

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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In the Matter of the Petition of:

ASHRAF MOHAMED ABDELAAL A/K/A
ASHRAF MOHAMED ABDEL AL AND K & J
SUPERMARKET, INC. (T/A ASSOCIATED
SUPERMARKET),

Petitioners,

To Review Under Section 101 of the Labor Law:
An Order to Comply with Article 19 of the Labor Law,
an Order to Comply with Article 6 of the Labor Law,
and an Order Under Articles 5 and 19 of the Labor Law,
all dated June 24, 2014,

- against -

THE COMMISSIONER OF LABOR,

Respondent.
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DOCKET NO. PR 14-184

RESOLUTION OF DECISION

APPEARANCES

Tarter Krinsky & Drogin LLP, New York (Laurent S. Drogin of counsel); J. Orlando & Co. Accountants, Brooklyn, (James Orlando) for petitioners.

Pico P. Ben-Amotz, General Counsel, NYS Department of Labor, Albany (Larissa C. Bates of counsel), for respondent.

WITNESSES

Ashraf Mohamed Abdelaal, Said Abdel Al, Guarino Reyes, Gustavo Castro, for petitioners.

Labor Standards Investigator Danaysy Rodriguez, for respondent.

WHEREAS:

On August 25, 2014, petitioners Ashraf Mohamed Abdelaal and K & J Supermarket, Inc. (T/A Associated Supermarket 1413 Ave J Brooklyn) filed a petition for review of three orders issued against them by respondent Commissioner of Labor on June 24, 2014. Petitioners amended their petition on September 29, 2014, and respondent filed her answer on November 20, 2014.

Upon notice to the parties, a hearing was held on April 8, 2015, September 23, 2016, and November 7, 2016 in New York, New York, before Administrative Law Judge Jean Grumet, 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 of the Labor Law (minimum wage order) directs payment of \$112,492.50 (including \$40,131.97 due and owing to claimant Guarino Reyes for the period June 15, 2004 to April 14, 2009, and \$72,360.53 for wages due and owing to claimant Gustavo Castro for the period November 4, 2003 to October 11, 2009), together with \$128,829.11 in interest at 16% per annum calculated to the date of the order, 25% liquidated damages in the amount of \$28,123.20, and a 100% civil penalty of \$112,492.50, for a total amount due of \$381,937.31.

The order to comply with Article 6 of the Labor Law (wage order) directs payment of \$207.00 for wages due and owing to claimant Guarino Reyes for the period June 15, 2004 to April 14, 2009, together with \$171.89 in interest at 16% per annum calculated to the date of the order, and a 100% civil penalty of \$207.00, for a total amount due of \$585.89.

The order under Articles 5 and 19 of the Labor Law (penalty order) imposes: (1) a \$1,000.00 civil penalty for violating Labor Law § 661 and 12 NYCRR 142-2.6 by failing to keep and/or furnish true and accurate payroll records for each employee for the period from November 1, 2005 through December 30, 2011; (2) a \$1,000.00 civil penalty for violating Labor Law § 661 and 12 NYCRR 142-2.7 by failing to give employees a wage statement with every payment of wages for the period from November 1, 2005 through December 30, 2011; and (3) a \$700.00 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 six hours extending over the noon day meal period, for the period from July 18, 2007 through October 11, 2009. The total amount due is \$2,700.00.

The amended petition alleges that: (1) payroll records indicate Guarino Reyes was employed by K & J Supermarket only in 2007 and 2009; and (2) Gustavo Castro submitted a statement declaring that he received his total wages for regular and overtime hours. Petitioners contested the civil penalties, liquidated damages, and interest assessed in the orders.

SUMMARY OF EVIDENCE

Testimony of Petitioner Ashraf Mohamed Abdelaal

Petitioner Ashraf Mohamed Abdelaal is the owner of K & J Supermarket. The supermarket usually opened at 6:00 a.m. for deliveries and was open to the public from 8:00 a.m. to 9:00 p.m. or 12:00 a.m., and sometimes 24 hours. Employees started work at 6:00 a.m. and stopped about 5:00 or 6:00 p.m.

