STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of:	
ANGEL MOINA AND MARIA J. MOINA AND NAPOLEON MOINA AND LA POSADA REST INC. AND GAVIOTA'S RESTAURANT AND SPORTS BAR INC. AND TEQUILA SONG CORP.,	
Petitioners,	DOCKET NO. PR 10-069
To Review Under Section 101 of the Labor Law: Three Orders to Comply With Article 6 of the Labor Law, An Order to Comply with Article 19 of the Labor Law and An Order Under Articles 5 and 19 of the Labor Law, each dated January 14, 2010 and Amended and Reissued June 27, 2012,	RESOLUTION OF DECISION
- against -	
THE COMMISSIONER OF LABOR,	
Respondent.	

APPEARANCES

Joseph Altman, Esq. for petitioners Napoleon Moina and Tequila Song Corp.

Francisco Santiago, Esq. for petitioners Maria J. Moina and Gaviota's Restaurant and Sports Bar Inc.

Angel Moina petitioner pro se, and for La Posada Rest Inc.

Pico Ben-Amotz, Acting Counsel, NYS Department of Labor (Larissa C. Bates of counsel), for the respondent.

WITNESSES

Anyuli Suero, Carmen Aguilera, Maria Moina, for the petitioners.

Mirna Hernandez, Gregoria Jeronimo, Griselda Sallas, Rocio Velez, Carmen Amaguaya, Labor Standards Investigator Cloty Ortiz, for the respondent.

WHEREAS:

The petition in this matter was filed with the Industrial Board of Appeals (Board) on March 8, 2010, and seeks review of five orders issued by the Commissioner of Labor (Commissioner or respondent) against petitioners Angel Moina, Maria J. Moina, Napoleon Moina, La Posada Rest Inc., Gaviota's Restaurant and Sports Bar Inc., and Tequila Song Corp. on January 14, 2010. A final amended petition was filed on May 10, 2011. Upon notice to the parties a hearing was held in this matter on April 20 and June 14, 2012 in New York, New York, before Anne P. Stevason, Chairperson of 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, make statements relevant to the issues, and file post-hearing briefs.

The order to comply with Article 19 (minimum wage order) under review was issued by the respondent Commissioner of Labor against the petitioners on January 14, 2010 and amended and reissued on June 27, 2012 pursuant to stipulations made at the hearing. The amended minimum wage order directs compliance with Article 19 and payment to the Commissioner for minimum wages due and owing to 29 known claimants and 6 unknown claimants in the amount of $385,364.34 for the time period from April 3, 2005 through March 23, 2009, with interest continuing thereon at the rate of 16% calculated to the date of the amended order, in the amount of $198,767.40, liquidated damages in the amount of $96,341.09, and assesses a civil penalty in the amount of $770,728.68, for a total amount due of $1,451,201.51.

The order to comply with Article 6 (deductions order) under review was issued by the respondent Commissioner of Labor against the petitioners on January 14, 2010 and amended and reissued on June 27, 2012 pursuant to stipulations made at the hearing. The amended deductions order directs compliance with Article 6 and payment to the Commissioner for unlawful deductions made from the wages of 18 known claimants and 4 unknown claimants in the amount of $90,023.50 for the time period from April 3, 2005 through March 21, 2009, with interest continuing thereon at the rate of 16% calculated to the date of the amended order, in the amount of $47,482.55, and assesses a civil penalty in the amount of $180,047.00, for a total amount due of $317,553.05.

The order to comply with Article 6 (wage order) under review was issued by the respondent Commissioner of Labor against the petitioners on January 14, 2010 and amended and reissued on June 27, 2012 pursuant to stipulations made at the hearing. The amended wage order directs compliance with Article 6 and payment to the Commissioner for wages due and owing to Mirna Hernandez in the amount of $420.00 for the time period from June 8, 2007 through January 26, 2009, with interest continuing thereon at the rate of 16% calculated to the date of the amended order, in the amount of $227.83, and assesses a civil penalty in the amount of $840.00, for a total amount due of $1,487.93.

The order to comply with Article 6 (tip appropriations order) under review was issued by the respondent Commissioner of Labor against the petitioners on January 14, 2010 and amended and reissued on June 27, 2012 pursuant to stipulations made at the hearing. The amended minimum wage order directs compliance with Article 6 and payment to the Commissioner for gratuities appropriated from 12 known claimants and 3 unknown claimants in the amount of $86,205.00 for the time period from January 7, 2007 through March 21, 2009, with interest

continuing thereon at the rate of 16% calculated to the date of the amended order, in the amount of $46,210.33, and assesses a civil penalty in the amount of $172,410.00, for a total amount due of $304.825.33.

The order under Articles 5 and 19 (penalty order) under review was issued by the respondent Commissioner of Labor against the petitioners on January 14, 2010 and amended and reissued on June 27, 2012 pursuant to stipulations made at the hearing. The amended penalty order assesses a $9,000.00 civil penalty against the petitioners for violating Labor Law § 661 and 12 NYCRR 137-2.1 by failing to furnish true and accurate payroll records for each employee for the period from March 1, 2009 through March 21, 2009; a $9,000.00 civil penalty for violating 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 March 1, 2009 through March 21, 2009; a $9,000.00 civil penalty for violating Labor Law § 161 by failing to allow employees at least 24 consecutive hours rest in any calendar week during the period from March 1, 2009 through March 21, 2009; and a $9,000.00 civil penalty for violating Labor Law § 162 by failing to provide employees at least 30 minutes off for the noon day meal when working a shift of more than 6 hours extending over the noon day meal period from 11:00 a.m. to 2:00 p.m. for the period from March 1, 2009 through March 21, 2009; for a total due and owing of $36,000.00.

The petitioners allege that these orders are invalid or unreasonable because the independent and corporate petitioners are separate entities that cannot be held individually liable for the violations of the other entities; the petitioners properly paid their employees for the hours they worked; the petitioners did not make unlawful deductions from their employees' wages; the petitioners did not appropriate gratuities from their employees; and the petitioners provided employees a thirty minute meal break during each shift.

The respondent answered that on or about January 23, 2009, the Department of Labor (DOL) received a referral from a community organization that the petitioners were in violation of the Labor Law; that DOL investigators met with the petitioners' employees, conducted interviews, and received information that the petitioners' employees worked six or seven days per week between 12 and 16 hours per day, were paid a flat weekly rate in cash without wage statements; that the petitioners appropriated gratuities from their employees and made unlawful deductions from their wages for placing a wrong order or losing a receipt; that employees were rotated among the petitioners' three restaurants for work; and were not provided a 30 minute meal break. The respondent additionally found in its investigation that the petitioners had no records of daily hours worked by their employees.

