STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of:	
BULGANIN B. CHANDOK, SR. A/K/A BULGANIN CHANDHOK, SR. AND REENA B. CHANDOK, SR. A/K/A REENA CHANDHOK, SR. AND TRIPLE V ENTERPRISES LLC (T/A UNIVERSAL MAIDS) AND ROYAL SERVICES, INC. (T/A MOLLY MAID OF NE QUEENS COUNTY INC.)	DOCKET NO. PR 15-205
Petitioners,	RESOLUTION OF DECISION
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 May 4, 2015,	
- against -	
THE COMMISSIONER OF LABOR,	
Respondent.	

APPEARANCES

Bulganin B. Chandhok, Sr., petitioner pro se, and for Reena Chandhok and Triple V Enterprises, LLC and Royal Services, Inc.

Pico P. Ben-Amotz, General Counsel, NYS Department of Labor (Benjamin T. Garry of counsel), for respondent.

WITNESSES

Bulganin B. Chandhok, Sr. and Reena Chandhok, for petitioners.

Sara Juarez, Amalia Garcia, Laura Cabrera and Senior Labor Standards Investigator Cloty Ortiz, for respondent.

WHEREAS:

On July 7, 2015, petitioners Bulganin B. Chandhok, Sr. Reena Chandhok, Triple V Enterprises, LLC (T/A Universal Maids), and Royal Services, Inc. (T/A Molly Maid of N.E. Queens County, Inc.) filed a petition for review of three orders issued against them on May 4, 2015 by respondent Commissioner of Labor. Respondent filed her answer on November 18, 2015.

The order to comply with Article 19 of the Labor Law (minimum wage order) directs payment to the Commissioner in the amount of $1,032.71 for wages due and owing to claimant Laura Cabrera for the time period from February 2, 2013 to December 21, 2013, and $19,015.38 for wages due and owing to claimant Amalia Garcia for the time period from March 5, 2011 to December 28, 2013, for a total amount of $20,048.09 with interest continuing thereon at the rate of 16% calculated to the date of the order in the amount of $5,403.76 and 25% liquidated damages in the amount of $5,012.03, and a 100% civil penalty in the amount of $20,048.09, for a total amount due of $50,511.97.

The order to comply with Article 6 of the Labor Law (wage order) directs payment to the Commissioner in the amount of $689.47 for wages due and owing to claimant Sara Juarez for the time period from March 18 to March 30, 2013, with interest continuing thereon at the rate of 16% calculated to the date of the order in the amount of $148.70 and 25% liquidated damages in the amount of $172.37, and a 100% civil penalty in the amount of $689.47, for a total amount due of $1,700.01.

The order under Articles 5 and 19 of the Labor Law (penalty order) imposes a $500.00 civil penalty for violating Labor Law § 162 by failing to provide employees at least 30 minutes off for the noon day meal; a $500.00 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; and a $500.00 civil penalty for violating Labor Law § 661 and 12 NYCRR 142-2.7 by failing to give each employee a complete wage statement with every payment of wages, all for the period from on or about March 5, 2011 through December 28, 2013, for a total owed under the penalty order of $1,500.00.

Petitioners allege that the orders are unreasonable because claimants, who were paid based on a percentage of the work they performed, were paid more than minimum wage for all hours worked and because the orders list a six month period from May through November 2011 when claimant Garcia was employed by Ms. Chandhok's company, Molly Maid, and Mr. Chandhok was not an employer during this period. Petitioners also contest the civil penalties and liquidated damages assessed in the orders.

Upon notice to the parties a hearing was held on February 9 and 10, 2016 in New York, New York, before Administrative Law Judge Jean Grumet, Esq., the designated Hearing Officer in this proceeding. Each party was afforded a full opportunity to present documentary evidence, examine and cross-examine witnesses, and make statements relevant to the issues.

SUMMARY OF EVIDENCE

Undisputed Facts

Mr. Chandhok is the owner and president of Triple V Enterprises, LLC, which registered with the NYS Department of State Division of Corporations on August 3, 2009, listing Mr. Chandhok as the agent for service of process. Triple V Enterprises, LLC filed an Assumed Name Limited Liability registration for "Universal Maids" with the NYS Department of State Division of Corporations on October 17, 2011.