Claimant Guarino Reyes began working for K & J in 2007 as a grocery bagger. In 2005 and 2006 he worked at another supermarket partly owned by Abdelaal. Abdelaal hired Reyes to work at K & J in 2007 based on the recommendation of a delivery person when the store where

Reyes was then working closed. After working at K & J for between three and six months, Reyes disappeared, did not work at K & J in 2008, and returned in 2009. Reyes was paid minimum wage and sometimes more than minimum wage multiplied by the hours he worked. "At one time I was giving him \$400 a week" for 40 hours. Reyes was paid in cash, and petitioners did not get a receipt. He "was supposed to work five days a week, eight hours a day," but in practice worked part-time "because he never showed up." Reyes was usually assigned hours each day depending on deliveries to the store, sometimes 8:00 a.m. to 5:00 p.m., sometimes 11:00 a.m. to 4:00 p.m.

Claimant Gustavo Castro worked in the supermarket during 2004, 2005, and 2009, and was given his daily schedule by Abdelaal or the manager. Castro worked "[l]ike Monday to Friday, whatever days he was available to work." He also had another job working on a boat, and depending on his schedule worked in both places. Castro worked on the boat "all the summer," disappeared for about three years, and then returned to work for petitioners. Castro was paid minimum wage in cash. He provided a letter to the company stating that he was paid in full.

K & J employees "h[u]ng out" with Abdelaal on his boat and helped him clean it, but they did not work on the boat. Petitioners maintained a payout book which listed how much was paid to each employee, but it was never provided to the DOL because DOL never requested it. Petitioners also kept time cards showing what days and hours employees worked. When the DOL came to the supermarket, Abdelaal answered its questions and had his accountant give them records. The DOL also requested time cards, which were at Abdelaal's house, but Abdelaal did not retrieve them because he was going through a divorce.

Testimony of Said Abdel Al

Said Abdel Al is Abdelaal's brother and worked three or four days per week as assistant manager of the supermarket from 2004 to 2008. The supermarket was open seven days per week from 8:00 a.m. to 8:00 p.m. Both claimants' job was to stock the shelves. They unloaded the delivery trucks, brought boxes inside, put merchandise on the shelves, and put the boxes in the basement. Claimants were not required to work weekends and generally did not work after 5:00 p.m., although they would do so if they arrived late, like at 1:00 p.m. Abdel Al believes that Castro stopped working for petitioners in 2005, and Reyes worked for petitioners in 2007. Abdel Al initially testified that he did not know how many hours per week Reyes worked, but later stated that Reyes "worked seven, eight hours the most every day." Castro worked no more than 40 hours per week. Neither Reyes nor Castro was a responsible employee or had perfect attendance. Reyes would disappear for a week or two and then beg for his job back.

Testimony of claimant Guarino Reyes

Guarino Reyes testified that he began working for petitioners in 2000. From 2003 to summer 2009, except for one year when he worked at another of petitioners' supermarket, Reyes worked a 72-hour workweek at K & J, 12 hours per day, six days per week with Saturdays off. Petitioners paid Reyes \$400.00 per week, but never for overtime or more than \$400.00 per week. The supermarket opened at 6:00 a.m. and closed at midnight. There was no fixed schedule, and Reyes often found out his schedule daily. He often covered for employees who called in absent. Although Reyes was given a half hour lunch break, when a delivery arrived during his lunch break, he would have to work on the delivery. He testified that besides work at the supermarket, Abdelaal "would take me to do construction. He would take me to Staten Island. He would take me to his

ship. He would take me everywhere. He would also take me to clean one of his ships, his boat.” Reyes took some unpaid days off. Reyes identified a Minimum Wage/Overtime Complaint he filed with the DOL on September 25, 2009, alleging that he worked for petitioners from June 15, 2004 to April 14, 2009 for \$6.00 per hour paid in cash, with no overtime, for work from 9:00 a.m. to 8:00 or 9:00 p.m. with a 30-minute meal break, Sunday through Friday.