Neither petitioner Angel Moina or Maria Moina were represented by counsel on the first day of hearing. Prior to the second day of hearing Maria Moina retained counsel who requested a continuance of the second day, which was granted. On the second day of hearing Angel Moina stated that he would not be testifying due to a pending criminal matter against him and requested an adjournment. It was further clarified that the only outstanding issue in the criminal matter was sentencing and the sentencing had already been postponed twice. The adjournment was denied.

EVIDENCE

A. DOL's Investigation

Employee interviews

Senior Labor Standards Investigator Cloty Ortiz testified that in January 2009 a community organizer notified DOL that employees of three restaurant-bars located in New York City with common ownership – La Posada, Gaviota, and Tequila Song – wished to meet with DOL investigators to complain about their working conditions. Following this referral, Ortiz met with and interviewed Mirna Hernandez, Gregoria (Golla) Jeronimo, Leocadia (Lupe) Jeronimo, Jose Trinidad, and Griselda Sallas (Zayas) on January 27, 2009. These employees alleged that they worked for La Posada, Gaviota, and Tequila Song, that the restaurants were owned and managed by Angel Moina, Maria (Janet) Moina, and Napoleon Moina[1], that they worked 11 to 12 hours per day, six or seven days per week, were paid a daily salary of $30.00 per day (except Trinidad, who earned $50.00 per day), and received an average of $40 to $75.00 per day in gratuities from customers (except Trinidad, who received an average of $55.00 in gratuities per week), and that they rotated among the different restaurants. The employees also informed Ortiz that the petitioners made deductions from their wages for violating the restaurants' "house rules." They stated that the petitioners fined them if, for example, they put in an incorrect order to the kitchen or lost a receipt.

Based on the information DOL received on January 21, Ortiz organized an investigation of the petitioners' restaurants. She testified that on March 21, 2009 she coordinated three teams of Spanish speaking investigators to simultaneously visit La Posada, Gaviota, and Tequila Song to interview employees about their working conditions. DOL investigators interviewed 18 employees that night -- six at La Posada, three at Gaviota, and nine at Tequila Song. The employees interviewed worked between 4 ½ to 11 hours per day, from 3 to 7 days per week, for wage rates ranging from $20.00 to $35.00 per day in the front of the house with back of the house employees earning weekly salaries from $300.00 to $400.00 a week. Employees who received gratuities stated that they received anywhere from $50.00 to $400.00 a week in tips. Most of the employees interviewed stated that they worked at more than one of the petitioners' restaurants. All of them were hired by Angel Moina, Maria Moina, or Napoleon Moina, and indicated that they were also supervised by one or more of them. Some employees indicated that the petitioners made deductions from their wages for wearing the wrong uniform, breaking dishes, or other reasons, while other employees informed DOL that the petitioners had not made deductions from their wages. Employees also indicated that gratuities were pooled and shared with managers at La Posada. Many of the employees informed DOL that they were not given a break during their shift.

DOL also received one claim form on or about August 21, 2008 from Maria Del Carmen Aguilera alleging that she had worked as a waitress at La Posada since February 15, 2008, 13 hours a day, six days a week, for a daily salary of $30.00 plus an additional $30.00 per day in gratuities.

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[1] Napoleon Moina was only involved with the operation of Tequila Song.

Calculation of minimum wage underpayments

Ortiz testified that she determined the amount of minimum wages due and owing based on the interviews and other information gathered by DOL during its investigation of the petitioners. Employees DOL had not interviewed were included in the minimum wage order. Their names were obtained from the petitioners' work schedules and DOL "used the information [it] had gathered from other workers as to hours of work, days of work, wages possibly earned, because the statements were consistent." Although the petitioners did provide DOL with some payroll records, Ortiz testified that she did not consider those records in making her determinations of the wages due because she had received information, as noted in her records of the investigation, from an employee that the petitioners had fabricated payroll documents after the investigation commenced in order to mislead DOL. Mirna Hernandez and Gregoria Jeronimo testified that the petitioners told them to lie to DOL investigators and otherwise attempted to interfere with DOL's investigation. Carmen Amaguaya testified that the petitioners pressured her to sign false payroll records. Amaguaya stated that she contacted Ortiz to advise her of what the petitioners were attempting to do.

Calculation of illegal deductions from wages

The petitioners' "house rules" (in effect at La Posada and Gaviota) provided that employees would be fined $60.00 for selling liquor without asking for identification, $50.00 for failing to follow the hygiene rules (wearing gloves, hairnets, and maintaining a clean and organized work station), $20.00 for being absent Monday to Thursday without calling in a timely manner to justify the absence (double for the second offense), $50.00 for being absent on Friday, Saturday, or Sunday without calling in a timely manner to justify the absence (double for the second offense), $20.00 for arriving to work in the wrong uniform, $20.00 for losing original checks or copies (double for the second offense), $20.00 for placing an order without a check, and $20.00 for placing an order in the kitchen without time stamping it. The house rules also state that an employee must give a week's notice before leaving the job or they will lose half their wages; and that any employee who takes a delivery order incorrectly, which results in the food being returned, will have to pay for the order and give $3.00 to the delivery boy.

Ortiz testified that she determined the amount the petitioners had illegally deducted from their employees' wages by using the house rules. She explained that:

> "We added the numbers on the rules, those amounts. And we – after we added the number, we took 25% and we multiplied it by all of the weeks that the person worked there . . . Because the deductions were so extensive that it was – it was just the correct thing. It would have been perhaps twice, three times the amount that ended up on the recap sheet."

