.[2] The restaurant was located in the Peck Slip area of Manhattan near the financial district and offered lunch and dinner service seven days a week. Petitioner and his partner sold Acqua after several years of declining business revenues resulting from the 2008 financial crisis and dissolved the company in November 2011. Petitioner acknowledged that he employed each of the claimants during their respective claim periods covered by the minimum wage order and submitted a letter addressed to them in May 2011 thanking them for their service.

Petitioner testified that he ran the restaurant with his managers, including a chef who supervised the kitchen staff and was the person in charge of communication with them. The restaurant was open from 12:00 p.m. to 10:00 p.m. each day and closed earlier if it was not busy. Each of the claimants worked the same schedule of hours throughout their employment, from 12:00 p.m. to 10:00 p.m. five days a week and from 7:00 a.m. to 2:00 p.m. one day a week when they did food preparation. They had a half hour meal period from 3:30 to 4:00 p.m. and a one-hour break from 5:00 to 6:00 p.m. Claimants worked 52 hours per week and never worked more than 10 hours per day.

Petitioner testified that he did not keep records of the hours worked or wages paid the claimants because their hours and wages were the same every week. He paid the kitchen staff in cash and personally delivered each employee his pay in an envelope that included a note stating the amount he was being paid. No wage statements were issued. While the rest of the staff recorded their daily hours on a computer and were paid by check, the kitchen staff was unable to utilize the computer because of language and other difficulties.

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[2] Petitioner's partner lived in Italy throughout most of the time the restaurant was in operation.

As evidence of payment, petitioner submitted emails he sent his partner in January and March 2009 alerting him to Acqua's declining revenues and that he had trouble meeting the kitchen's weekly payroll of $5,920.00 per week. He submitted a memo titled "Payroll Kitchen Acqua July 2009" that provides a breakdown of salaries paid the kitchen staff, including Castaneda at $560.00 per week, DeJesus at $580.00 per week, Garcia at $590.00 per week, and Many-Cordero at $600.00 per week. Asked whether the memo was written in July 2009, petitioner replied that he "assume[d]" it was. Petitioner testified that he and his general manager prepared the memo to make sure the pay envelopes they gave the kitchen staff were in the right amounts. Petitioner maintained that claimants were paid these salaries throughout their employment.

Petitioner testified that he operated a small restaurant that was eventually forced out of business as a result of the financial crisis and recession. He nonetheless kept the claimants on for several years despite declining revenues because they had been there from the beginning, were good workers, and needed their jobs. Acqua's computer, payroll, and financial records were left in the basement for the company that purchased the restaurant in 2011 but were destroyed the next year in Super-storm Sandy. Petitioner submitted photos and insurance records corroborating the damage. He was unable to respond to DOL's investigation because he did not receive a collection letter sent to the restaurant in April 2014 after it had been sold. He did not receive a letter sent to him at an apartment in Brooklyn in July 2014, as he was no longer living there.

Testimony of Daria Spieler and Dimitri Lodico

Daria Spieler testified that she worked at the restaurant as a server and floor manager from 2009 to 2011. Servers and kitchen staff worked a lunch shift each day from 12:00 p.m. to 4:00 p.m. and a dinner shift from 5:00 p.m. to 10:00 or 10:30 p.m. After lunch was over around 3:15 p.m. the full staff ate their meal together from 3:30 to 4:00 p.m. Kitchen staff then had a one-hour break from 4:00 to 5:00 p.m. to do whatever they wanted because the kitchen "was basically closed" and there was no food service. Servers stayed in the restaurant, however, so they could serve customers who came in to have drinks or coffee.

Spieler testified that she was familiar with what the kitchen staff was paid because she helped petitioner with bookkeeping to pay the restaurant's vendors. In the process, she talked with the chef who managed the kitchen staff and "pretty much decided how they were paid." According to Spieler, the dishwasher (Castaneda) was paid "about" $560.00 or $570.00 per week, De Jesus "about" $580.00, and Many-Cordero "about" $600.00.