The Claims

Garcia's minimum wage claim filed with the New York State Department of Labor (DOL) on March 3, 2014 alleged that she worked a six day/58 hour workweek: Monday and Tuesday 7:30 a.m. to 3:30 p.m., Wednesday 6:00 a.m. to 3:30 p.m., and Thursday through Saturday 7:30 a.m. to 6:30 p.m. ; that she was underpaid from March 3, 2011 to December 24, 2013; that she was not provided with a meal break and ate when traveling from one site to another; that as of July 1, 2013, work was reduced to four to five days per week, 40 hours or less; and that she wore a uniform with the Universal Maids logo that she laundered herself.

Cabrera's minimum wage claim filed March 3, 2014 alleged that she worked a six day/47.5 hour workweek as a driver and a cleaner: Monday 7:30 a.m. to 1:00 p.m., Tuesday 7:30 a.m. to 2:00 p.m., Wednesday 6:00 a.m. to 2:00 p.m., Thursday 7:30 a.m. to 3:30 p.m., Friday 7:30 a.m. to 5:00 p.m., and Saturday 7:30 a.m. to 6:00 p.m.; that she was underpaid from January 21, 2013 to December 24, 2013; and that she wore a uniform with the Universal Maids logo that she laundered herself.

Juarez's claim for unpaid wages filed April 24, 2013 alleged that she was hired on September 8, 2011, was not paid for her last two weeks of work from March 18 to March 30, 2013, was owed $689.47 for a total of 75 work hours, and was paid with checks which were returned by the bank for insufficient funds.

Petitioners' Evidence

Mr. Chandhok testified that Ms. Chandhok owned Royal Services, Inc., which operated a Molly Maid franchise for ten years until October 2011, and that Royal Services, Inc. employed claimant Garcia during the first six months of the relevant period. Mr. Chandhok was in the real estate business until October 17, 2011, when he started Triple V Enterprises, which operates as Universal Maids. Triple V Enterprises is a residential and office cleaning service, which Mr. Chandhok operates from the Chandhoks' home in Queens, New York. Ms. Chandhok helps her husband manage Universal Maids. They paid the claimants on a weekly basis. Mr.and Ms. Chandhok maintained the daily employee schedules and "when we had time, we put it in the computer."

Ms. Chandhok testified that once the franchise agreement with Molly Maids expired in October 2011, she helped her husband run Universal Maids by setting employees' schedules and explaining their job duties to them. When Ms. Chandhok was not available, Mr. Chandhok would perform these functions. Employees, including claimants Cabrera, Garcia and Juarez, arrived at the Chandhoks' home office at 8:00 a.m. to get the day's schedule, cleaning supplies, and a car. The schedule listed customers' names and addresses, times the workers were expected by each customer, and the pre-arranged prices to be charged which varied from customer to customer and which included New York's 8.875% sales and use tax. Sometimes Garcia and Cabrera, who worked as a team, arrived at 6:00 a.m. because they were assigned to clean an office where they had to be finished by 7:30 a.m. The employees cleaned in pairs. One member of the pair drove them from customer to customer in a car provided by petitioners, starting each morning at the Chandhoks' home office and returning there at the end of the workday. Usually a pair of workers had three homes to clean, one at 8:30 or 9:00 a.m., one at 10:30 or 11:00 a.m., and one at 1:00 or

2:00 p.m., and was finished by 3:00 or 4:00 p.m. Although employees were supposed to record what time they began and finished at each home, most of the time they did not.