DOL had possession of payroll envelopes that contained notes of the exact deductions the petitioners made from some of their employees' wages; however, Ortiz testified that DOL did not audit those records. A few of the envelopes are in evidence and show deductions from Carmen Aguilera's wages in the amount of $6.00 for incorrect charges, $5.25 for using the telephone, $8.00 and $10.05 for placing incorrect orders, $12.00 for an incorrect report, $10.86 for incorrect addition, and $5.50 for an unspecified reason. Mirna Hernandez's envelopes show deductions from her wages in the amount of $10.00 for using the telephone, $16.00 for not

writing a date correctly, $9.00 for an unknown reason, and $24.00 for an incorrect charge. Griselda Sallas' receipts indicate deductions in the amount of $30.00 for two days of low sales, another $15.00 for low sales, $80.00 for shortages, $10.00 for adding a bill wrong, another $15.00 for low sales, another $14.00 for adding a bill wrong, and an additional $30.00 and $20.00 for two more incorrect bills. An envelope for Rocio Velez shows that the petitioners deducted $20.00 from her wages for arriving late to work on a Sunday. Gregoria (Golla) Jeronimo's receipts show deductions in the amount of $8.00 for an unspecified reason, $5.25 for using the phone, $10.00 for doing the receipts wrong, $10.00 for "no manager on Saturday," and $23.00 for an incorrect charge.

Civil penalties

DOL imposed a 200% civil penalty against the petitioners. Ortiz testified that the amount of the civil penalty was based on DOL's determination that the violations were willful and egregious. She testified that she based this on the petitioners' failure to come into compliance with the Labor Law after the investigation commenced. Ortiz testified that DOL's investigation revealed that the petitioners continued to make illegal deductions from their employees' wages but no longer provided receipts of such deductions. She also stated that employees continued to work 12 to 16[2] hours per day but there were time cards now showing otherwise because the petitioners directed their employees to clock out prior to the end of their shift and then continue working.

B. Employee testimony

Maria Del Carmen Aguilera

Maria Del Carmen Aguilera testified that she started working as a waitress at La Posada in 2005. In 2008, she started to work at both La Posada and Gaviota. She testified that she worked two or three days a week at La Posada and two or three days a week at Gaviota. Her hours at Gaviota were from 4:00 p.m. to 12:00 a.m. and she did not take a break during her shift. The petitioners paid her $30.00 per day for both restaurants and she received gratuities. Maria Moina made the work schedule for both restaurants and Angel Moina paid her wages. According to Aguilera, Maria Moina continued to supervise employees at La Posada after Gaviota opened. Aguilera said that she "sometimes worked 15 days in a row because they didn't have waitresses."

Aguilera testified that at Gaviota and La Posada "there were fines for everything," including breaking glasses, using the telephone, missing beverages, and wearing the wrong blouse or skirt.

Aguilera also testified that she received gratuities from customers. She said that the gratuities were kept in a box next to the cash register and divided at the end of the shift, and that "when we worked with [Maria Moina], we would split them between us . . . with [Maria Moina]."

[2] There is no evidence anywhere in the record that employees worked 16 hours per day.

During the DOL's investigation, the "owners" told her, "if the ones from the Department of Labor arrived, to say that [we] only work six or eight hours, and that we got paid extra hours if we stayed."

Mirna Hernandez

Mirna Hernandez testified that Maria Moina hired her at La Posada, and sometimes sent her to work at Gaviota. She was originally hired to be a waitress, but in reality did cleaning work, bartending, and worked as a cashier. The petitioners paid her $30.00 a day and she received gratuities, which she had to share with the manager and with Angel and Maria Moina if they were there. Hernandez considered both Angel and Maria Moina to be the bosses, because "although [Maria Moina] would not be around sometimes. She would order us by telephone and tell us what to do. And Angel would only come by to check that we were actually doing the cleaning and that everything was okay." Furthermore, Hernandez testified that Maria Moina often gave instructions to employees at La Posada.

Hernandez testified that there was never a week that the petitioners did not make deductions from her wages. The petitioners made deductions from her wages for broken glasses, missing beverages, not wearing a hair net, and arriving late to work. The house rules were enforced at both La Posada and Gaviota by both Angel and Maria Moina.

Hernandez testified that when Maria Moina learned that Hernandez had complained to DOL, she sent her to Gaviota where she earned less in gratuities than at La Posada. Maria Moina also threatened Hernandez, offered her money to drop the claim, and pleaded with her to tell other employees to stop the case.

Gregoria Jeronimo

Gregoria Jeronimo testified that she worked as a waitress at La Posada and also worked for a few days at Gaviota. Angel Moina hired her, and Maria Moina sometimes supervised her at La Posada. According to Jeronimo, both Angel and Maria Moina were "in charge" at La Posada and Gaviota. Jeronimo worked 6:00 p.m. to 6:00 or 7:00 a.m. seven days a week for $30.00 a day plus gratuities. Jeronimo did not have a break during her shift.

Jeronimo testified that the petitioners made deductions from her wages. She identified a pay envelope in evidence that showed she worked five days at $30.00 a night for a total of $150.00, with an $8.00 deduction, so she only received $142.00. Another envelope indicated she worked six days for $180.00 with a deduction in the amount of $23.00, "supposedly for bills that were wrong, that were charged wrong," and her net pay was $157.00. Jeronimo testified that the handwriting on the envelopes belonged to Maria Moina. She further testified that on one occasion the petitioners made her buy new locks for the restaurant which cost $100.00. She was not reimbursed for the locks.

Griselda Sallas

Griselda Sallas (Zayas) testified that she was hired by Maria Moina in September 2008 to work as a waitress at La Posada, Tequila Song, and Gaviota. She worked seven, sometimes six nights per week which started at 6:00 p.m., and according to Sallas were supposed to end at 4:00 a.m., but "it was never like that . . . I left later because after the gate was closed, people remained

inside." She did not have a meal break during her shift. Sallas normally worked at La Posada, but could work at all three restaurants during a week. The petitioners paid her $30.00 a day and she received gratuities. She explained that deductions were sometimes made from her wages and gave examples of being charged a fine of $15.00 if she had low sales. She recalled that she was once fined $14.00 for not sharing her tips with "Jose." Finally, she testified that the petitioners instructed her to lie to DOL and tell the investigators she was paid minimum wage.

Rocio Velez

Rocio Velez testified that she worked as a waitress at La Posada and Tequila Song, and that both Angel and Maria Moina were her "boss." She stated that when she first started at La Posada, she worked four days a week, but when the petitioners moved her to Tequila Song, she worked five, six, or seven days a week depending on the petitioners' need for waitresses. Angel and Maria Moina supervised her work at Tequila Song when they were present otherwise they gave her instructions through Napoleon Moina. The last eight months Velez worked for the petitioners were in the bar in the basement at La Posada. She did not receive tips during that time, but did receive tips during all other periods she worked for the petitioners. Additionally, Velez testified that Angel and Maria Moina asked her to sign false payroll documents, which she did.