Testimony of claimant Gustavo Castro Pimentel

Gustavo Castro Pimentel testified that he is currently employed by petitioners, worked for them off and on between 2003 and 2009, and believes he was paid the correct amount. Although he was told by Reyes and initially believed that he was not paid correctly, Castro is satisfied with the pay he received. Beginning around 2005 and continuing throughout the relevant period and until about 2013, Castro worked on a “party boat” in addition to working for petitioners. Sometimes he worked for petitioners during the day in addition to his job on the boat. Castro also worked for a supermarket in New Jersey. When he worked in New Jersey, he would stay there for an entire week or month, or for “the whole season” during the summer and did not work for petitioners.

At K & J, Castro’s hours varied and he sometimes worked 9:00 a.m. to 4:00 p.m., five or six days per week. He did not have a regular start time, and sometimes arrived later than 9:00 a.m. He worked six days per week unless he had to be elsewhere; he did not remember how often this occurred. Castro testified that he never worked until 11:00 p.m. and did not remember working until 8:00 or 9:00 p.m.

Castro identified a typewritten notarized letter which he signed on April 7, 2015, reading:

“TO WHOM IT MAY CONCERN

I’m GUSTAVO CASTRO PIMENTEL D.O.B. 01/09/78
Since the year of 2003 to the year of 2009 I had worked at
K & J Supermarket located at 1413 Ave J Brooklyn, NY 11230
Only in the 2004, 2005 and the year of 2009.
I had received all my salary and all my money that was due to me
Including (overtime).
And I was treated fairly by K & J Supermarket.”

Castro signed this letter at the request of petitioners’ manager. Although Castro is Spanish-speaking, testified through an interpreter and stated that he reads very little English, the letter is in English; Castro testified that he asked somebody to read it to him in Spanish. After being shown the document, Castro testified that he worked for petitioners in 2006, 2007, and 2008 as well as in 2004, 2005 and 2009. He also identified two versions of a handwritten English-language letter which he also signed, one undated and one notarized January 14, 2014, stating: “I am Gustavo Castro. I worked at the Associated Supermarket between 2003 and 2009 on and off and I’ve recieved [sic] my total pay includes over time [sic] for the amount of hours that I’ve worked and I was treated fairly at my job.” Castro testified that he could read only the words “I am Gustavo Castro. I work in the Associated Supermarket between 2003 and 2009” and was unable to read the rest of the document.

On cross-examination by DOL's attorney, Castro testified that between 2003 and 2009 he worked 12 hours on some days. He identified a Spanish-language Minimum Wage/Overtime Complaint he filed with the DOL on November 4, 2009, alleging that he worked for petitioners from November 15, 1992 to October 11, 2009, and was paid \$400.00 per week in cash, was not paid overtime, and worked from 9:00 a.m. to 9:00 p.m. Monday, Tuesday, Wednesday and Friday; 9:00 a.m. to 11:00 p.m. Thursday; and 8:00 a.m. to 11:00 p.m. Saturday, with a 30-minute meal break. Castro testified that he signed the claim form while still employed at K & J, that in doing so he truthfully stated his hours and pay, and that his memory regarding his employment was fresher when he signed the claim in 2009 than when testifying in 2016.

On redirect examination by petitioner's attorney, Castro testified that he did not always work 12 hours per day. Although he had a regular schedule, his work hours varied, and sometimes he worked seven, eight or nine hours per day. Castro did not tell the DOL about his jobs on party boats or in New Jersey.