Petitioners did not record employees' daily start and finish times, but offered in evidence daily assignment sheets for many weeks during 2011-2013, which Ms. Chandhok testified had been given to the cleaners. For example, a handwritten sheet for Tuesday, October 18, 2011 listed two customers, one at 8:15 a.m. and the other at 10:15 a.m., and "Janet" and "Adriana" – who Ms. Chandhok testified was Garcia – as cleaners. Notations on the sheet, which Ms. Chandhok testified were made by one of the cleaners, showed work completed at the first home at 10:15 a.m., and at the second at 11:40 a.m. Sheets for Wednesday, Friday and Saturday of the same week listed four, three and two customers respectively, and showed starting times for the last customer Friday and Saturday as 2:00 p.m. and 1:00 p.m. respectively; other times were not shown. Ms. Chandhok stated that the absence of sheets for Monday and Thursday "should" mean the cleaners worked only four days that week. Similarly, a computer-generated assignment sheet for Saturday, February 2, 2013 listed four customers, and "Carolina" and "Adriana" – who Ms. Chandhok testified were Cabrera and Garcia – as cleaners. On this sheet, handwritten notations stated work times for the four customers as 9:00-10:30 a.m., 10:45 a.m.-12:45 p.m., 1:00-2:30 p.m., and 3:00-5:00 p.m. Petitioners also offered summaries of Garcia's and Cabrera's daily work hours, which Ms. Chandhok stated she prepared based on the assignment sheets.

The daily assignment sheet entered into evidence for the week of July 7-13, 2013 indicates that Garcia (listed as Flores) worked six jobs during the two hour span of 9:00 a.m. and 11:00 a.m. on Wednesday, July 10, 2013, and four jobs from 9:00 a.m. to 11:00 a.m. on Thursday, July 11, 2013. The entries for these two days indicate that Cabrera (listed as Carolina) was apparently driving Garcia; however Cabrera is listed as having worked five jobs during the two hour span of 9:00 a.m. to 11:00 a.m. on Wednesday, July 10, 2013, and three jobs from 9:00 a.m. to 11:00 a.m. on Thursday, July 11, 2013.

Ms. Chandhok testified that cleaners who did not drive, including Garcia and Juarez, were paid 18% of what was paid by the customers, net of the tax. Cleaners who also drove, including Cabrera, were paid 20% of what customers paid, net of the tax. Although cleaners' wages were based on a percentage, not on hours worked, and although the summaries prepared by Ms. Chandhok list only the time spent at a home or office as work time and do not include travel time, Ms. Chandhok believes Garcia and Cabrera received more than the legal minimum wage, even with travel time counting as work time. With respect to Juarez, Ms. Chandhok testified that checks failed to clear because Juarez tried to cash them immediately, before money paid by customers became available to cover them. When Juarez refused to re-deposit the checks and demanded immediate payment Ms. Chandhok paid her in cash, but did not ask for a receipt. Ms. Chandhok also testified that "we worked for ten years for Molly Maid" and "we closed" the Molly Maid franchise.

Respondent's Evidence

Garcia testified that she worked for the Chandhoks for six years beginning in 2009, when she was referred to Molly Maids by an employment agency. Mr. Chandhok interviewed and hired Garcia, and told her to report to work at the Chandhoks' home office each morning at 7:00 a.m. Garcia continued to arrive between 7:00 and 7:10 a.m. each day to get her schedule from Ms. Chandhok. It took 20 to 30 minutes to collect supplies and get ready for the day, and Garcia might

have to be at a house to start cleaning by 7:45 a.m. The earliest she completed work was at 2:30 p.m., and the latest she worked was until 9:30 p.m., when Mr. Chandhok came to pick her up. Garcia worked with Cabrera for two years as a team. Besides cleaning, Cabrera also drove and took care of collecting money from customers. Workers did not receive a lunch break; Garcia brought her lunch and ate while in transit between customers. Garcia usually worked six days a week, sometimes five or seven. Besides the schedules kept by Ms. Chandhok, Garcia also kept her own notebook and wrote down every house or office that she cleaned and how much she was paid for each house or office. She never received a wage statement from the Chandhoks. She was paid by either of the Chandhoks; they told her she would earn an 18% commission, and they explained how to compute the commission.

Cabrera testified that when Ms. Chandhok interviewed her on a Friday night for a job as a driver and cleaner, Cabrera asked not to start immediately, but Ms. Chandhok told her she had to start the next day because "Saturday is my busiest day. So if you really want the job, you have to be here tomorrow at 7:00." Ms. Chandhok stated only the start time, not an end time, which varied. When Cabrera arrived at work she found approximately six workers picking up cleaning supplies and vacuum cleaners. Cabrera worked mostly from 7:00 a.m. to 4:00 or 5:00 p.m. Sometimes she would work until 1:00 or 2:00 p.m. She "very rarely" worked until 6:00 or 7:00 p.m., and worked a few times until 8:00 or 9:00 p.m. When she began, Cabrera worked five days a week, which after several months was reduced to four at her own request.