Carmen Amaguaya

Carmen Amaguaya testified that she worked at La Posada and Gaviota, but never worked at both during the same week. Angel Moina hired her and both Angel and Maria Moina supervised her work. Amaguaya started working at La Posada in September 2006 and began to work at Gaviota in the winter of 2008. She was originally hired as a waitress and was eventually "put in charge," which she explained meant that in addition to waiting tables, she wrote the schedules of when the waitresses arrived, collected the bills, checked that the waitresses wore proper attire, and helped to enforce the house rules. The petitioners paid Amaguaya $30.00 a day and her salary remained the same after she was put in charge. According to Amaguaya, the petitioners paid $30.00 a day to all the waitresses at La Posada and Gaviota. She worked 7:00 or 8:00 a.m. to 7:00 p.m., and the work schedules were posted by Maria Moina.

Amaguaya testified that each day the waitresses were supposed to wear a different color. Maria Moina instructed Amaguaya to fine waitresses if they wore the wrong color. Maria Moina prepared the pay envelopes, which included notes about the deductions, if any, to be made from the employees' wages. Maria Moina once fined Amaguaya $20.00 for failing to send packets of ketchup with a delivery order.

Amaguaya also testified that Angel Moina told her to lie if DOL investigators came to speak to her, and to tell them she only worked 7 to 8 hours per day, although in reality she worked 12 to 13 hours. Additionally, Amaguaya heard Angel and Maria Moina discussing that they had to make false papers to give to DOL. The petitioners "pressured" her to sign documents about the amount they paid her, but the information on the documents was not accurate.

Anyuli Sueno

Anyuli Sueno worked as a cook at Gaviota for six months in 2008. Angel Moina hired and supervised him. He stated that he worked from 7:00 to 4:00 (with no indication of a.m. or

p.m.) with a 30 minute meal break six days per week. The petitioners initially paid him $500.00 a week which was eventually reduced to $400.00 although his hours of work remained the same. Sueno testified that he knows what overtime is and does not recall whether the petitioners paid him an overtime premium since he had a "set salary."

Sueno denied that he had informed investigators that the petitioners fined employees for violating the house rules, but admitted that there was a sign posted on the wall of the restaurant listing the rules and fines for violating them. He further admitted that the rules were enforced, but he did not remember who enforced them. He was adamant that the petitioners never took any deductions from his wages and that nobody had ever told him that Maria Moina had taken deductions from their wages.

C. Petitioner's Testimony

Maria Moina

Maria Moina testified that she opened Gaviota on December 28, 2008. She bought the restaurant "half and half" with her husband, Angel Moina. Angel Moina hired the original employees of Gaviota because she was not in the country at the time the restaurant opened. When she returned in January 2009, she went to work at Gaviota to "be in charge" of the corporation. Maria Moina explained that the businesses are divided – "200 per cent" of Gaviota to her and "200 per cent" of La Posada to Angel Moina. According to Maria Moina, no employees could have worked at Gaviota prior to December 28, 2008, because the restaurant was not open until then, although she admitted that it was incorporated in August 2008, and validated by Tax and Finance in September 2008. She testified that Gaviota had nine employees in 2009.

Maria Moina testified that she worked as a waitress at La Posada from 2006 to 2008, prepared the payroll there, and helped her husband supervise the restaurant. She did not return to work at La Posada after Gaviota opened. When Maria Moina worked at La Posada, she shared gratuities equally with the others. She did not receive any gratuities from Gaviota.

Maria Moina testified that the house rules were required by the Liquor Authority and Health Department, and that the rules she posted at Gaviota were the same, or similar, to the ones used at La Posada. She told the employees they needed to follow the rules and threatened to fine them, but never actually did; however, she admitted that her handwriting was on one of the envelopes in evidence that included a deduction from wages, and admitted to making the deduction listed on another envelope for "squaring done wrong."

Maria Moina testified that some employees from Gaviota also worked at La Posada. She explained that the schedules showing employees working at both restaurants were because "those employees were from La Posada, and I would give them the days that they were free at La Posada because La Posada they only worked two or three days. And I completed their schedule at Gaviota's."

ANALYSIS

The Board makes the following findings of fact and law pursuant to the provision of Board Rules of Procedure and Practice (Rules) 65.39 (12 NYCRR 65.39):

A. Burden of Proof

The petitioners' burden of proof in this matter was to establish by a preponderance of the evidence that the orders issued by the Commissioner are invalid or unreasonable (State Administrative Procedure Act § 306 [1]; Labor Law §§ 101, 103; 12 NYCRR 65.30).

B. Employer Status

The individual and corporate petitioners argue that they are separate entities, and cannot be liable under the Labor Law as an employer for the violations of the other individuals and corporations. We disagree. At the outset we note that Angel Moina and Napoleon Moina presented no evidence on this issue, and, accordingly, we affirm the respondent's finding that Angel Moina and Napoleon Moina are liable as employers under Articles 6 and 19 of the Labor Law where they failed to meet their burden of proof on this issue. Maria Moina, however, contested employer status arguing that she was only an employee of La Posada prior to becoming the owner of Gaviota, at which time she alleged that she no longer worked at La Posada. Notwithstanding Maria Moina's testimony that she was solely dedicated to Gaviota after it opened, the evidence clearly shows that Maria Moina was an employer at all three restaurants throughout the duration of the claim period.

"Employer" as used in Articles 6 and 19 of the Labor Law means "any individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons acting as an employer" (Labor Law § 651 [6]; *see also* Labor Law § 190 [3]). "Employed" means "suffered or permitted to work" (Labor Law § 2 [7]).

The federal Fair Labor Standards Act, like the New York Labor Law defines "employ" to include "suffer or permit to work" (29 USC § 203 [g]), and "the test for determining whether an entity or person is an 'employer' under the New York Labor Law is the same test . . . for analyzing employer status under the Fair Labor Standards Act" (*Chu Chung v The New Silver Palace Rest., Inc.*, 272 F Supp 2d 314, 319 n6 [SDNY 2003]).

In *Herman v RSR Sec. Servs. Ltd.*, 172 F3d 132, 139 (2d Cir 1999), the Second Circuit Court of Appeals stated that the test used for determining employer status by explaining that:

> "Because the statute defines employer in such broad terms, it offers little guidance on whether a given individual is or is not an employer. In answering that question, 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 employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records" (internal quotations and citations omitted).When applying this test, "no one of the four factors standing alone is dispositive. Instead the 'economic reality' test encompasses the totality of the circumstances, no one of which is exclusive." (*Id.* [internal citations omitted]).

