

STATE OF NEW YORK  
INDUSTRIAL BOARD OF APPEALS

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In the Matter of the Petition of:

ALI ARAIF AKA ARAIF ALI AND BUFFALO  
FINANCIAL SERVICES LLC T/A DELAVAN  
CHECK CASHING,

Petitioners,

To Review Under Section 101 of the Labor Law:  
An Order to Comply with Article 19 of the Labor  
Law, dated June 15, 2018,

- against -

THE COMMISSIONER OF LABOR,

Respondent.  
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DOCKET NO. PR 18-040

RESOLUTION OF DECISION

**APPEARANCES**

*The Tarantino Law Firm, LLP, Buffalo (Jacob A. Piorkowski of counsel), for petitioners.*

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

**WITNESSES**

Araif Ali, Mohammad Saleh, and Akram Aldairi, for petitioners.

Labor Standards Investigator Edwin Rodenhaus, for respondent.

**WHEREAS:**

Petitioners Ali Araif AKA Araif Ali (hereinafter "Ali") and Buffalo Financial Services LLC (hereinafter "Buffalo Financial") T/A Delavan Check Cashing filed a petition in this matter on August 1, 2018, pursuant to Labor Law § 101, seeking review of orders issued against them by respondent Commissioner of Labor on June 15, 2018. Respondent filed her answer to the petition on September 14, 2018.

Upon notice to the parties a hearing was held in this matter on December 18, 2018 in Buffalo, New York before Matthew Robinson-Loffler, Associate Counsel to the Board, and the designated hearing officer in this proceeding. Each party was afforded a full opportunity to

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

The order to comply with Article 19 (hereinafter “minimum wage order”) under review directs compliance with Article 19 and payment to respondent for unpaid minimum wages to Akram Aldairi<sup>1</sup> (hereinafter “Aldairi”), Maribel Rodriguez (hereinafter “Rodriguez”) and Mohamed Saleh (hereinafter “Saleh”) in the amount of \$16,830.00 for the time period from February 2, 2015 to October 12, 2017, interest continuing thereon at the rate of 16% calculated to the date of the order in the amount of \$1,874.80, liquidated damages in the amount of \$16,830.00, and assesses a civil penalty in the amount of \$33,660.42. A separate civil penalty for violations of Labor Law Section 661 and Department of Labor Regulations (12 NYCRR) § 142-2.6 (hereinafter “penalty order”) in the amount of \$3,000.00 is included in the order, for a total amount due of \$72,194.80.

In their petition, petitioners allege that the orders are invalid and unreasonable because Aldairi and Saleh (1) were not paid an amount less than the minimum wage; (2) were not paid less than one-and one-half times their hourly wage; and (3) do not claim they are owed wages. At hearing, petitioners further argue that any underpayment calculated by the respondent as owed to Rodriguez, was already paid.

## SUMMARY OF EVIDENCE

### Anonymous Complaint Referral and Interviews

On August 17, 2017, respondent received a referral from respondent’s Unemployment Insurance Fraud Division based on a complaint the division received. The complaint stated:

“The business operates Monday-Friday from 9:30 am [to] 6:00 pm Thursday-Friday 9:30 am until 6:30 pm and Saturdays 9:30am-4:00pm however we have to arrive there mandatory by 9:00 am and work from 9:00 am m-f until 7:30 pm and there’s been days that we have been there until later th[a]n 7:30 to fix errors or the system being down. The owner pays 80 hrs on the books and the remainder off the books to avoid paying time and a half. Essentially we get paid 80 hrs biweekly off[f] the books and 15 hrs off[f] the books which still makes no sense to me. Today 8-17-2017 I was fired because I brought up a discrepancy in hrs [sic]. Araif failed to understand and accused me of not knowing what I was referring to.[ ]I have been employed with the company for close to 4 years with promises of changes and PTO to be earned every pay and nothing reflects my pay stubs.[ ]I[’]m sure every employee there is suffering the same losses.”