Dimitri Lodico testified that he worked at the restaurant as a server from 2008 to 2011. Although the kitchen opened at 12:00 p.m. and closed at 11:00 p.m., servers and kitchen staff were both required to be at the restaurant by 11:00 a.m. and to work to at least 11:00 p.m. After the kitchen closed, the servers "would stay to rearrange the stools, [until] 11:30, 12:00 max" and once the kitchen staff "were done with their set up in the kitchen, they were free to go."

Lodico further testified that everyone took a half-hour meal break at 3:00 or 3:30 p.m. Asked if he had ever seen anyone not take the break, he replied "You could choose not to take it, but you were still offered the option." Lodico added that servers had a one-hour break from 4:00 p.m. to 5:00 p.m. when the kitchen was shut down and sometimes a two-hour break if they worked double shifts and additional servers were coming in.

Testimony of claimants Zenaido Castaneda, Paulino De Jesus, and Margarito Many-Cordero

Claimant Zenaido Castaneda testified that he was employed at the restaurant doing "prep and dishwashing" from 2007 to July 28, 2011. He worked six days per week, from 6:00 a.m. to 3:00 p.m. each day, and his starting salary was $380.00 per week. Sometime in 2008, he could not recall exactly when, his salary was raised to $420.00 per week. Asked whether he was given a half-hour meal break, he replied "Not me. I didn't have time to eat." Castaneda authenticated his claim form and testified that the information he provided DOL on the form was accurate.

Claimant Paulino De Jesus testified that he was employed at the restaurant as a "salad man" from 2006 to 2012. He worked five days per week, from 11:30 a.m. to 11:30 p.m. each day, and was paid $480.00 per week. He was provided a one-half hour meal break between 4:00 and 4:30 p.m. DeJesus authenticated his claim form and testified that the information he provided DOL on the form was accurate.

Claimant Margarito Many-Cordero testified that he was employed as a "cook" at the restaurant from 2006 to 2012. He worked a varied schedule of 60 hours over six days per week, with a one-hour break each day for meals. He started at $580.00 per week and after several years was raised to $600.00 per week. Many-Cordero authenticated his claim form and testified that the information he provided DOL on the form was accurate.

Testimony of Senior Labor Standards Investigator Joyce Chan

Senior Labor Standards Investigator Joyce Chan testified that she reviewed DOL's file compiled during its investigation for purposes of the hearing. The investigation was conducted and reviewed by two other investigators who are no longer employed by the agency.

In follow up to the claims, DOL issued petitioner a collection letter to the restaurant's address on April 10, 2014 advising him of the details and requesting payroll records of the daily hours worked and wages paid the claimants from July 15, 2006 to March 5, 2012. An attorney for the company that purchased the restaurant in May 2011 replied that his client had temporarily employed the claimants during a transition period but had subsequently terminated their employment. The attorney submitted sale and other documents verifying the date of acquisition.

In the absence of a response or payroll records received from petitioner, DOL calculated wages owed based on the claimants' written claims. Because each employee was paid a weekly salary, a derived hourly rate of pay for each claimant was calculated by dividing the salary they received by the hours they worked and calculating an overtime rate at one and one-half times that rate. Where the derived rate was less than minimum wage, wages were calculated at the applicable minimum wage. Spread of hours payments were applied where appropriate, meal credits given, and meal breaks were calculated only if the employees received them.

On July 30, 2014, DOL issued petitioner a recapitulation of wages due, a Notice of Labor Law Violations, and a letter explaining how the wage calculations were made. The mailing was sent to an address for petitioner in Brooklyn, New York and a second address on John Street in Manhattan. The letter addressed to John Street was returned by the Postal Service as undeliverable. DOL requested that petitioner remit payment of the wages due by August 19, 2014 or the case

would be referred for orders to comply, entailing additional interest, liquidated damages, and civil penalties. No response was received.