Labor Standards Investigator Danaysy Rodriguez

Labor Standards Investigator Danaysy Rodriguez testified that she participated in the investigation in this matter. According to records in DOL's investigative file, a field visit to the supermarket was conducted on September 29, 2009 by DOL investigator S. Montes De Oca, who met with Abdelaal. According to De Oca's Interim Report, Abdelaal stated that the supermarket's hours of operation were 8:00 a.m. to 5:00 or 6:00 p.m. Monday through Thursday; 8:00 a.m. to 2:00 p.m. on Friday; closed on Saturday; and 10:00 a.m. to 4:00 p.m. on Sunday. Abdelaal stated that there was no printed schedule because the employees work the same hours every day. During a second field visit on November 30, 2011, Abdelaal told De Oca that the hours of operation were 6:00 a.m. to 7:00 or 8:00 p.m. from Monday through Thursday; 6:00 a.m. to 2:00 p.m. on Friday; and 8:30 a.m. to 6:00 p.m. on Saturday and Sunday. According to De Oca's Interim Report, Abdelaal stated that there was no cash log book and no time cards. De Oca left a Notice of Revisit requesting payroll records of employees' hours worked and wages received covering the period November 1, 2005 to the present, including time cards, payroll register, bank statements, cancelled checks, and cashbooks, requests that De Oca repeated in a December 9, 2011 letter to petitioners and their accountant.

A December 21, 2011 Interim Report states that De Oca met with petitioners' accountant Michael Sileo, who provided an "[e]mployee check record" and NYS Quarterly reports from 2005 to the date of their meeting and stated that petitioners had no method of keeping time, did not have a cash ledger, and did not have receipts for wages paid to employees. On January 13, 2014 Rodriguez sent petitioners a letter explaining the history of the investigation, DOL's findings, and an explanation of how minimum wage underpayments were calculated. Attached to her letter was a Notice of Payment Due and a Recapitulation Sheet - Preliminary Report listing amounts due to each of the claimants. The DOL investigation's Narrative Report states that Sileo provided the DOL with a copy of Castro's letter stating that "I've received my total pay," but the accountant failed to provide requested contact information for Castro.

Rodriguez testified that because petitioners did not provide legally required time and payroll records, she computed claimants' minimum wage underpayments based on their claims. She removed the period March 15, 2005 to September 1, 2005 from her underpayment calculations for Reyes because he told the DOL that he worked at a different supermarket owned by petitioner

during that period; she also removed one day per month from the calculations since Reyes stated he did not work on 50 non-consecutive days between June 2004 and January 2009. Rodriguez also calculated an extra hour at minimum wage for the spread of hours for each day the claimants worked more than 10 hours in a workday. The 100% civil penalty in the minimum wage order was assessed by her supervisor due to petitioners' failure to provide time and payroll records during the investigation, and a 100% penalty is usually assessed under these circumstances.

STANDARD OF REVIEW AND BURDEN OF PROOF

When a petition is filed, the Board reviews whether an order issued by the Commissioner is "valid and reasonable" (Labor Law § 101 [1]). A petition must state "in what respects [the order on review] is claimed to be invalid or unreasonable," and any objections not raised shall be deemed waived (*Id.* § 101 [2]). The Labor Law provides that an order of the Commissioner shall be presumed valid (*Id.* § 103 [1]). The hearing before the Board is *de novo* (Board Rules of Procedure and Practice [Board Rules] [12 NYCRR] § 66.1 [c]). Petitioners have the burden to prove by a preponderance of the evidence that the orders are not valid or reasonable (Board Rules [12 NYCRR] § 65.30; State Administrative Procedure Act § 306; *Matter of Angello v Natl. Fin. Corp.*, 1 AD 3d 850, 854 [3d Dept 2003]).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

Petitioners Did Not Satisfy Their Record-Keeping Obligations

Article 19 of the Labor Law requires employers to maintain for at least six years and furnish to the Commissioner on demand contemporaneous, true and accurate payroll records that show, among other things, employees' weekly hours worked, wage rate, gross and net wages paid, regular and overtime rates, number of regular and overtime hours worked, and time of arrival and departure of each employee working a spread of hours exceeding 10. (Labor Law § 661; 12 NYCRR 142-2.6; *see also* Labor Law § 195). Article 19 further requires employers to furnish employees a statement with each payment of wages listing hours worked, rates paid, gross wages, any allowances claimed as part of the minimum wage, deductions, and net wages (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.