We find that petitioner Maria Moina exercised more than sufficient control over the employees of all three restaurants to be liable as an employer under Articles 6 and 19 of the Labor Law for the entire time period covered by the orders.

Maria Moina had the authority to hire employees at La Posada and Gaviota, and transferred employees among all three restaurants. Mirna Hernandez testified that Maria Moina hired her at La Posada and sometimes sent her to Gaviota or Tequila Song when waitresses were needed at the other restaurants. Griselda Sallas testified that Maria Moina hired her to work at La Posada and sometimes sent her to work at Gaviota. Rocio Velez testified that she worked at La Posada and was later sent by Maria Moina to Tequila Song. Likewise, Mirna Hernandez testified that Maria Moina sent her from La Posada to work at Gaviota. Moreover, six employees, comprised of workers from all three restaurants, informed DOL investigators that Maria Moina had hired them. This evidence was not rebutted by the petitioners. We find that Maria Moina had the authority to hire employees at La Posada and Gaviota, and also the authority to transfer employees among all three restaurants, including Tequila Song, which is analogous to hiring employees at Tequila Song (*see Matter of Yick Wing Chan et al.*, Docket No. PR 08-174 [October 17, 2012] [appeal pending]).

Maria Moina also supervised and controlled employee work schedules and conditions of employment at all three restaurants. Mirna Hernandez provided unrebutted testimony that Maria Moina, even when she was not present, would give directions to employees over the phone, and that Maria Moina often supervised employees at La Posada. Rocio Velez testified that Maria Moina, when present at Tequila Song, directed the employees' work. One employee informed DOL investigators when interviewed that Maria Moina supervised his work. Carmen Amaguaya testified that Maria Moina made and posted work schedules, and several employees testified, as discussed above, that she rotated them among the three restaurants to work. Maria Moina did not contradict this, explaining that "those employees were from La Posada, and I would give them the days that they were free at La Posada because [at] La Posada they only worked two or three days. And I completed their schedule at Gaviota's." Maria Moina, herself, testified that she posted the same house rules as at La Posada, or similar, at Gaviota and told the employees those were the rules they needed to follow. Several employees testified that Maria Moina enforced those rules by taking deductions from their wages for wearing the wrong color uniform, losing receipts, incorrect orders, and other violations of the rules. There was also credible evidence that Maria Moina monitored the restaurants by video when she was not present.

Maria Moina testified that she gave employees their pay envelopes at La Posada in 2006 and 2007 and admitted that her handwriting was on some of the pay envelopes in evidence that indicated deductions were taken from an employee's wages, and Carmen Amaguaya provided detailed testimony of Maria Moina's system of preparing the pay envelopes, including the fines for violating the house rules, and having them delivered to the restaurants.

Maria Moina's testimony that she no longer worked at La Posada after Gaviota opened is not credible. Maria Aguilera convincingly testified that Maria Moina directed employees at La Posada even after Gaviota opened, and other witnesses confirmed that Maria Moina made the schedules and enforced the house rules for both restaurants, and continued to transfer employees among the three restaurants. Accordingly, based on the above, we find that Maria Moina exercised sufficient control over the petitioners' employees to meet the definition of an employer as set forth in Articles 6 and 19 of the Labor Law.

C. Minimum Wage Order

Article 19 of the Labor Law, entitled "Minimum Wage Act" sets forth the minimum wage that every employer must pay each of its non-exempt employees for each hour of work (Labor Law § 652 [1]). The applicable minimum wage rates during the time period covered by the minimum wage order were $6.00 an hour from April 3, 2005 to December 31, 2005; $6.75 an hour in 2006; and $7.15 an hour from January 1, 2007 to March 23, 2009 (Labor Law § 652 [1]; 12 NYCRR 137-1.2).[3] Additionally, Labor Law § 652 (4) provides that the applicable wage rates for food service workers receiving tips during the time period covered by the wage order were $3.85 an hour in 2005, $4.35 an hour in 2006; and $4.60 an hour from January 1, 2007 to March 23, 2009, provided that the tips of such employees, when added to the cash wage, are equal to or exceed the relevant minimum wage rate (*see also* 12 NYCRR 137-1.5 [2009]). Payment of the lower food service worker rate is dependent upon the employer keeping accurate records of the gratuities employees receive (12 NYCRR 137-3.4 [c] [2009]; *See also Bakerman. Inc. v Roberts*, 98 AD2d 965 [4th Dept 1983]; *Padilla v Manlapaz*, 643 F Supp 2d 302, 310 [EDNY 2009])

12 NYCRR 137-2.1 (a), which was in effect during the relevant time period, provided that every employer was required to maintain weekly payroll records for each employee that included, *inter alia*, the wage rate, number of hours worked daily and weekly, the amount of gross wages, deductions from gross wages, allowances, if any, claimed from the minimum wage, and money paid in cash. The records produced by the petitioners to DOL during the investigation, samples of which are in evidence, were clearly fabricated. Several employees testified that Angel and Maria Moina told them to lie to DOL investigators, and Carmen Amaguaya said that she was pressured by the petitioners to sign false statements about her hours and wages. Gregoria Jeronimo reported the petitioners' attempts to mislead investigators to Ortiz, and Ortiz recorded that contact in her notes, and testified that she did not credit the petitioners' records because they were created in order to mislead the investigators. Furthermore, the records themselves showing employees working only 40 hours (or less) a week at exactly minimum wage are not credible against the background of numerous employees informing DOL that they worked six or seven days a week, more than ten hours a day, for a flat daily pay rate of $30.00 day, or in light of the credible testimony of several witnesses who said the same. We simply cannot accept the petitioners' payroll records as shedding any light on the hours the petitioners' employees worked or the wages they were paid, and find that the respondent was reasonable to not give such records any weight in its investigation.

The minimum wage order finds that the petitioners paid sixteen named waitresses, eight named dishwashers, seven named cooks, one named delivery person, three unidentified waitresses, and three unidentified dishwashers less than the minimum wage rates and overtime required by Article 19 of the Labor Law from April 3, 2005 to March 23, 2009. Specifically the minimum wage order finds that the petitioners owe these 29 known and six unknown employees $385,364.34 in unpaid minimum wages and overtime.