In the absence of adequate payroll records establishing the hours worked and wages paid the claimants, DOL issued the orders under review on November 14, 2014. In support of the 100% civil penalty assessed in the minimum wage order, investigator Jeong Lee completed an investigative report titled "Background Information-Imposition of Civil Penalty" that provides information relating to the size of petitioners' firm, their good faith, gravity of the violation, and non-wage violations. In addition, a report titled "Labor Law Articles 6, 19 and 19-A Violation Recap" was completed that cited petitioners for the recordkeeping, wage statement, hourly rate of pay, and meal period violations in the penalty order. DOL did not submit testimony or further documentation explaining how they arrived at the civil penalties assessed in the orders.

GOVERNING LAW

Petitioner's Burden of Proof

Petitioner's burden of proof in this case was to establish by a preponderance of evidence that the orders issued by the Commissioner are invalid or unreasonable (State Administrative Procedure Act § 306 [1]; Labor Law § 101 [1]; 12 NYCRR 65.30; *Matter of Ram Hotels, Inc.* PR 08-078 at 24 [October 11, 2011]).

Minimum Wage and Overtime

Article 19 of the Labor Law, known as the Minimum Wage Act, requires employers to pay each of its covered employees the minimum wage in effect at the time payment is due (Labor Law § 652). During the relevant time period, the minimum wage was $6.75 per hour in 2006, $7.15 per hour in 2007, and $7.25 per hour from July 24, 2009 through April 28, 2011 (Labor Law § 652 [1]; 12 NYCRR 137-1.2).[3] An employer must also pay every covered employee an overtime premium of one and one-half times the employee's regular hourly rate for hours worked over 40 in a week (12 NYCRR 137-1.3). When an employee is paid on a salary or any basis other than an hourly rate, the regular rate is the employee's total earnings divided by the total hours worked during the week (12 NYCRR 137-3.5).[4]

An Employer's Obligation to Maintain Adequate Payroll Records

The Labor Law requires employers to maintain accurate payroll records that include, among other things, their employees' daily and weekly hours worked, wage rate, gross and net wages paid, and any allowances claimed as part of the minimum wage (Labor Law § 661; 12 NYCRR 137-2.1). Employers are required to keep such records open to inspection by the

[3] Effective January 1, 2011, the Restaurant Industry Wage Order (12 NYCRR Part 137) was replaced by the Hospitality Industry Wage Order (12 NYCRR 146).

[4] Under the Hospitality Wage Order, where an employee is not paid an hourly rate, the regular rate is now determined by dividing the employee's total weekly earnings by the lesser of 40 hours *or* the total number of hours worked during the week (12 NYCRR 146-3.6).

Commissioner or a designated representative at the place of employment and maintain them for no less than six years (*Id.*).

Employers are further required to furnish each employee a statement with every payment of wages listing the hours worked, rates paid, gross and net wages, and any allowances claimed as part of the minimum wage (Labor Law § 661; 12 NYCRR 137-2.2). The required recordkeeping provides proof to the employer, the employee, and the Commissioner that the employee has been properly paid.

In the absence of accurate records required by the Labor Law, an employer bears the burden of proving that the disputed wages were paid (Labor Law § 196-a). Where the employer has failed to keep such records, the Commissioner may draw reasonable inferences and calculate unpaid wages based on the "best available evidence" drawn from employee statements and 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 2010]).

In *Anderson v Mt. Clements Pottery Co.*, 328 US 680, 687-688 (1949), superseded on other grounds by statute, the U.S. Supreme Court long ago discussed the fairness of relying on employee statements where the employer failed to keep adequate records:

> "[W]here the employer's records are inaccurate or inadequate . . . . [t]he solution . . . is not to penalize the employee by denying him any recovery on the ground that he is unable to prove the precise extent of uncompensated work. Such a result would place a premium on an employer's failure to keep proper records in conformity with his statutory duty; it would allow the employer to keep the benefits of an employee's labors without paying due compensation as contemplated by the Fair Labor Standards Act."