Juarez testified that when she was hired, Ms. Chandhok told her she had to be at work at 7:00 a.m. because some clients wanted work done early. She worked three to four days a week, and sometimes got back to the Chandhoks' home office at 6:00 p.m. On cross-examination, Juarez testified that she cleaned one to four houses per day and that if there was just one house to clean, which was not very frequent, she got back early, at noon or 1:00 p.m. Juarez was paid for her last two weeks with checks that were returned by the bank for insufficient funds. She was never paid in cash or by any other effective payment for those two weeks.

Supervising Labor Standards Investigator Ortiz testified that in July 2014 petitioners, in response to DOL's request for records of daily and weekly hours worked and of wages earned and paid, supplied records including daily assignment sheets, bank statements and canceled checks from which respondent, in September 2014, made an initial computation of underpayments. The checks provided by the Chandhoks to DOL were for the period January 27, 2012 to the end of the relevant period, were from a Universal Maids checking account, and were signed by Mr. or Ms. Chandhok. A September 19, 2014 letter to Mr. Chandhok from an investigator supervised by Ortiz stated that "the amounts of the checks that you provided" were credited towards what respondent computed was the minimum wage owed to employees. The letter stated that since petitioners did not record hours, DOL had calculated "based on the employees' signed statements." Computation sheets confirm that for purposes of its calculations respondent assumed the work hours stated for particular days of the week in Garcia's and Cabrera's claim forms were accurate.

Ortiz testified that at a January 29, 2015 conference attended by the Chandhoks, Cabrera, Garcia and Juarez, DOL established that besides checks, cleaners received cash wages, and the "claimants themselves provided us with the book where they kept track of how much money they were getting on a daily basis" and calendars showing how much they made per week. When petitioners supplied week-by-week summaries of claimants' pay and days worked for each week (but not hours worked each day, since as to that no records beyond the daily assignment sheets

existed), DOL found that these summaries generally, but not always, matched the calendars provided by claimants. When the two did not match, DOL accepted the claimants' version. Using this newly received information, DOL revised its original computation to arrive at the underpayment figures in the orders ultimately issued.

Ortiz completed a "Background Information – Imposition of Civil Penalty" form in which she assessed a 100% civil penalty for the minimum wage and wage orders. She testified that a 100% civil penalty was imposed based on the gravity of the violation and Mr. Chandhok's resistance and failure to appreciate the nature of the violation or how to come into compliance. Regarding the three $500.00 civil penalties imposed in the penalty order for failure to maintain records, failure to provide wage statements, and failure to give employees 30 minutes off for the noonday meal, Ortiz testified that the maximum penalty was $1,000.00 for each violation, and she imposed half that amount.

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 (Labor Law § 101 [2]). The Labor Law provides that an order of the Commissioner shall be presumed valid (Labor Law § 103 [1]). The hearing before the Board is *de novo* (Board Rules of Procedure and Practice [Board Rules] 66.1 [c], 12 NYCRR 66.1 [c]), and if the Board finds based on that hearing that the order or any part thereof is invalid or unreasonable, the Board is empowered to affirm, revoke or modify the order (Labor Law § 101 [3]). Since the hearing before the Board is *de novo*, we must consider the testimony and evidence at hearing in making our determination. (*Matter of Zi Qi Chan and Jason Tong and Henry Foods, Inc.*, PR 10-060 [March 20, 2013]). Petitioners have the burden to prove by a preponderance of the evidence that the orders are invalid or unreasonable (Board Rule 65.30 [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 Board Rule 65.39 (12 NYCRR 65.39).