In the absence of sufficient payroll records, petitioners then bear the burden of proving that the disputed wages were paid (Labor Law § 196-a; *Angello v Natl. Fin. Corp.*, 1 AD3d 818,

[3] The regulations applicable to this matter were found in the Minimum Wage Order for the Restaurant Industry, which is codified at 12 NYCRR Part 137 (repealed effective January 1, 2011 and replaced by the Wage Order for the Hospitality Industry, 12 NYCRR Part 146).

821 [3d Dept 1989]; *Heady v Garcia*, 46 AD3d 1088 [3d Dept 2007]). As the Appellate Division stated in *Matter of Mid Hudson Pam Corp v Hartnett,* 156 AD2d 818, 821 [3d Dept 1989], "[w]hen an employer fails to keep accurate records as required by statute, the commissioner is permitted to calculate back wages due to employees by using the best available evidence and to shift the burden of negating the reasonableness of the Commissioner's calculation to the employer" (*see also Matter of Bae v Industrial Board of Appeals*, 104 AD3d 571 [1st Dept 2013], *cert denied* 2013 NY Slip Op 76385 [2013]). Therefore, the petitioners have the burden of showing that the minimum wage order is invalid or unreasonable by a preponderance of the evidence of the specific hours that the employees worked and that they were paid for those hours, or other evidence that shows the Commissioner's findings to be invalid or unreasonable (*In the Matter of Ram Hotels, Inc.* Board Docket No. PR 08-078 [October 11, 2011] [appeal pending]). Where incomplete or unreliable wage and hour records are available, DOL is "entitled[d] to make just and reasonable inferences and use other evidence to establish the amount of underpayments, even though the results may be approximate" (*Hy-Tech Coatings v New York State Dept. of Labor,* 226 AD2d 378, [(1st Dept 1996], *citing Mid-Hudson Pam Corp.*; *see also Matter of Bae v Industrial Board of Appeals*, 104 AD3d 571). Here, Ortiz testified that DOL used the information and employee statements gathered by DOL on January 27 and March 21, 2009 to determine the minimum wage underpayments. We agree with the respondent that this was the best available evidence with respect to the following employees who were interviewed by DOL investigators and provided statements -- Jose Trinidad, Leocadia Jeronimo, Elizabeth Castanedo Quintanilla, Alberto Elizalde, Maria Sanchez, Nelly Doris, Jesus Gonzales, Jose Tamay, Caleb Reyes, Ana Guevara, Leidi Salomon, Alberto Martinez, Natasha Garcia, Natalia Rodriguez, and Deysi Sevilla – and we affirm DOL's findings with respect to those employees. Several employees interviewed by DOL investigators – Anyuli Sueno, Mirna Hernandez, Gregoria Jeronimo, Rocio Velez, and Griselda Sallas (a/k/a Zayas) – also testified at hearing. We find that their testimony concerning the hours they worked and wages they were paid was reasonably consistent with the statements they provided to DOL and affirm the portions of the minimum wage order related to them except that we modify the order to change Rocio Velez's starting date from March 5, 2007 to March 1, 2008 as she indicated in her interview sheet and to reduce the wages due and owing to her accordingly.

Maria Del Carmen Aguilera filed a claim form with DOL but there is no document in evidence indicating that she was ever interviewed by DOL investigators. She also testified at the hearing. The minimum wage order finds that the petitioners employed her from February 17, 2008 to March 21, 2009 and she worked 62 ½ hours per week. The claim she filed on August 21, 2008 alleges that she started work for the petitioners on February 15, 2008 and worked 78 hours per week. She testified that she started with the petitioners in "summer" 2005, and was unclear about the number of hours she worked per week, which appears to have been at least eight hours per day, six days per week. She did not testify when or if she stopped working for the petitioners, but her name is listed in the petitioners' fabricated payroll records indicating that DOL's determination that she was still employed by the petitioners on March 21, 2009 was reasonable. We find based on the best available evidence – the testimony of Maria Del Carmen Aguilera, which was credible, that she worked eight hours per day, six days a week (48 hours) for $30.00 per day from June 21, 2005 to March 21, 2009 and received $30.00 per day in gratuities, and direct DOL to recalculate the wages due and owing to Aguilera based on our findings herein except that the wages due and owing may not exceed $14,104.88.

Carmen Amaguaya testified at the hearing but was not interviewed by DOL. The minimum wage order finds that she worked for the petitioners as a dishwasher from March 18, 2007 to March 21, 2009 and is owed $22,021.13. Amaguaya testified that she started to work for the petitioners in September 2006. She did not say when or if she stopped working for the petitioners, but, according to her testimony, was working for them in 2009. She testified that she worked from 7:00 or 8:00 a.m. to 7:00 p.m. per day for $30.00. Although there was no testimony as to the number of days per week that she worked, we find the estimate of six days per week, which appears to be the number used by DOL in its audit, based on the amount found due, to be reasonable based on the fact that that was the usual schedule. We direct DOL to recalculate the wages due and owing to Amaguaya based on 11 hours per day, 6 days per week or 66 hours per week at $30 per day or $180 per week, except that the wages due and owing may not exceed $22,021.13.

The minimum wage order also finds wages due and owing to numerous employees who were not interviewed by DOL, did not file a claim, and did not testify. These employees include Jarely Almanzar, Carolos Cruz, Miguel Estrada, Benjamin Ramirez, Guillermina Saavedra, Aurelia Sanchez, Lourdes Tapia, Carmen Vazquez, three unidentified waitresses, and three unidentified dishwashers. DOL obtained the names of Jarely Almanzar, Miguel Estrada, and Lourdes Tapia from the fabricated payroll records the petitioners created to mislead DOL investigators. The weeks covered by the payroll records in evidence were March 16, 2009 to April 12, 2009; however, DOL determined that wages were owed to Almanzar, Estrada, and Tapia for the period from September 1, 2008 to March 21, 2009. This determination is unreasonable because there is no evidence of the dates of employment for these employees, the hours they worked, or any indication that DOL interviewed these employees or obtained information about their hours of work from the employees they did speak to. We cannot sustain the finding that wages are due to Almanzar, Estrada, and Tapia on the record before us, and the minimum wage order must be modified accordingly.