In a proceeding challenging such determination, the employer must then 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 employees' evidence *(Mt. Clemens Pottery Co.,* 328 US at 688; *Tyson Foods, Inc. v Bouaphakeo,* 136 S. Ct. 1036, 1047 [2016]; *Mid-Hudson Pam Corp.*, 156 AD2d at 821). Given the interrelatedness of wages and hours, the same burden shifting applies to wages and requires the employer to prove the "precise wages" paid for that work or to negate the inferences drawn from the employee's statements (*Doo Nam Yang v ACBL Corp.,* 427 FSupp2d 327, 332 [SDNY 2005]; *Matter of Kong Ming Lee,* PR 10-293 at 16 [April 10, 2014]).

The Board has summarized the applicable federal and state principles governing the employer's burden of proof in cases before the Board, holding that petitioners have the burden of showing that the Commissioner's wage order is invalid or unreasonable by a preponderance of evidence of the specific hours that the claimant worked and that he was paid for those hours, or other evidence that shows the Commissioner's findings to be unreasonable (*Matter of Ram Hotels, Inc,* PR 08-078 at 24 [October 11, 2011]).

FINDINGS

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

The Minimum Wage Order Is Affirmed But Modified As to the Amount of Wages Owed

Subject to the modifications below, we find that petitioner failed to meet his burden of proof to establish the precise hours worked by the claimants and that they were paid for those hours or that the inferences supporting the calculation of wages made by the Commissioner in the Minimum Wage Order were otherwise unreasonable.

Petitioner testified in general fashion that claimants worked the same schedule five days a week from 12:00 p.m. to 10:00 p.m. and one day a week from 7:00 a.m. to 3:00 p.m. Each claimant had a half-hour meal break between 3:30 and 4:00 p.m. and an additional one-hour break from 4:00 to 5:00 p.m. According to petitioner, claimants worked exactly 52 hours per week and never worked more than 10 hours per day. Petitioner conceded that he kept no payroll records showing the specific hours worked by any of the claimants throughout the period of their claims. The Board has repeatedly held that such general, conclusory, and incomplete testimony concerning the work schedules of employees is insufficient to satisfy the high burden of precision required to meet an employer's burden of proof (*Matter of Young Hee Oh,* PR 11-017 at 12 [May 22, 2014] [employer cannot shift burden with arguments, conjecture, or incomplete, general, and conclusory testimony]; *Matter of Wilson Quiceno,* PR 14-287 at 8 [July 13, 2016] [conclusory testimony that employee never worked more than set number of hours per week insufficient to establish precise hours worked]).

As corroboration for his testimony, petitioner submitted the testimony of Daria Spieler, a server and floor manager who worked at the restaurant from 2009 to 2011. Spieler testified that kitchen staff worked the same overall schedule as the servers in the front of the house each day, i.e. they worked the lunch shift from 12:00 p.m. to 4:00 p.m. and the dinner shift from 5:00 p.m. to 10:00 or 10:30 p.m. Spieler's testimony was inconsistent with another server who worked at the restaurant, Dimitri Lodico, who testified that while the kitchen opened at 12:00 p.m. and closed at 11:00 p.m., servers and kitchen staff were *both* required to be at the restaurant by 11:00 a.m. and to work to at least 11:00 p.m. After the kitchen closed, the kitchen staff was free to leave after they completed "their set up in the kitchen" for the next day.

As proof of payment, petitioner submitted a memo dated July 2009 that provides a breakdown of the claimants' weekly salaries. Petitioner testified that he "assume[d]" the memo was written at the time and that it was prepared to make sure that the pay envelopes he was giving the kitchen staff were in the right amounts. Petitioner maintained that claimants were paid these salaries throughout their employment. Spieler testified that she was familiar with claimants' salaries because she talked with the chef who managed the kitchen staff and decided how much they should be paid. She estimated that Castaneda, De Jesus, and Many-Cordero were paid "about" the same amounts that are listed in the memo. We give no weight to this evidence as it is vague, self-serving, and unsupported by contemporaneous payroll records and wage statements showing the exact rates and wages that claimants were paid during the period of their claims (*Matter of James A. Kane,* PR 11-092 at 8 [April 29, 2015] [general testimony and vague speculation as to

wage rate, unsupported by contemporaneous payroll records, fails to meet burden to establish pay rate and precise wages paid]).