Bulganin B. Chandhok, Sr. Was An Employer Throughout the Relevant Period

Labor Law § 190 (3) defines "employer" for purposes of Article 6 of the Labor Law as including "any person, corporation, limited liability company, or association employing any individual in any occupation, industry, trade, business or service." "Employer" as used in Article 19 of the Labor Law includes "any individual, partnership, association, corporation, limited liability company, business trust, legal representative, or any organized group of persons acting as employer" (Labor Law § 651 [6]). "Employed" means "permitted or suffered to work (Labor Law § 2 [7]). The federal Fair Labor Standards Act (FLSA), like the New York Labor Law, defines "employ" to include "suffer or permit to work" (29 USC § 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" (*Chung v The New Silver Palace Rest., Inc.*, 272 FSupp2d 314, 319 n6 [SDNY 2003]); *Bonito v Avalon Partners, Inc.*, 106 AD3d 625, 626 [1st Dept 2013]; *Cohen v Finz & Finz, P.C.*, 131 AD3d 666 [2d Dept 2015]).

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

> "[T]he overarching concern is whether the alleged employer possessed the power to control the workers in question with an eye to the 'economic reality' presented by the facts of each case. Under the 'economic reality' test, the relevant factors include whether the alleged employer (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records" (internal quotations and citations omitted).

No one of these factors is dispositive; the purpose of examining them is to determine economic reality based on a "totality of circumstances" (*Id.*). Under the broad New York and FLSA definitions of "employer," more than one person or entity can be found to be an employee's employer (*Zheng v. Liberty Apparel Co.*, 355 F3d 61 [2d Cir 2003]; *Matter of Robert Lovinger and Miriam Lovinger and Edge Solutions, Inc.*, PR 08-059 [Mar. 24, 2010]); *Matter of Stephen B. Sacher, Travco, Inc., and Sacher & Co., CPA, P.C.,* PR 11-151 [April 10, 2014])..

The petition argues that Mr. Chandhok's personal liability be limited to the period after Triple V Enterprises began its business because Ms. Chandhok rather than he owned Molly Maid. The credible evidence, however, establishes that Mr. Chandhok individually was always an "employer" within the meaning of the Labor Law. Garcia credibly testified that Mr. Chandhok interviewed and hired her in 2009 to work for Molly Maid, and set her work schedule and conditions of employment, which remained unchanged throughout her employment with Molly Maid as well as Universal Maids. Ms. Chandhok testified that "we worked for ten years for Molly Maid" and "we closed the business" confirming that both Mr. and Ms. Chandhok operated Molly Maid during the first six months of the relevant period. Ms. Chandhok's testimony corroborated Garcia's testimony and undermined Mr. Chandhok's assertion that he had no role in the business prior to October 2011. There was no credible evidence of any significant difference in Mr. Chandhok's role regardless which corporation was then operative. Mr. Chandhok had the power to hire and fire employees, supervised and controlled employee work schedules and conditions of employment, determined the rate and method of payment, and maintained employee records. (*Matter of Robert Lovinger and Miriam Lovinger and Edge Solutions, Inc.*, PR 08-059 [Mar. 24, 2010]; *Michael Sanseverino and Rocco's Pizza and Pasta of Webster, Inc. and Rocco's Pizza and Pasta of Ontario, Inc. (T/A Rocco's Pizza and Pasta)*, PR 11-002 [July 22, 2015]). We find that it was reasonable and valid for the Commissioner to find that as a matter of economic reality, Mr. Chandhok was individually liable as the employer of all of the claimants throughout the relevant period.[1]

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[1] While Ms. Chandhok did not challenge the imposition of personal liability in the orders, we note that the evidence at hearing also supports the Commissioner's finding that Ms. Chandhok was also personally liable as an employer throughout the relevant period.

Royal Services, Inc. was an Employer until October 16, 2011;
Triple V Enterprises, LLC was an Employer Thereafter

We find that all three orders must be modified to limit the finding of liability with respect to Royal Services, Inc. (T/A Molly Maid of N.E. Queens County, Inc.) to the period prior to October 17, 2011 when the Molly Maid franchise expired and the Chandhoks began to operate their cleaning business through Triple V Enterprises, LLC, and to limit the liability finding with respect to Triple V Enterprises, LLC to the period starting October 17, 2011, when Universal Maids was established (*see Matter of Israel I. Berkowitz and NPI Manufacturing, Ltd. [T/A NPI Limited]*, PR 14-170 at 5 [September 14, 2016] modifying a wage order to remove company as a responsible party for wages due and owing for a period prior to its creation]).