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<sup>1</sup> While throughout the record and on the petition, Akram Aldairi’s surname was spelled Aldari or Aldairi, at the December 18, 2018 hearing date, Akram Aldairi himself spelled his name Aldairi on the record when making his appearance. Thus, throughout this decision, the Board uses Aldairi.

In response to the referral, investigator Edwin Rodenhaus (hereinafter "Rodenhaus") was assigned the case and scheduled a field visit. During a December 1, 2017 field visit, Rodenhaus took statements from two Buffalo Financial employees, Saleh and Aldairi. Rodenhaus wrote both statements and Saleh and Aldairi signed them.

Saleh's statement, in relevant part, states that Buffalo Financial's hours of operation are 9:30 a.m. to 6:00 p.m., Monday through Wednesday, 9:30 a.m. to 6:30 p.m., Thursdays and Fridays, and 9:30 a.m. to 4:00 p.m. on Saturdays. Saleh works open to close every day, arriving at 9:15 a.m. or 9:20 a.m., and has for eight months due to a staffing shortage. He receives 15-20 minutes for lunch each day. Aldairi's statement, in relevant part, states that Buffalo Financial's hours of operation are 9:30 a.m. to 6:00 p.m., Monday through Wednesday, 9:30 a.m. to 6:30 p.m., Thursdays and Fridays, and 9:30 a.m. to 4:00 p.m. on Saturdays. He has worked for Buffalo Financial for one year and works open to close every day except Sunday. Aldairi arrives for work at 9:00 a.m. and starts working immediately. He also states all employees work the same hours.

### Petitioners' Evidence

#### *Testimony of Araif Ali*

Ali testified that he has been the sole owner of Buffalo Financial, a check cashing business, since February 2015. Ali used two payroll services during the relevant time period. The first payroll company would call him directly and ask how many hours per week each employee worked. The second company had an online portal which allowed him to enter employee hours worked directly into the payroll services system.

Ali testified that between October 28, 2016 and October 12, 2017, Aldairi worked at Buffalo Financial as a check cashing teller, 40 hours per week, 9:30 a.m. to 6:00 p.m., Monday through Friday and received a thirty-minute lunch break. Between March 31, 2017 and May 25, 2017, Saleh worked at Buffalo Financial as a check cashing teller, working 40 hours per week except for one or two weeks. Saleh was paid time and half for all hours worked over 40. Aldairi and Saleh each worked the same weekly schedule unless a change was required due to a business need or if someone requested time off. When an employee worked overtime, Ali paid them time and a half for those hours worked over 40 in a week. Ali's employees did not record the time that they arrived or when they left. Ali does not know why Aldairi and Saleh told Rodenhaus they worked every day open to close.

On December 1, 2017, Rodenhaus advised Ali that he was from the New York State Department of Labor and asked to interview Buffalo Financial's employees, which Ali allowed Rodenhaus to do. Rodenhaus interviewed employees one-on-one. Rodenhaus then asked Ali to gather certain records and scheduled a time for a revisit. Ali did not provide the requested records for Saleh, Aldairi, and Rodriguez because they were "on a set schedule for the most part."

As a result of the respondent's investigation, Ali was made aware that he had misreported Rodriguez's hours. Rodriguez had worked in excess of 40 hours on occasion and Ali did not tell the payroll company that the hours she worked in excess of 40 had to be paid at the legal overtime rate. After learning this from the respondent, Ali contacted Rodriguez, who was no

longer working for him, and informed her of the underpayment. He provided her with a check for the amount of the underpayment, which she cashed at Buffalo Financial. Ali testified that the earnings statement evidences petitioners' payment of respondent's calculated underpayment because it is for the exact amount determined to be owed by respondent's investigator. The payment was marked as miscellaneous pay because that was the only option available to Ali when processing the check. Ali testified that Rodenhaus was aware that the payment was made to Rodriguez because it was discussed in an email between the petitioners' attorney and Rodenhaus. The earnings statement contains a pay date of April 12, 2018 and does not contain an entry for the number of hours worked.