With the modifications that follow, we find that petitioner failed to overcome the presumption favoring the Commissioner's calculation of wages owed each of the claimants. With the exception of the break time calculated by the Commissioner for Garcia, we credit their testimony concerning their meal breaks as it was specific and credible and find that it rebutted petitioner's assertions that the entire kitchen staff was provided break times of one and one-half hours each day. In light of petitioner's failure to maintain required records of the daily and weekly hours worked by the claimants, including meal breaks, we find the Commissioner's determination reasonable.

Wages Owed Zenaido Castaneda

Castaneda testified that he was employed from 2007 to 2011 doing "prep and dishwashing" and worked six days per week, from 6:00 a.m. to 3:00 p.m. each day. Asked whether he was given a half-hour meal break, he replied that he was not because he was too busy performing his duties and "didn't have time to eat." As the kitchen staff was supervised by the chef, petitioner was on actual and constructive notice that he was "permitted and suffered to work" during this time and the additional hours must be compensated (*Matter of John D. Givens,* PR 10-076 at 7-8 [February 6, 2013] [where employer on notice that employee worked through lunch period, additional hours must be compensated]).

Castaneda further testified that he was paid $380.00 per week when he started in 2007. Sometime in 2008, he could not recall exactly when, he was raised to $420.00 per week. As DOL calculated his underpayment at a starting salary of $360.00 per week for the period from June 15, 2007 to December 31, 2007, based on Castaneda's written claim, we affirm the minimum wage order on his behalf but modify it to find that he was paid $380.00 per week during that period of time. We direct the Commissioner to recalculate his underpayment accordingly.

Wages Owed Paulino De Jesus

De Jesus testified that he was employed from 2006 to 2012 as a "salad man," worked five days per week from 11:30 a.m. to 11:30 p.m. each day, and was paid $480.00 per week. He was provided a one-half hour meal break between 4:00 and 4:30 p.m. As DOL calculated his underpayment at six days per week and did not factor in the meal break, based on his written claim, we affirm the minimum wage order on his behalf but modify it to find that he worked five days and 55 hours per week during the period of his claim. We direct the Commissioner to recalculate his wages accordingly.[5]

Wages Owed Margarito Many-Cordero

Many-Cordero testified that he was employed as a "cook" from 2006 to 2012, worked a varied schedule of 60 hours over six days per week, and had a one-hour break each day for meals. He started at $580.00 per week and after several years was raised to $600.00 per week. As DOL

[5] While De Jesus estimated that he worked 11:30 p.m. each day because he often worked extra hours, we are limited in our review to the order issued by DOL and may not modify the order upwards. The order is based on his claim form indicating he worked until 11:00 p.m.

calculated his underpayment at 56 hours per week, based on his written claim, we affirm the minimum wage order on his behalf but modify it to find that he worked 54 hours per week during the period of his claim, excluding the meal break. We direct the Commissioner to recalculate his underpayment accordingly.

Wages Owed Clemente Garcia

Garcia stated in his written claim that he was employed as a "cook" from 2006 to 2011 and worked from 11:30 a.m. to 11:00 p.m. each day over six days per week. He was paid $480.00 per week from July 15, 2006 to December 31, 2007, $590.00 per week from January 1, 2008 to December 31, 2010, and $600.00 per week from January 1, 2011 through April 28, 2011.

Petitioner argued in his brief that Garcia's underpayment should be revoked because he failed to testify at hearing to rebut petitioner's evidence. However, where an employer has failed to provide adequate payroll records, it is petitioner's burden in the first instance to prove that the disputed wages were paid, even where the employee did not testify (*Matter of James A. Kane,* at 7-8 [wage order drawn solely from written claim upheld where petitioner fails to meet burden of proof to establish precise hours worked and wages paid]). In this case, petitioner acknowledged that he employed Garcia as a member of the kitchen staff throughout the period of his claim. He presented testimony through his witness, Dimitri Lodico, that members of the kitchen staff who worked the lunch and dinner shifts were required to be at the restaurant from 11:00 a.m. until at least 11:00 p.m., a range of hours consistent with those calculated by the Commissioner for Garcia. Two other members of the kitchen staff who worked each day during this time frame, De Jesus and Many-Cordero, testified to a range of hours similar to that calculated for Garcia. Petitioner did not submit time or payroll records showing the *actual* hours that Clemente worked and wages he was paid during the period covered by the Commissioner's order. In light of petitioner's failure to maintain such records, we find the Commissioner's approximation of hours worked and wages owed Garcia to be reasonable, subject to the following modification.