Petitioners Failed to Maintain Required Records

Article 19 of the Labor Law requires employers to maintain for at least six years payroll records that show for each employee, among other things, the wage rate, number of regular and overtime hours worked daily and weekly, and gross and net wages paid (Labor Law § 661; 12 NYCRR 142-2.6 [a]). Article 19 also requires employers to provide each employee a statement with each payment of wages showing hours worked, rates paid, allowances, deductions, gross and net wages (12 NYCRR 142-2.7). Payroll records must be available to DOL for inspection (Labor Law §§ 660, 661). In the present case, in which it is undisputed that petitioners did not keep records stating cleaners' total hours worked daily and weekly or indicating other required information and did not provide cleaners a statement with each payment of wages, petitioners failed to maintain and make available records required by the Labor Law.

The work hours which petitioners were required to record, and for which they were required to pay the cleaners, include not only time spent cleaning customers' homes or offices but also travel time between customers and to and from petitioners' office where cleaners were required to report at the beginning and end of each work day. 12 NYCRR 142-2.1 (b) expressly states that the legal "minimum wage shall be paid for the time an employee is permitted to work, or is required to be available for work at a place prescribed by the employer, and shall include time spent in traveling to the extent that such traveling is part of the duties of the employee." As explained in 29 CFR 785.38, implementing the federal Fair Labor Standards Act (FLSA), "Time spent by an employee as part of his principal activity, such as travel from job site to job site during the workday, must be counted as hours worked. Where an employee is required to report at a meeting place to receive instructions... or to pick up and to carry tools, the travel from the designated place to the work place is part of the day's work, and must be counted as hours worked." The same applies under the New York Labor Law (*See, e.g., Kalloo v Unlimited Mech. Co. of NY*, 977 FSupp 2d 187, 203 [EDNY 2013]; *Hernandez v NJK Contrs., Inc.*, 2015 US Dist. LEXIS 57568, *67-*87 [EDNY, May 1, 2015] [awarding damages under both statutes]). It is undisputed that cleaners were required to report at and return to the Chandhoks' home office each day to receive instructions and cleaning supplies and most significantly, to pick up and return the car the Chandhoks provided to the claimants to perform their duties. Travel time from and back to the office as well as from site to site during the work day must be counted as hours worked.

In the Absence of Required Records, Petitioners Bore the Burden of Proving Employees Were Paid Earned Wages

In the absence of records required by the Labor Law, an employer bears the burden of proving that earned wages were paid (Labor Law § 196-a). Where the employer has failed to keep such records, the Commissioner may draw reasonable inferences and calculate unpaid wages based on the "best available evidence" drawn from employee statements and other evidence, even though the results may be approximate (*Matter of Mid-Hudson Pam Corp. v Hartnett*, 156 AD2d 818, 820-821 [3d Dept 1989]; *Matter of Ramirez v Commissioner*, 110 AD3d 901 [2d Dept 2013]). In *Anderson v. Mt. Clemens Pottery Co.*, 328 US 680, 687-688 (1949), superseded on other grounds by statute, the U.S. Supreme Court long ago discussed the fairness of relying on employee statements where the employer failed to keep adequate records, explaining that when the employer fails to keep such records the solution "is not to penalize the employee by denying him any recovery on the ground that he is unable to prove the precise extent of uncompensated work. Such a result would place a premium on an employer's failure to keep proper records." The employer in such a case must provide proof of the "precise" amount of work performed or otherwise negate the reasonableness of the inferences drawn from the employees' evidence (*Tyson Foods, Inc. v Bouphakeo*, 136 S.Ct. 1036, 1047 [2016]; *Matter of Kong Ming Lee*, PR 10-293 at 16 [April 10, 2014]). Since petitioners in the present case did not keep required records, the burden of disproving reasonable inferences from the best available evidence, even if such conclusions are only approximate, fell on petitioners.

We have summarized the applicable federal and state principles governing the employer's burden of proof in cases before the Board, holding that petitioners have the burden of showing that the Commissioner's order is invalid or unreasonable by a preponderance of 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 at 24 [October 11, 2011]).