#### *Testimony of Mohamed Saleh*

Saleh testified that between March 31, 2017 and May 25, 2017, he was employed by Buffalo Financial as an assistant manager and check teller. During that time, he was scheduled to work "...Monday through Friday from, I believe, nine thirty until six." He would arrive to work at 9:20 a.m., get a coffee from the donut shop next door and start work at 9:30 a.m. He did work over-time between March 2017 and May 2017 because the office was shorthanded, "... [a]nd I think I have - - I think - - I think I did and I got paid for it. I can't really recall right now, but whatever - - whenever I started working full-time, I got paid for it. It was around that time, I believe." He also received a thirty-minute lunch break.

Saleh was interviewed by Rodenhaus during Rodenhaus's initial site visit. It was the first Friday of the month, which is normally a busy time for the business. Rodenhaus wrote Saleh's statement but Saleh reviewed it and signed it. When reviewing the statement at hearing, Saleh testified that he was able to read and understand the entirety of his statement. Saleh told Rodenhaus that he worked every day open to close, including Saturdays, when his testimony at hearing was that he did not, because, "[w]ell, when - - when he came, at that - - at that time, I believe I was working Saturdays. I'm not really sure." Saleh also testified that while his statement says he received 15 minutes for lunch, he actually received 30 minutes for lunch but he only ate his lunch during 15 of those 30 minutes and he used the remaining time to use the restroom and/or to smoke a cigarette.

After Ali received Rodenhaus's report, Ali asked Saleh to speak with Ali's attorney. Saleh wanted to clarify with the attorney that his statement was incorrect as to his lunch period. Ali's attorney drafted an affidavit which Saleh signed on July 30, 2018. The affidavit states that the commissioner of labor's underpayment calculation of \$1,552.50 is inaccurate and untrue, that Saleh is not owed wages and has been paid fairly for all hours worked.

#### *Testimony of Akram Aldairi*

Aldairi testified that he was employed by Buffalo Financial from October 28, 2016 through October 12, 2018 as a teller and he worked 40 hours per week, from 9:30 a.m. to 6:00 p.m., Monday through Friday. He never worked on Saturday and he generally worked the same schedule and received a half hour lunch break. He never worked over 40 hours per week during that period. Aldairi testified that English is not his primary language but he can understand and speak English without an interpreter "to a certain point." He was interviewed by Rodenhaus but does not recall the conversation. He did not recall informing the investigator that English was not his primary language and could not recall if he spoke Arabic to Rodenhaus. He did remember

that Rodenhaus arrived during a busy time and that he was “uncomfortable” during the interview.

When asked to review the statement, written by Rodenhaus, at hearing, Aldairi testified that he knew what the document was but did not know what it said because he cannot read cursive. He told Rodenhaus that he could not read cursive during the interview. Aldairi testified that, in response, Rodenhaus told him to read the statement to the best of his ability. Aldairi signed the interview statement because he felt pressure to sign so that he could continue with his work day.

Aldairi testified that he signed an affidavit at Ali’s attorney’s office on July 30, 2018, after Ali asked him to visit Ali’s attorney. Aldairi did not know why he went to Ali’s attorney’s office. The affidavit, drafted by Ali’s attorney and signed by Aldairi, states that Rodenhaus encouraged Aldairi to sign the interview notes even though Aldairi could not read them, that the commissioner of labor’s underpayment calculation of \$14,490.00 is false, that Aldairi is not owed wages and has been paid fairly for all hours worked, and that his answers to Rodenhaus’s questions were inaccurate due to his nervousness and inability to fully comprehend what was being asked of him.

#### Respondent’s Evidence

##### *Testimony of Labor Standards Investigator Edwin Rodenhaus*

Rodenhaus testified that he visited Buffalo Financial on December 1, 2017. He identified himself, stated the purpose of his visit, and asked to speak to the owner or manager. Ali was not there so Rodenhaus spoke to him on the telephone. After Ali arrived, Rodenhaus interviewed each of the two employees who were working then, Saleh and Aldairi.