Finally, the minimum wage order finds that petitioners owe wages to six unidentified employees. In *Matter of Anthony Boumoussa et al.*, Docket No. PR 09-058 (February 7, 2011), the Board modified an order which included wages owed to unidentified workers. DOL included a number of unidentified employees on the audit to account for the total number of employees observed at the time of inspection and the complete time period. The Board based its finding on *Reich v Petroleum Sales, Inc.*, 20 F3d 654 (6th Cir 1994), where the court held that it could award damages to unidentified employees under the Fair Labor Standards Act (FLSA) as long as the existence, work hours and wages of these employees is established by a preponderance of the evidence. While Commissioner may have established the likely existence of unidentified workers, he has not proven the number of such workers, or their work hours or their periods of employment and wages by a preponderance of the evidence. There is simply not sufficient information in the record (either testimonial or documentary) showing how the respondent came to the conclusion that there were six unidentified workers, what their schedules were, and how much they were paid. We see none of the type of evidence that would support the respondent's findings with respect to unknown workers such as, for example, interview notes detailing with specificity the staffing levels and a detailed explanation of the assumptions DOL reached concerning unknown workers based on facts provided either by surveillance or information received from cooperating employees or both, nor did Ortiz or any of the employees who testified explain the number of shifts at each restaurant per week, the start and end time of each shift, and which known and unknown employees worked which shifts. Since the respondent did

not meet his burden to establish the existence, work hours and wages of the six unidentified employees, we modify the order to remove them.

Civil Penalty

The minimum wage order assesses a 200% civil penalty. Labor Law § 218 requires the respondent to assess a 200% civil penalty where the failure to pay wages is either willful or egregious. Counsel for the respondent stated in her opening statement that the violations in this case were among the most egregious DOL has investigated. We agree. The petitioners required many of their employees to work six or seven days a week, many of them for more than ten hours a day without a break, for $30.00 per day with no overtime pay. In addition to this, the petitioners systematically forced their employees to pay the wages back to them by taking unlawful deductions from their below minimum wage for any number of arbitrary, absurd, and illegal reasons, in some instances leaving the employees with less than half of the wages they had earned. If any employer can be said to have engaged in egregious and willful violations of the Labor Law, it is the petitioners and the imposition of a 200% civil penalty under the facts of this case was fully warranted. We affirm the civil penalty.

Liquidated Damages

Labor Law § 663 (2) provides that the Commissioner may collect liquidated damages for violations of the Minimum Wage Act in an amount of up to 100% of the unpaid wages unless the employer proves a good faith basis to believe that its underpayment was in compliance with the law. The petitioners produced no evidence of a good faith belief that their wage and hour practices were in compliance with the law, nor could they have. Accordingly, we affirm the imposition of liquidated damages.

Interest

Labor Law § 219(1) provides that when the Commissioner determines that wages are due, then 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 section 14-A sets the "maximum rate of interest" at "sixteen percent per centum per annum."

D. Unlawful Deductions Order

Article 6, Labor Law § 193 (1) prohibits employers from making any deduction from the wages of an employee, except deductions that are made in accordance with the provisions of any law, rule or regulation or are authorized in writing by the employee and are for the benefit of the employee, and are limited to payments for insurance premiums, pension or health and welfare benefits, contributions to charitable organizations, payments for United States bonds, payments for dues or assessments to a labor organization, and similar payments for the benefit of the employee. DOL interviewed several of petitioners' employees who alleged that the petitioners made deductions from their wages for various violations of the posted house rules (transcribed at p5 *supra*). Additionally, employees provided specific and credible testimony at hearing about the deductions that were taken from their wages for violating the house rules and pay envelopes in evidence clearly prove that the deductions were made. Even Maria Moina admitted that she posted the same or similar house rules at Gaviota as at La Posada, and although at first she

denied ever fining any employees, she later admitted that she was responsible for the deductions listed on at least two of the envelopes in evidence. The evidence clearly shows, and we find, that the petitioners violated Labor Law § 193 (1) by taking deductions from their employees' wages for such unlawful reasons as wearing the wrong color blouse, placing incorrect orders, customers returning food, low sales, and broken items (*see also* 12 NYCRR 137-2.5 [2009]).

DOL determined that unlawful deductions were made from the wages of 18 known and 4 unknown employees in the amount $90,023.50 for the time period from April 3, 2005 through March 21, 2009. Ortiz testified that the respondent's method for determining this amount was:

> "We used the rules. We added the numbers on the rules, those amounts. And we – after we added the number, we took 25% and multiplied it by all the weeks that the person worked there . . . Because the deductions were so extensive that it was – it was just the correct thing. It would have been perhaps twice, three times the amount that ended up on the recap sheet."

Ortiz further testified that although DOL had at least some of the pay envelopes showing the actual deductions taken, DOL did not audit the envelopes. DOL's assumptions and methodology in determining the amount and extent of the illegal deductions was arbitrary. This is particularly true as DOL had available to it the best evidence – the envelopes themselves – and did not audit them or any portion of them to determine a statistically valid estimate of the illegal deductions made.

Aside from being arbitrary, the evidence does not, itself, support the findings of the deductions order. Jesus Gonzalez, Alberto Martinez, Maria Sanchez, and Jose Tamay informed DOL investigators that the petitioners had not made any deductions from their wages, and Caleb Reyes had not even been paid yet (so no deductions could have been made) when he was interviewed by DOL. Despite these statements in the investigative file, DOL determined that the petitioners made illegal deductions from the wages of these employees. We find that the unlawful deductions order is unreasonable and revoke it except for the receipts in evidence for Carmen Aguilera in the amount of $57.66, Mirna Hernandez in the amount of $58.00, Griselda Sallas (a/k/a Zayas) in the amount of $185.00, Rocio Velez in the amount of $20.00, and Gregoria Jeronimo in the amount of $56.25 (plus an additional $100.00 that she testified she was required to pay to change the locks), and $20.00 to Carmen Amaguaya based on her testimony that she was fined for failing to send ketchup packets with a delivery order, for a total due and owing of $496.91 in unlawful deductions.

Civil Penalty

The unlawful deductions order assesses a 200% civil penalty. As discussed above, Labor Law § 218 requires the respondent to assess a 200% civil penalty for willful or egregious violations. Also as discussed above, we find that the petitioners' widespread practice of taking illegal deductions from their employees' wages for such things as wearing the wrong color blouse, using the phone, low sales, placing an incorrect order, and adding a bill wrong constitutes an egregious and willful violation, particularly where the petitioners were paying the employees less than minimum wage and then stealing what often amounted to over half of their wages

through fines for violating the house rules. A 200% civil penalty is more than justified under the circumstances of this case.