The Minimum Wage Order is Affirmed

We find that petitioners failed to meet their burden of proof to establish the precise hours worked by claimants and that they were paid for those hours or that the inferences supporting the calculation of wages made by the Commissioner in the minimum wage order were otherwise unreasonable. While petitioners were free to base wages on a percentage of what customers paid for cleaning, such a system does not excuse the obligation to pay at least the minimum wage required by law. As 12 NYCRR 142-2.9 expressly states, the legal minimum regular and overtime wage rates are required "regardless of the frequency of payment, whether the wage is on a commission, bonus, piece rate, or any other basis." 12 NYCRR 142-2.16 defines an employee's regular rate as "the amount that the employee is regularly paid for each hour of work. When an employee is paid on a piece-work basis, salary, or any basis other than hourly rate, the regular hourly wage rate shall be determined by dividing the total hours worked during the week into the employee's total earnings."

During the relevant time period, the minimum regular rate set by the Labor Law was $7.25 per hour (Labor Law § 652; 12 NYCRR 142-2.1 [a]). Employers were also required to pay an overtime premium of one and one-half times a non-residential employee's regular hourly rate for hours worked over forty in a week (12 NYCRR 142-2.2), "spread of hours" pay of one hour at the

basic minimum hourly rate for every day in which the interval from the beginning to the end of the employee's work day exceeded ten hours (12 NYCRR 142-2.4 and 142-2.18), and $9.00 per week to minimum-wage employees who worked more than 30 hours per week if the employer failed to launder or maintain required uniforms (12 NYCRR 142-2.5 [c]). Respondent's method of determining whether claimants were paid less than required by dividing a cleaner's total earnings for a week by the total hours she worked to derive an hourly rate, finding underpayment if that derived rate was less than $7.25 per hour, requiring overtime pay for hours worked beyond 40, and computing the total wage required for a week by taking into account not only overtime requirements but also "spread of hours" pay and the uniform allowance was reasonable. Where the amount actually paid by the employer was less than that minimum requirement, the difference constituted prohibited underpayment regardless how the amount actually paid was figured.

The wages petitioners actually paid Garcia and Cabrera are not disputed; the issue with regard to the minimum wage order is how many hours they worked. While petitioners seek to rely on the daily assignment sheets, those sheets often lack specific times for jobs; include many cross-outs, deletions and obscurities; are incomplete; do not reflect travel time; are often implausible, and do not constitute the "best evidence" in a case that includes testimony as well as sworn claim forms. In the absence of records of hours worked by claimants, which petitioners were required to keep, the burden of proof is on petitioners on this issue. In light of the credible testimony at hearing and the sworn claim forms, we find that claimants' credible and consistent testimony rather than petitioners' account of hours worked must be accepted where the two conflict. For example, while Ms. Chandhok stated that cleaners came to the office at "8 a.m. or 8:15," all three claimants credibly testified they were required to report there by 7:00 am. Garcia testified Mr. Chandhok told her to do so when he hired her, and she continued to do so throughout her employment. Cabrera testified Ms. Chandhok told her she had to report at 7:00 if she wanted the job at all. Juarez testified Ms. Chandhok told her she had to be at work at 7:00 because some clients wanted work done early. On cross-examination, Ms. Chandhok herself acknowledged that Garcia and Cabrera started before 8:00, sometimes as early as 6:30, because "these two girls always go" to an office that "tells us to be started by 7 o'clock or 7:30 you have to be finished."

Ms. Chandhok's testimony that cleaners received at least minimum wage even with travel time taken into account, was general and conclusory. Petitioners also failed to produce any records to establish how much travel time was involved or the total amount of work time with travel time included. The Board has repeatedly held that such general, conclusory and incomplete testimony concerning the work schedules of employees is insufficient to satisfy the high burden of precision required to meet an employer's burden of proof in the absence of required records (*Matter of Young Hee Oh*, PR 11-017 at 12 [May 22, 2014]; *Matter of Wilson Quiceno,* PR 14-287 at 8 [July 13, 2016]). We find, in light of the testimony as well as the burden of proof, that claimants' rather than petitioners' version of their work hours deserves credit.