Rodenhaus took notes while he spoke to Saleh and asked Saleh to review the notes, to correct anything that was incorrect and to sign the document with the notes, as was his typical practice when interviewing workers. Rodenhaus did not recall Saleh indicating that any corrections needed to be made to the document. Rodenhaus also interviewed Aldairi and took notes, that Aldairi then signed. Aldairi gave no indication that he did not understand Rodenhaus’s questions nor did he indicate that he did not understand the document with the interview notes as written by Rodenhaus. Rodenhaus asked Aldairi to review the interview notes, make changes and sign the document.

On January 16, 2018, Rodenhaus also interviewed Maribel Rodriguez, by telephone, who told him that she had always been paid correctly. Rodenhaus asked her why she filed a complaint saying she was not paid overtime and she told him that she was disgruntled and that is why she made the complaint. Rodenhaus noted that this account was not consistent with her prior anonymous complaint made to respondent’s Unemployment Insurance Division.

Rodenhaus testified that the records provided by Buffalo Financial were not accurate because they were contradicted by the statements made by Saleh and Aldairi during interviews. Rodenhaus calculated an underpayment based on the interview statements and the payroll records supplied by Buffalo Financial. Rodenhaus testified that while Aldairi’s interview does not explicitly state that he was not paid time and a half or the minimum wage, Rodenhaus

believes those conclusions can be drawn from Aldairi's statements about the number of hours he worked as compared to the evidence of what he was actually paid according to the employer's payroll records.

Rodenhaus testified that he assessed a 200% penalty because of the lack of good faith of the employer and the amount of the unpaid wages.

### FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

Petitioners' burden of proof in this matter is to establish, by a preponderance of the evidence, that the orders issued by the Commissioner are invalid or unreasonable (State Administrative Procedure Act § 306 [1]; Labor Law §§ 101, 103; Board Rules [12 NYCRR] § 65.30; *Garcia v Heady*, 46 AD3d 1088, 1090 [3d Dept 2007]; *Matter of Angello v Natl. Fin. Corp.*, 1 AD3d 850, 854 [3d Dept 2003]; *Matter of RAM Hotels, Inc.*, Docket No. PR 08-078, at p. 24 [October 11, 2011]). A petition must state "in what respects [the order on review] is claimed to be invalid or unreasonable," and any objections not raised shall be deemed waived (Labor Law § 101 [2]). The Labor Law provides that an order of the Commissioner shall be presumed valid (*id.* § 103 [1]). The hearing before the Board is *de novo* (Board Rules [12 NYCRR] § 66.1 [c]).

#### Petitioners Failed to Maintain Required 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; Department of Labor Regulations [12 NYCRR] § 142-2.6). Employers are required to keep such records open to inspection by the Commissioner or a designated representative at the place of employment and maintain them for no less than six years (*id.*). Employers are further required to furnish each employee a statement with every payment of wages listing the hours worked, rates paid, gross and net wages, and any allowances claimed as part of the minimum wage (Labor Law § 661; Department of Labor Regulations [12 NYCRR] § 142-2.7). The required recordkeeping provides proof to the employer, the employee, and the Commissioner that the employee has been properly paid.

At hearing, petitioners entered an "Earnings Statement", which indicates that a check was issued to Rodriguez by Buffalo Financial Services LLC on April 12, 2018, in the gross amount of \$984.38 and for the net amount of \$888.11. The statement shows zero for the number of hours worked. Petitioners also entered "Payroll Details" for Saleh and Aldairi, covering the pay periods December 19, 2016 through December 17, 2017 and January 18, 2016 through December 18, 2016, and "Payroll Journals" for Rodriguez covering the periods February 9, 2015 through January 17, 2016 (hereinafter "payroll records"). These payroll records do not include actual daily hours worked and only serve to demonstrate what was reported by Ali to his payroll companies and do not satisfy the required records that must be kept of actual hours worked and wages paid (Labor Law § 661; Department of Labor Regulations [12 NYCRR] § 142-2.6). The



payroll records lack the specificity and the reliability to establish by a preponderance of the evidence the specific hours that the claimants worked and that they were paid for these hours (*Matter of RAM Hotels, Inc.*, Docket No. PR 08-078, at p. 24). Moreover, Ali testified that Saleh and Aldairi did not record the time that they arrived or left as they had a “set schedule”.