Interest

Labor Law § 219(1) provides that when the Commissioner determines that wages are due, then 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 section 14-A sets the "maximum rate of interest" at "sixteen percent per centum per annum."

E. Tip Appropriations Order

Article 6, Labor Law § 196-d prohibits any employer or his agent or an officer or agent of any corporation or any other person from demanding or accepting, directly or indirectly, any part of the gratuities received by an employee or retaining any part of a gratuity or of any charge purported to be a gratuity for an employee. In the case of *Barenboim v Starbucks Corp.*, 2013 NYLEXIS 1678 (June 26, 2013), the Court of Appeals decided who may participate in a tip pool and held:

> "In sum, an employee whose personal service to patrons is a principal or regular part of his or her duties may participate in an employer-mandated tip allocation arrangement . . . even if that employee possesses limited supervisory responsibilities. But an employee granted meaningful authority or control over subordinates can no longer be considered similar to waiters and busboys within the meaning of section 196-d and, consequently, is not eligible to participate in a tip pool."

The Commissioner determined that the petitioners appropriated the gratuities of 12 known and 3 unknown employees in the amount of $86,205.00 for the time period from January 7, 2007 through March 21, 2009. The Commissioner argued that due to the fact that employees were forced to share their tips with "Janet Moina, and Angel Moina, as well as the night managers Carla, Sergio and Jose," the tip pool was illegal. While we agree that it would be improper to include Maria (Janet) and Angel Moina in a tip pool, there is limited evidence of how much they participated and there is no evidence of how the amount on the order for tip appropriations was calculated. While we agree that the main reason for the lack of evidence is petitioners' failure to keep the required records, absent some basis for the calculations, the Board finds the order unreasonable.

F. Wage Order

Mirna Hernandez informed DOL investigators that she was not paid for two weeks work. Article 6, Labor Law § 191 requires employers to pay earned wages to their employees. Manual workers such as waitresses must be paid within seven days of the date the wages are earned (Labor Law § 191 [1] [a]). DOL issued the wage order based on Mirna Hernandez's statement to DOL, which was not rebutted by the petitioners. We find that the wage order is reasonable in all respects and affirm it.

G. Penalties Order

Count 1

The penalty order found that the petitioners violated Labor Law § 661 and 12 NYCRR 137-2.1 (2009) by failing to furnish true and accurate payroll records for each employee for the period from March 1, 2009 through March 21, 2009, and imposed a $9,000.00 civil penalty for such violation. As discussed above, the payroll records the petitioners furnished to DOL were fabricated. Accordingly, the civil penalty for violating Labor Law § 661 and 12 NYCRR 137-2.1 (2009) is upheld and we note that the amount of the penalty was not specifically challenged by the petitioners was therefore waived (Labor Law § 101 [2]).

Count 2

The penalty order also finds that the petitioners violated Labor Law § 661 and 12 NYCRR 137-2.2 (2009) by failing to give each employee a complete wage statement with every payment of wages for the period from March 1, 2009 through March 21, 2009, and imposed a $9,000.000 civil penalty for such violation. The regulations in effect during the relevant time period required the petitioners to "furnish 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" (12 NYCRR 137-2.2 [2007]). The petitioners provided no proof that such statements were provided, and the pay envelopes in evidence do not satisfy the regulation since they did not list the hours worked. We uphold this portion of the penalty order, and, again note that the amount of the penalty was not specifically challenged.

Count 3

Labor Law § 161 requires an employee to allow restaurant employees at least 24 consecutive hours of rest in a calendar week. DOL determined that the petitioners violated this section by failing to allow employees at least 24 hours of rest in any calendar week during the period from on or about March 1, 2009 through March 21, 2009, and imposed a $9,000.00 civil penalty. Only one employee, Alberto Elizalde, informed DOL that he worked seven days a week as of March 21, 2009, when he was interviewed by DOL. Since Labor Law § 218 (1) only allows for a civil penalty not to exceed $1,000.00 for a first violation, we modify penalty order to reduce the violation in count 3 to $1,000.00.

Count 4

Finally, the orders imposed a $9,000.00 civil penalty against the petitioners for violating Labor Law § 162 by failing to provide employees at least 30 minutes off for the noon day meal when working a shift of more than 6 hours extending over the noon day meal period from 11:00 a.m. to 2:00 p.m. from March 1, 2009 to March 21, 2009. Numerous employees informed DOL and/or testified that the petitioners did not allow them a 30 minute break during their shifts. We uphold this portion of the penalty order.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The order to comply with Article 19 (minimum wages) is affirmed with respect to Jose Trinidad, Leocadia Jeronimo, Elizabeth Castanedo Quintanilla, Alberto Elizalde, Maria Sanchez, Nelly Doris, Jesus Gonzales, Jose Tamay, Caleb Reyes, Ana Guevara, Leidi Salomon, Alberto Martinez, Natasha Garcia, Natalia Rodriguez, Deysi Sevilla, Anyuli Sueno, Mirna Hernandez, Gregoria Jeronimo, Griselda Sallas (Zayas), Carlos Cruz, Benjamin Ramirez, Guillermina Saavedra, Aurelia Sanchez, and Carmen Vazquez; modified to change Rocio Velez's starting date to March 1, 2008 with the wages and interest due and owing to her reduced accordingly; modified with respect to Maria Carmen Del Aguilera in accordance with this decision; modified with respect to Carmen Amaguaya; and revoked with respect to Jarely Almanzar, Miguel Estrada, Lourdes Tapia, and six unidentified employees; the civil penalty, liquidated damages, and interest are affirmed but reduced proportionately according to this decision, and the respondent Commissioner is directed to serve an amended order to comply with Article 19 (minimum wages) consistent with this decision; and

2. The order to comply with Article 6 (illegal deductions) is modified to reduce the amount due and owing to $496.91 with the civil penalty and interest affirmed but reduced proportionately; and

3. The order to comply with Article 6 (wages) is affirmed; and

4. The order to comply with Article 6 (tip appropriations) is revoked; and

5. The order under Articles 5 and 19 (penalties order) is affirmed; and

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

Anne P. Stevason, Chairperson

J. Christopher Meagher, Member

Jean Grumet, Member

LaMarr J. Jackson, Member

RECUSED
Jeffrey R. Cassidy, Member

Dated and signed in the Office
of the Industrial Board of Appeals
at New York, New York, on
July 25, 2013.