DOL calculated Garcia's wages at 69 hours per week based on his written claim that stated he had only a 10-minute meal period each day. However, the two other claimants who worked in the kitchen during the claim period, testified that they had meal breaks of 30 minutes and one hour. We find that petitioner negated the reasonableness of the Commissioner's calculation of the meal break concerning Garcia and modify the minimum wage order on his behalf to find that he worked 63 hours per week, consistent with the meal break of one hour afforded the other "cook" covered by the order. We direct the Commissioner to recalculate his underpayment accordingly.

We find the approximation of hours and wages drawn by the Commissioner to calculate wages owed to the four claimants in this case to be reasonable, subject to the modifications described above. In the absence of adequate payroll records submitted by petitioner, the Commissioner was entitled to rely on the "best available evidence" and draw an approximation of the hours worked and wages owed from the claimant's written claims. Even if the wages found are somewhat imprecise, the order may not be faulted for its imprecision since it is only an estimate (*Mt. Clements Pottery,* at 687-88 ["The employer cannot be heard to complain that the damages lack the exactness and precision of measurement that would be possible had he kept records in accordance with the [recordkeeping] requirements of . . . the Act"]; *Reich v Southern New England Telecommunications Corp.,* 121 F3d 58, 70 n.3 [2d CA 1997] [finding no error in damages that "might have been somewhat generous" but were reasonable in light of the evidence and "the

difficulty of precisely determining damages when the employer has failed to keep adequate records"]).

Statute of Limitations

Petitioner did not submit proof at hearing supporting his claim that the minimum wage order is barred by the statute of limitations beyond the conclusory allegation in his petition. As the order directs petitioners to pay back wages within six years of the filing of the respective claims, it is reasonable (*Matter of 238 Food Corp.*, PR 05-068 [April 23, 2008] [reasonable for Commissioner to recover wages for period six years from date employee files claim with DOL]; *see also, Matter of Richard M. Aufrichtig*, PR 11-260 [June 10, 2015]; *see also* Labor Law § 663 [3]).

Interest

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

Petitioner did not challenge the interest assessed in the minimum wage order and the issue is thereby waived pursuant to Labor Law § 101 (2). The order is modified as to the total amount of wages owed the claimants and the interest shall be reduced proportionally.

Liquidated Damages

Labor Law § 663 (2) provides that when any employee is paid less than the wage to which he is entitled, the Commissioner may bring administrative action against the employer to collect such claim, and the employer shall be required to pay the full amount of the underpayment "and unless the employer proves a good faith basis to believe that its underpayment was in compliance with the law, an additional amount as liquidated damages." Such damages shall not exceed one hundred percent of the total amount of wages found to be due.

Petitioner did not challenge the Commissioner's determination to assess liquidated damages in the minimum wage order and the issue is thereby waived pursuant to Labor Law § 101 (2). The order is modified as to the total amount of wages owed the claimants and liquidated damages shall be reduced proportionally.

The Civil Penalties in the Minimum Wage Order and the Penalty Order Are Revoked

Labor Law § 218 (1) provides that when the Commissioner determines that an employer has violated a provision of Articles 5 and 19, he must issue an order directing payment of any wages found to be due, "plus the appropriate civil penalty."