We find the earnings statement and payroll records are insufficient evidence of the actual hours worked. As such, the Commissioner correctly determined that petitioners failed to maintain legally required payroll records.

#### The Minimum Wage Order is Affirmed

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 or other evidence, even though the results may be approximate (*Ramirez v Commissioner of Labor*, 110 AD3d 901 [2d Dept 2010]; *Hy-Tech Coatings v New York State Dept. of Labor*, 226 AD2d 378, 379 [2d Dept 1996] citing *Matter of Mid Hudson Pam Corp. v Hartnett*, 156 AD2d 818, 820-821 [3d Dept 1989]). As the Appellate Division stated in *Matter of Mid Hudson Pam Corp v Hartnett*, (156 AD2d at 820-821) “[w]hen an employer fails to keep accurate records as required by statute, the commissioner is permitted to calculate back wages due to employees by using the best available evidence and to shift the burden of negating the reasonableness of the Commissioner’s calculation to the employer.”). The petitioners have the burden of showing that the Commissioner’s order is invalid or unreasonable by a preponderance of the evidence of the specific hours that the claimants worked and that they were paid for these hours, or of other evidence that shows the Commissioner’s findings to be invalid or unreasonable (*Matter of Joseph Baglio and the Club at Windham*, Docket No. PR 11-394, at p. 7 [December 9, 2015]; *Matter of RAM Hotels, Inc.*, Docket No. PR 08-078, at p. 24).

Petitioners argue that the wages that the Commissioner determined to be owed in the order are incorrect because Aldairi and Saleh (1) were not paid an amount less than the minimum wage; (2) were not paid less than one and one-half times their hourly wage; and (3) do not claim they are owed wages. At hearing, petitioners further argue that any underpayment calculated by the respondent as owed to Rodriguez, was paid in a check tendered to Rodriguez in April 2018.

Ali testified that Aldairi, Rodriguez and Saleh each worked the same weekly schedule and that when an employee worked overtime, he paid them one and one-half times for those hours. However, Ali also conceded that Rodriguez was not paid the legal overtime rate for some hours but that was an error because he did not realize it was his responsibility to inform his payroll company that her rate of pay changed for any hours worked over 40 hours. Ali’s testimony was not specific enough to make up for the lack of required records showing actual hours worked. Without specific evidence of precise hours worked, we give little credibility to Ali’s testimony about Aldairi and Saleh’s hours of work. The Board has repeatedly held that general, conclusory and incomplete testimony concerning the work schedules of employees is insufficient to satisfy the high burden of precision required to meet an employer’s burden of proof in the absence of required records (*Matter of Frank Lobosco and 1378 Coffee, Inc.*, Docket No. PR 15-287, at p. 6 [May 3, 2017] citing *Matter of Young Hee Oh*, Docket No. PR 11-017, at p. 12 [May 22, 2014] [employer cannot shift its burden to DOL with arguments, conjecture, or

incomplete, general, and conclusory testimony]). Ali's vague and conclusory testimony was further undermined by his own testimony that this uniform weekly schedule would change as needed by business demands or requests for time off made by his employees and his admission that he underpaid Rodriguez for overtime hours that she worked.

At hearing, both Saleh and Aldairi testified that they generally worked 9:30 a.m. to 6:00 p.m., Monday through Friday, for a total of 40 hours per week, which was not what they told Rodenhaus when he interviewed them in December 2017. Saleh stated that he did work overtime between March 2017 and May 2017 because the office was shorthanded but was paid for the overtime. When questioned about their prior statements, that both worked every day that the business was open from open to close, Saleh and Aldairi both testified that the information contained in those statements was incorrect due to the pressure they felt during their respective interviews. For the following reasons, we find that the statements that they made to Rodenhaus during their interviews in December 2017 to be credible and that it was reasonable for the respondent to rely on these statements as the best available evidence.