It is undisputed that claimants in this case were paid in cash. It is also undisputed that no wage statements were provided to employees, nor did the employer obtain receipts for wages paid to employees. Abdelaal testified that petitioners maintained a "payout book," but did not provide it to the DOL because they never requested it. The record shows that the DOL's November 30, 2011 Notice of Revisit and December 9, 2011 letter to petitioners' accountant specifically requested a payroll register, bank statements, cancelled checks, cashbooks and time cards, and that at a December 21, 2011 meeting petitioners' accountant provided De Oca with an "Employee Check Record."

The “Employee Check Record” does not list daily or weekly hours or pay rates as required by Labor Law § 661 and 12 NYCRR 142-2.6, making it impossible to tell how petitioners computed claimants’ earnings. Although it is undisputed that claimants were always paid cash and were not provided with wage statements, the “Employee Check Record” lists a “Check #” and deductions for each weekly wage payment to each employee. There was no evidence that the “Employee Check Record” was kept contemporaneously. We cannot credit this record as accurate or reliable evidence of when Reyes and Castro worked, or that they were properly compensated.

DOL’s Calculation of Wages in the Absence of Employer Records

Labor Law § 196-a provides in relevant part:

“Failure of an employer to keep adequate records, in addition to exposing such employer to penalties . . . shall not operate as a bar to filing of a complaint by an employee. In such a case the employer in violation shall bear the burden of proving that the complaining employee was paid wages, benefits and wage supplements.”

As 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 calculations to the employer” (See *Matter of Garcia v Heady*, 46 AD3d 1088 [3d Dept 2007]; *Matter of Bae v IBA*, 104 AD3d 571 [1st Dept 2013]; *Matter of Ramirez v Commissioner*, 110 AD3d 901 [2d Dept 2013]; *Matter of Mohammed Aldeen*, PR 07-093 [May 20, 2009], *aff’d sub nom. Matter of Aldeen v Industrial Appeals Bd.*, 82 AD3d 1220 [2d Dept 2011]). In such a situation, the amount and extent of underpayment is a matter of just and reasonable inference. (*Mid-Hudson Pam*, 156 AD2d at 821; *Aldeen*, PR 07-093, p. 12).

Therefore, 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 those hours, or other evidence that shows the Commissioner’s findings to be unreasonable (*Matter of Ram Hotels, Inc.*, PR 08-078 [October 11, 2011]). When incomplete or unreliable wage and hour records are available, DOL is “entitle[d] to make just and reasonable inferences and use other evidence to establish the amount of underpayments, even though the results may be approximate” (*Matter of Hy-Tech Coatings v New York State Dept. of Labor*, 226 AD2d 378 [1st Dept 1996], citing *Mid-Hudson Pam*). The employer “cannot be heard to complain that the damages lack the exactness and precision of measurement that would be possible had he kept records” as required (*Anderson v Mt Clemens Pottery Co.*, 328 US 680, 688-89 [1949]; see also *Mid-Hudson Pam*, 156 AD2d at 821; *Aldeen*, 82 AD3d 1220). Even if DOL estimates based on employee claims are imprecise, “reasonable estimates are allowed since it is the employer’s burden to maintain accurate records” (*Matter of Karl Geiger and Geiger Roofing Co.*, PR 10-303 [Jan. 16, 2014], at 8, *aff’d sub nom.*, *Matter of Geiger v DOL*, 131 AD3d 887 [1st Dept 2015]; *Reich v Southern New England Telecommunications Corp.*, 121 F3d 58, 67 [2d Cir 1997] [finding no error in damages that “might have been somewhat generous” but were reasonable in light of the evidence and “the difficulty of precisely determining damages when the employer has failed to keep adequate records”])).