We find the approximation of hours and wages drawn by the Commissioner to calculate wages owed to the claimants in this case to be reasonable. In the absence of adequate payroll records submitted by petitioners, the Commissioner was entitled to rely on the "best available evidence" and draw an approximation of the hours worked and wages owed from claimants' written claims. Even if the wages found are somewhat imprecise, the order may not be faulted for its imprecision since it is only an estimate (*Mt. Clemens Pottery,* at 687-688 ["The employer cannot be heard to complain that the damages lack the exactness and precision of measurement that would be possible had he kept records in accordance with the [recordkeeping] requirements of . . . the

Act"]; *Reich v Southern New England Telecommunications Corp.*, 121 F3d 58, 70 n.3 [2d 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 Civil Penalty in the Minimum Wage Order Is Affirmed

The minimum wage order assessed a civil penalty in the amount of 100% of the wages due. Petitioners offered no evidence to contest the basis for these penalties and the Board finds that the considerations that the Commissioner was required to make in connection with the civil penalty were valid and reasonable.

The Wage Order Is Affirmed

The wage order finding that Juarez was not paid for the two weeks she worked for petitioners is affirmed. Ms. Chandhok confirmed Juarez's testimony that she was paid with checks that did not clear the bank. Ms. Chandhok's testimony that she subsequently paid Juarez in cash but did not ask for or obtain any receipt is inadequate to rebut Juarez's credible testimony that no such cash was tendered, all the more so since the burden of proof in the absence of required employer-kept records rested on petitioners (*Matter of Mike Gordon a/k/a Meir Gordon and Kenben Industries Ltd.*, PR 14-048 at 24 [July 13, 2016]).

Civil Penalty in the Wage Order

The wage order assessed a civil penalty in the amount of 100% of the wages due. Petitioners offered no evidence to contest the basis for these penalties and the Board finds that the considerations and computations that the Commissioner was required to make in connection with the imposition of the civil penalty amount set forth in the wage order were valid and reasonable.

Liquidated Damages Assessed in the Minimum Wage Order and the Wage Order

The minimum wage and wage orders assessed liquidated damages in the amount of 25% of the wages owed. Labor Law § 218[2] provides that when wages are found to be due, respondent shall assess against the employer the full amount of the underpayment or unpaid wages and an additional amount as liquidated damages, unless the employer proves a good faith basis for believing that its underpayment or nonpayment of wages was in compliance with the law. 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 imposition of 25% liquidated damages in the minimum wage order and the wage order.

Interest

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

[2] 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.

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."

Petitioners did not challenge the interest assessed in the minimum wage or wage orders. The issue is thereby waived pursuant to Labor Law § 101 (2).

The Penalty Order is Affirmed

The penalty order assesses a $500.00 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; a $500.00 civil penalty for violating Labor Law § 661 and 12 NYCRR 142-2.7 by failing to give each employee a complete wage statement with every payment of wages; and a $500.00 civil penalty for violating Labor Law § 162 by failing to provide employees at least 30 minutes off for the noon day meal, for a total owed under the penalty order of $1,500.00.

Count 1: Failure to maintain payroll records

Labor Law § 661 and 12 NYCRR 142-2.6 require employers to keep wage and hour records, including daily and weekly hours worked by each employee for a period of six years. It is undisputed that petitioners failed to keep records of the total hours worked daily and weekly by employees, and we affirm this count of the penalty order.

Count 2: Failure to provide wage statements

Labor Law § 661 and 12 NYCRR 142-2.7 require employers to give employees a complete wage statement with each payment of wages. It is undisputed that wage statements were never provided to employees. We affirm this count of the penalty order.

Count 3: Failure to allow employees a 30-minute uninterrupted meal break

Labor Law § 162 requires employers to allow each employee a 30-minute uninterrupted meal break when working a shift of more than six hours extending over the noon day meal period. Garcia credibly testified that employees were not provided with an uninterrupted meal period and ate while driving to their customers' locations. Petitioners provided no evidence to refute Garcia's testimony. We affirm this count of the penalty order.

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NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The minimum wage order, wage order and penalty orders are affirmed but modified to indicate that the periods for which petitioners Royal Services, Inc. (T/A Molly Maid of N.E. Queens County, Inc.) and Triple V Enterprises, LLC are liable are, respectively, limited to before and commencing October 17, 2011; and

2. The petition for review be, and the same hereby 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
December 14, 2016.