First, the initial statements were given contemporaneously with the events at issue and without knowledge of what they would be asked. In contrast, the statements at hearing were given approximately one year later. The lapse in time thus favors the initial statements over the later recantations. Saleh's and Aldairi's testimony were prepared, at least in part, by petitioners' attorney as evidenced by the affidavits drafted by petitioners' attorney. The testimony occurred after consultation with petitioners' attorney and in front of Ali, who still employs Saleh and Aldairi. Both Saleh and Aldairi have an economic interest in testifying in support of petitioners since they are both still employed by petitioners (*Matter of Fred Barthelman III and North Coast Sealing, Inc.*, Docket No. PR 14-114, at p. 18 [December 13, 2017] citing *Matter of Rafael Almonte and D'Almonte Enterprises Parking Garage, Inc.*, Docket No. PR 12-040, at p. 7 [December 9, 2015]).

Second, Saleh's and Aldairi's testimony was as general as Ali's. Neither Saleh nor Aldairi provided any specific testimony regarding the number of daily hours worked during the relevant respective claim periods. In addition to its lack of specificity, Saleh's testimony was replete with instances of poor recall. Aldairi's testimony on the issue of hours worked was too conclusory to be reliable. Without specific evidence of precise hours worked, we give little credibility to Aldairi and Saleh's testimony at hearing. (*Matter of Frank Lobosco and 1378 Coffee, Inc.*, Docket No. PR 15-287, at p. 6 citing *Matter of Young Hee Oh*, Docket No. PR 11-017, at p. 12.)

Third, we find Saleh's and Aldairi's testimony that the statements that they made to Rodenhaus were incorrect because they were given under pressure incredible. Rodenhaus testified that he asked Ali to cover for Saleh and Aldairi while he interviewed each of them individually. Rodenhaus's unrebutted testimony that the initial interviews were voluntarily given was credible. Each employee was afforded an opportunity to review the statement written by Rodenhaus and to make changes as needed before signing the statement. This argument confuses petitioners' burden of proof. Petitioners do not meet their burden through indirect means by attacking the Commissioner's investigation (*see Mohammed Aldeen and Island Farm Meat Corp. (T/A Al-Noor Live Poultry*, Docket No. PR 07-093, at p. 12-15 [May 20, 2009] citing *Angello v National Finance Corp.*, 1 AD3d at 820-821 [assertions that Commissioner's order was not based on "credible proof" does not shift burden from employer with inadequate records]). In the



absence of contemporaneous payroll records for its employees, it was petitioners' burden to submit sufficient affirmative evidence to negate the Commissioner's determination of wages owed. The testimony of these two witnesses was simply too general and flawed by unreliable recollection regarding their specific hours during the period covered by the Commissioner's audit to overcome the presumption favoring the Commissioner's calculation (*id.*).

Lastly, Ali's testimony that the underpayment calculated by respondent has been paid to Rodriguez is unsupported in the record. The earnings statement contains no evidence of an actual payment made to Rodriguez. The earnings statement is merely a record of information reported to petitioners' payroll company that is not substantiated by any other documentary evidence to explain the amount on the earnings statement. The amount in the earnings statement is different from the amount that respondent calculated was owed to Rodriguez and without additional evidence explaining the amount in the earning statement, we find it is not credible evidence to prove that Rodriguez was not owed wages. Additionally, no evidence of the check itself was introduced despite Ali testifying that the check was negotiated at petitioners' place of business. (*Matter of Frank Lobosco and 1378 Coffee, Inc.*, Docket No. PR 15-287, at p. 6 citing *Matter of Young Hee Oh*, Docket No. PR 11-017, at p. 12.)