The Minimum Wage Order Is Affirmed as Modified

We find that petitioners failed to meet their burden of proving that claimants were properly paid. With the modification discussed below, we affirm the minimum wage order. The “Employee Check Record” produced by petitioners during the investigation was unreliable, and petitioners never provided legally required records showing daily and weekly hours worked or employee wage rates either during the investigation or at the hearing. Petitioners also did not provide employees with weekly wage statements or provide the DOL a “cash book” when requested, or proof of what claimants were paid in the form of receipts or canceled checks. Under these circumstances, it is proper for the DOL to base its underpayment calculation on the best available evidence, including credible claims and testimony from employees.

Abdelaal’s testimony that: (1) Reyes was first hired in 2007; (2) only worked for three to six months in 2007; (3) did not work in 2008; (4) did not return to work until an unspecified date in 2009; (5) essentially worked part time because he never showed up for work; (6) was paid minimum wage, and at some point was paid \$400.00 per week for a 40-hour workweek; and Abdel Al’s testimony that Reyes worked only in 2007, was simply too general, non-specific in time, and flawed to overcome the presumption favoring the Commissioner’s calculation. “Petitioner cannot shift its burden to DOL with arguments, conjecture or incomplete, general and conclusory testimony.” (*Matter of Angela Jay Masonry & Concrete Inc.*, PR 06-073 [September 24, 2008] p. 5; *Matter of Young Hee Oh and Cheong Hae Corp.*, PR 11-017 [May 22, 2014]).

Reyes credibly testified that except for a period in 2005 when he worked at a different supermarket also partly owned by Abdelaal, he was employed by petitioners throughout the relevant period from June 15, 2004 to April 14, 2009, that petitioners paid him \$400.00 per week for a 72-hour work week and that his 30-minute lunch period was sometimes interrupted when deliveries arrived during lunch. Reyes testimony that his wage rate was \$400.00 per week was corroborated by Abdelaal (although Abdelaal stated this amount was for a 40-hour, rather than a 72-hour, workweek). Likewise, Reyes’ testimony that the supermarket opened at 6:00 a.m. and closed at midnight, was consistent with Abdelaal’s testimony that the supermarket was open from 8:00 a.m. to “sometimes say like 12 o’clock, 24 hours per day” and supports Reyes testimony that he worked evening hours, despite Abdelaal’s testimony that employees stopped work at 6:00 p.m. and Reyes’ work was only scheduled during the day. We also credit Reyes’ testimony that besides working at the supermarket, he also sometimes performed other work for Abdelaal including cleaning Abdelaal’s boat and doing construction work. Abdelaal admitted that employees helped him clean the boat, but denied that cleaning the boat was work; Abdelaal did not specifically deny that Reyes performed construction work.

We find that Reyes was paid \$400.00 per week for 72 hours of work during the relevant period except for the period March 15, 2005 to September 1, 2005, when he was working at another supermarket partly owned by Abdelaal, and affirm the minimum wage order as to Reyes. Even if the DOL’s underpayment calculation based on Reyes’ claim “might have been somewhat generous” (*Reich, supra*, 121 F3d at 67), the employer “cannot be heard to complain that the damages lack the exactness and precision of measurement that would be possible had he kept records” as required (*Mt Clemens, supra*, 328 US at 688-689). We affirm the minimum wage order as to Reyes in its entirety.