If a violation involves a willful or egregious failure to pay wages, or an employer who has previously been found in violation, the penalty "shall" be "in an amount equal to double the total amount . . . found to be due" (*Id.*). For all other types of violations, the amount of the penalty is

discretionary. Where the violations involve "a reason other than the employer's failure to pay wages," the amount shall not exceed $1,000.00 for a first violation, $2,000.00 for a second violation, and $3,000.00 for a third or subsequent violation. In applying her discretion, the statute directs the Commissioner to give, "due consideration to the size of the employer's business, the good faith basis of the employer to believe that its conduct was in compliance with the law, the gravity of the violation, the history of previous violations and, in the case of wages, benefits or supplements violations, the failure to comply with record-keeping or other non-wage requirements" (*Id.*).

Petitioner testified that he operated a small restaurant that was eventually forced out of business as a result of the financial crisis and recession. He nonetheless kept the claimants on for several years despite declining revenues because they had been there from the beginning, were good workers, and needed their jobs. Acqua's computer, payroll, and financial records were left in the basement for the company that purchased the restaurant in 2011 but were destroyed the next year in Super-storm Sandy. He was unable to respond to DOL's investigation because he did not receive a collection letter sent to the restaurant in April 2014 after it had been sold, or a letter sent to an apartment in Brooklyn in July 2014 because he was no longer living there.

Petitioner argued that the penalties assessed by DOL are unreasonable because he operated a small business, acted in good faith, paid his employees at minimum wage and afforded them meal breaks, and his inability to provide written records to DOL is excusable given their destruction and DOL's failure to provide him an opportunity to participate in the investigation.

Petitioner's testimony sufficiently invoked the statutory factors the Commissioner must weigh involving the size of the business, gravity of the violation, petitioner's claimed good faith, history of prior violations, and any other recordkeeping or non-wage violations. The burden of going forward thereby shifted to DOL to explain why the penalties assessed in the minimum wage and penalty orders are reasonable, versus lesser penalties within the Commissioner's discretion. The investigator who testified at hearing had no involvement in the investigation and simply reviewed the file for purposes of the hearing. She did not submit any testimony explaining how the penalties in the orders were arrived at or why they are reasonable under the circumstances.

We have previously held that the Commissioner's failure to adequately explain application of the criteria that must be given "due consideration" under Labor Law § 218 in assessing civil penalties is unreasonable. The investigator's testimony simply establishing a foundation for submission of the penalty form does not satisfy the particularization required by the statute (*Matter of Hoffman*, PR 08-115 [2009] [civil penalties assessed by Commissioner revoked where insufficient testimony offered regarding factors to be duly considered under the statute]). The civil penalties in the minimum wage and penalty orders are therefore revoked for failure of the Commissioner to explain the basis for her administrative determination (*Matter of Givens,* PR 10-076 [2013] [civil penalties revoked for failure to explain factors that must be given due consideration and basis for administrative determination]).

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NOW, THEREFORE IT IS HEREBY RESOLVED THAT:

1. The minimum wage order is affirmed but modified as to the amount of wages owed; and

2. The Commissioner is directed to recalculate the wages owed in the minimum wage order in accordance with this decision, with interest and liquidated damages reduced proportionally; and

3. The civil penalty in the minimum wage order is revoked; and

4. The penalty order is revoked; and

5. The petition for review be, and the same hereby is, granted in part and denied in part.

Vilda Vera Mayuga, Chairperson

J. Christopher Meagher, Member

Michael A. Arcuri, Member

Molly Doherty, Member

Gloribelle J. Perez, Member

Dated and signed by the Members
of the Industrial Board of Appeals
in New York, New York on
September 14, 2016.

NOW, THEREFORE IT IS HEREBY RESOLVED THAT:

1. The minimum wage order is affirmed but modified as to the amount of wages owed; and

2. The Commissioner is directed to recalculate the wages owed in the minimum wage order in accordance with this decision, with interest and liquidated damages reduced proportionally; and

3. The civil penalty in the minimum wage order is revoked; and

4. The penalty order is revoked; and

5. The petition for review be, and the same hereby is, granted in part and denied in part.

Vilda Vera Mayuga, Chairperson

J. Christopher Meagher, Member

Michael A. Arcuri, Member

Molly Doherty, Member

Gloribelle J. Perez, Member

Dated and signed by a Member
of the Industrial Board of Appeals
in Syracuse, New York on
September 14, 2016.