Accordingly, we find petitioners have failed to meet their burden to demonstrate the specific hours that the claimants worked and that they were paid for these hours. Because petitioners provided no evidence of legally required records of the daily and weekly hours worked or wages paid to the claimants, and no proof that they were paid for those hours, the Commissioner was entitled to use the best available evidence as a basis for her calculation of underpayment (Labor Law §196-a; *Matter of Ramirez v Commissioner of Labor*, 110 AD3d at 901-902; *Hy-Tech Coatings v New York State Dept. of Labor*, 226 AD2d at 379; *Matter of Joseph Baglio and the Club at Windham*, PR 11-394, at p. 7; *Matter of RAM Hotels, Inc.*, Docket No. PR 08-078, at p. 24). Here, the Commissioner used the best available evidence, which was the information contained in the interview statements obtained by the respondent during the onsite visit and the employers own payroll records. We affirm the minimum wage order.

#### Interest

Labor Law § 219 (1) provides that when the Commissioner determines that wages are due, the order directing payment of those wages shall include "interest at the rate of interest in effect as prescribed by the superintendent of financial services pursuant to section fourteen-a of the banking law per annum from the date of the underpayment to the date of payment." Banking Law § 14-a sets the "maximum rate of interest" at "sixteen per centum per annum." Here, respondent correctly determined that claimants were not paid all wages owed and petitioners did not offer any evidence to challenge the imposition of interest. As such, we affirm the interest in the order.

#### Liquidated Damages

Labor Law § 218 provides that when wages are found to be due, respondent shall assess against the employer the full amount of the underpayment or unpaid wages and an additional amount as liquidated damages, unless the employer proves a good faith basis for believing that its underpayment or nonpayment of wages was in compliance with the law. Here, respondent

correctly determined that claimants were not paid all wages and petitioners failed to offer any evidence challenging the imposition of liquidated damages. As such we affirm the liquidated damages in the order.

The Civil Penalty Is Affirmed

The unpaid wages order includes a 200% civil penalty. Labor Law § 218 (1) provides that when determining an amount of civil penalty to assess against an employer who has violated a provision of Article 19 of the Labor Law, respondent shall give:

“due consideration to the size of the employer’s business, the good faith basis of the employer to believe that its conduct was in compliance with the law, the gravity of the violation, the history of previous violations and, in the case of wages, benefits or supplements violations, the failure to comply with record-keeping or other non-wage requirements.”

In cases where the employer is a repeat offender or the violations are willful or egregious, respondent may assess up to a 200% civil penalty. Petitioners did not introduce any evidence to challenge the civil penalty. As such, we affirm the civil penalty in the order.

The Penalty Order is Revoked

The penalty order assesses a \$3,000.00 civil penalty for violating Labor Law § 661 and Department of Labor Regulations (12 NYCRR) § 142-2.6 by failing to keep and/or furnish for inspection a true and accurate record for each employee, showing daily and weekly hours worked, gross wages, deductions, any allowances claimed and net wages, and all other records required or each employee for the period February 2, 2015 through October 12, 2017.

Labor Law§ 218 (1) provides that where a violation involves "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 to non-wage violations, 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 .... " (Labor Law§ 218 [1]).

Respondent, however, assessed a \$3,000.00 civil penalty for this violation of the Labor Law. This amount exceeds the statutory maximum for first violations (*id.*). Since respondent offered no explanation at hearing as to the how the civil penalty was determined, the penalty order is revoked as unreasonable for assessing a civil penalty in excess of that allowed by statute for a first violation.


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

1. The minimum wages, interest, liquidated damages, and civil penalty are affirmed;
2. The penalty order is revoked; and
3. The petition for review be, and the same hereby is, otherwise denied.

  
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Molly Doherty, Chairperson  
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J. Christopher Meagher, Member  
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Michael A. Arcuri, Member  
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Gloribelle J. Perez, Member

Dated and signed by the Members  
of the Industrial Board of Appeals  
in New York, New York,  
on May 29, 2019.