The same principles govern our affirmance of the minimum wage order as it applies to Castro, with the modifications discussed below. That Castro did not wish to pursue his claim does not negate the DOL's power to enforce a statute that protects all New York employees and law-abiding employers vulnerable to undercutting by competitors that do not comply with legal standards. As we have previously stated, workers "cannot waive rights under the Minimum Wage Act and thereby bar DOL enforcement of the law (*See e.g.* Labor Law § 663 [1]; *Padilla v Manlapaz*, 643 F Supp 2d 302, 311 [SDNY 2009] [settled law that an employee may not waive the protections of the Labor Laws]; *Matter of Yook Wah Chu and Lucky Horse [NY] Corp. [T/A Fulton Chef]*, PR 11-308 [April 29, 2015], p. 12; *Matter of Stephen B. Sacher, Travco, Inc. and Sacher & Co.*, PR 11-151 [April 10, 2014], p. 7). While we credit Castro's factual testimony, we also note his interest in continuing to work for petitioners. (*Compare Matter of Rafael Almonte and D'Almonte Enterprises Parking Garage Inc.*, PR 12-040 [December 9, 2015], p. 7 [evidence undercut by witness's "admission of a substantial economic relationship with the petitioner"]). To the extent that Castro's testimony appeared evasive or inconsistent, we find it was likely he was trying to avoid offending his employer or risk losing his job.

While Castro did not wish to press his underpayment claim, he did not repudiate the claim's basic truth. When petitioners had Castro identify statements he signed implying he worked for petitioners only in 2004, 2005 and 2009, Castro testified that he signed them at the request of petitioners' manager, and that he also worked for petitioners in 2006, 2007 and 2008. On cross-examination by the DOL's attorney, Castro testified that his November 4, 2009 claim regarding hours he worked and what he was paid was truthful and that his memory regarding his employment between 2003 and 2009 was fresher when he completed the claim than at the November 7, 2016 hearing. Castro also testified at the hearing that there were days he worked 12 hours for petitioners and that he worked six days per week unless he had to be elsewhere. We do not credit petitioners' testimony that Castro completely stopped working for petitioners in 2005, disappeared for a period of over three years covering 2006 through 2008, and only returned to work for petitioners in 2009.

Castro testified that in addition to working for petitioners during the relevant period, he also worked on party boats and for a supermarket in New Jersey, and during those periods worked shorter hours for petitioners, or not at all. When filing his claim, Castro did not tell the DOL about these other jobs. Castro credibly testified that he worked for petitioners in each of the years from 2004 to 2009, while stating that during the relevant period he also worked on party boats and, for a week, month or in summer "the whole season," for a supermarket in New Jersey. The record does not make possible an exact recalibration of the DOL's underpayment calculation to reflect periods when Castro worked not for petitioners but for the other two employers. We are therefore guided by principles discussed earlier, including that petitioners were required to but did not maintain and make available records which would have made precision possible, and that the DOL must therefore make reasonable estimates based on the best available evidence.

In these circumstances, we find it reasonable and valid to assume as a best approximation for purposes of a reasonable calculation that on average from 2004 to 2009, Castro was not employed by petitioners for 10 weeks each summer while working on the party boat or at the supermarket in New Jersey, and an additional 5 weeks each year while working in New Jersey, for a total of 15 out of the 52 weeks per year that he did not work for petitioners. Castro's claim indicated that he worked a 74-hour workweek, and worked until 11 p.m. on Thursdays and Saturdays, and until 9:00 p.m. Monday through Wednesday and on Friday. At the hearing, Castro testified that he did not work until 11:00 p.m. We additionally modify the minimum wage order to

reduce Castro's hours on Thursdays and Saturdays by two hours each of those days, and we find that Castro was paid \$400.00 per week for a 70-hour workweek.

Based on our modifications, we find that the underpayment to Castro in the minimum wage order is reduced from \$72,360.53 to \$43,933.41, and the total amount of minimum wages due in the minimum wage order is reduced from \$112,492.50 to \$84,065.38.

The Penalty Order Is Affirmed

Counts One and Two

Counts One and Two imposes a \$1,000.00 civil penalty for violating Labor Law § 661 and 12 NYCRR 142-2.6 by failing to keep and/or furnish true and accurate payroll records for each employee for the period from November 1, 2005 through December 30, 2011 (Count One), and a \$1,000.00 civil penalty for violating Labor Law § 661 and 12 NYCRR 142-7 by failing to give employees a wage statement with every payment of wages for the period from November 1, 2005 through December 30, 2011 (Count Two). It is undisputed that petitioners failed to keep and/or furnish payroll records and to give employees wage statements as required, and we affirm counts one and two of the penalty order.

Count Three

Count Three of the penalty order assesses petitioners a \$700.00 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 six hours extending over the noon day meal period, for the period from July 18, 2007 through October 11, 2009. Reyes testified that when a delivery occurred during his lunch break, he had to stop eating and work on the delivery. We affirm count 3 of the penalty order.

The Wage Order Is Affirmed

The wage order finds that Reyes is owed \$207.00 for the period from June 15, 2004 to April 14, 2009 for unpaid wages. Petitioners did not submit evidence challenging the wage order and we find they waived any challenge to the wage order pursuant to Labor Law § 101 (2).

Liquidated Damages Assessed in the Minimum Wage Order Are Affirmed As Modified

The minimum wage order assessed liquidated damages in the amount of 25% of the wages owed. Labor Law § 218¹ provides that when wages are found to be due, respondent shall assess against the employer the full amount of the underpayment and an additional amount as liquidated damages, unless the employer proves a good faith basis for believing that its underpayment was in compliance with the law. Petitioners offered no evidence to prove that they had a good faith basis to believe that their underpayment was in compliance with the law. We therefore affirm the

¹ While Labor Law § 218 requires the Commissioner to include 100 % liquidated damages in her orders to comply, Labor Law §§ 198 and 663 provide that liquidated damages shall be calculated by the Commissioner as "no more than" 100 % of the underpayments found due.

imposition of 25% liquidated damages in the minimum wage order, but we reduce the liquidated damages from \$28,123.20 to \$21,016.35.

The Civil Penalty Assessed in the Minimum Wage Order is Affirmed As Modified

The minimum wage order assessed a civil penalty in the amount of 100% of the wages due. Labor Law § 218 (1) provides that when determining the amount of civil penalty to assess against an employer who has violated a provision of Article 19 of the Labor Law, the Commissioner 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” (*id.*).

Petitioners did not submit evidence challenging the civil penalty assessed in the minimum wage order and the issue is thereby waived pursuant to Labor Law § 101 (2). The civil penalty in the minimum wage order is reduced from \$112,492.50 to \$84,065.38.

Interest

Labor Law § 219 (1) provides that when the Commissioner determines that wages are due, then the order directing payment of those wages shall include “interest at the rate of interest then in effect as prescribed by the superintendent of financial services pursuant to section fourteen-a of the banking law per annum from the date of the underpayment to the date of payment.” Banking Law § 14-a sets the “maximum rate of interest” at “sixteen per centum per annum.” Here, respondent correctly determined that claimant was not paid all wages owed. Petitioner did not offer any evidence to challenge the imposition of interest and the issue is thereby waived pursuant to Labor Law § 101 (2). Interest must be recalculated based on the new principal amount of \$84,065.38.

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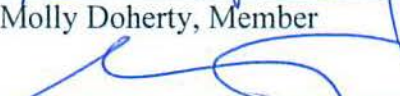
NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The minimum wage order is affirmed as modified where:
 - a. the underpayment to Castro is reduced from \$72,360.53 to \$43,933.41; and
 - b. the total amount of minimum wages due in the minimum wage order is reduced from \$112,492.50 to \$84,065.38; and
 - c. the civil penalty is reduced from \$112,492.50 to \$84,065.38; and
 - d. the liquidated damages are reduced from \$28,123.20 to \$21,016.35; and
 - e. the interest at 16% per annum must be recalculated based on the new principal amount; and
2. The wage order is affirmed; and
3. The penalty order is affirmed; and
4. The petition for review be, and the same is, otherwise denied.



Vilda Vera Mayuga, Chairperson

J. Christopher Meagher, Member

Michael A. Arcuri, Member

Molly Doherty, Member

Gloribelle J. Perez, Member

Dated and signed by the Members
of the Industrial Board of Appeals
at New York, New York, on
July 26, 2017.