

STATE OF NEW YORK  
INDUSTRIAL BOARD OF APPEALS

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In the Matter of the Petition of:	:
	:
DORA E. IDEZ AND JAVIER ROMAN IDEZ (T/A	:
SUBWAY),	:
	:
Petitioners,	:
	:
To Review Under Section 101 of the Labor Law:	:
An Order to Comply with Article 19 of the Labor	:
Law, two Orders to Comply with Article 6 of the	:
Labor Law, and an Order Under Articles 5, 6, and 19	:
of the Labor Law, each dated September 18, 2014,	:
	:
- against -	:
	:
THE COMMISSIONER OF LABOR,	:
	:
Respondent.	:
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DOCKET NO. PR 14-274

RESOLUTION OF DECISION

**APPEARANCES**

*Bernard Lipton*, Westbury, for petitioners.

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

**WITNESSES**

Bernard Lipton and Senior Labor Standards Investigators Fang Zou, for petitioners.

Senior Labor Standards Investigators Fang Zou and Guangming Liu, for respondent.

**WHEREAS:**

Petitioners Dora E. Idez and Javier Roman Idez (T/A Subway) filed a petition in this matter on November 4, 2014 pursuant to Labor Law § 101, seeking review of four orders issued against them by respondent Commissioner of Labor on September 18, 2014. Respondent filed her answer to the petition on February 27, 2015.

Upon notice to the parties a hearing was held in this matter on May 20, 2015 in Hicksville, New York before Vilda Vera Mayuga, Chairperson of the Industrial Board of Appeals, and the designated hearing officer in this proceeding. Each party was afforded a full opportunity to present documentary evidence, to examine and cross-examine witnesses, and to make statements relevant to the issues.

The first order to comply with Article 6 (unpaid wages order) under review directs compliance with Article 6 and payment to respondent for unpaid wages to one named employee in the amount of \$2,084.38 for the time period from September 4, 2011 to October 4, 2011, with interest continuing thereon at the rate of 16% calculated to the date of the order in the amount of \$980.40, liquidated damages in the amount of \$521.10, and assesses a civil penalty in the amount of \$2,084.38, for a total amount due of \$5,670.26.<sup>1</sup>

The second order to comply with Article 6 (unlawful deduction order) under review directs compliance with Article 6 and payment to respondent for unauthorized wage deductions from one named employee in the amount of \$30.00 for the time period from September 4, 2011 to October 4, 2011, with interest continuing thereon at the rate of 16% calculated to the date of the order in the amount of \$14.51, liquidated damages in the amount of \$7.50, and assesses a civil penalty in the amount of \$30.00, for a total amount due of \$82.01.

The order to comply with Article 19 (minimum wage order) under review directs compliance with Article 19 and payment to respondent for unpaid minimum wages due and owing to one named employee in the amount of \$483.75 for the time period from September 4, 2011 to October 4, 2011, with interest continuing thereon at the rate of 16% calculated to the date of the order in the amount of \$229.02, liquidated damages in the amount of \$120.94, and assesses a civil penalty in the amount of \$483.75, for a total amount due of \$1,317.46.<sup>2</sup>

The order under Articles 5, 6, and 19 (penalty order) assesses a \$500.00 civil penalty for violating Labor Law § 661 and 12 NYCRR 146-2.1 by failing to keep and/or furnish true and accurate payroll records for each employee from on or about September 4, 2011 to October 4, 2011; a \$500.00 civil penalty for violating Labor Law § 661 and 12 NYCRR 146-2.3 by failing to give each employee a complete wage statement with each payment of wages during the period from on or about September 4, 2011 to October 4, 2011; a \$500.00 civil penalty for violating Labor Law § 193 (2) by making prohibited deductions through a separate transaction to cover charges not permitted by law during the period from on or about September 4, 2011 to October 4, 2011; and a \$500.00 civil penalty for violating Labor Law § 162 by failing to provide employees with at least thirty minutes off for the noon day meal when working a shift of more than six hours extending over the noon day meal period from eleven o'clock in the morning to two o'clock in the afternoon from on or about September 4, 2011 to October 4, 2011, for a total amount due of \$2,000.00.

Petitioners allege that the orders are invalid and unreasonable because claimant was paid for all the hours that he worked, that he only worked 20 hours as a trainee, and that the penalties and interest in the orders as unreasonable.

## SUMMARY OF EVIDENCE

### Wage Claim

On October 24, 2011, claimant filed a minimum wage/overtime complaint, an unpaid wages claim, and an unlawful deduction claim against petitioners alleging that his agreed rate was

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<sup>1</sup> This is an amended amount. At hearing the orders were amended to correct a clerical error.

<sup>2</sup> *Id.*

\$7.25 per hour, that he worked 64 hours per week from September 4, 2011 through October 4, 2011, and that he received 15 minutes for a meal break, but was only paid \$125.00 in total for that entire time period and was not reimbursed \$30.00 he paid for a required uniform.

#### Testimony of Bernard Lipton, petitioners' representative

Bernard Lipton, a certified public accountant and petitioners' representative at hearing, testified that a federal I-9 form admitted into evidence showed claimant's first day of employment was September 21, 2011, not September 4, 2011 as determined by respondent. Lipton further testified that a copy of a paycheck purportedly issued to claimant and a payroll summary for the period September 19, 2011 to October 2, 2011, also admitted into evidence, reflected claimant had been paid all wages due. Lipton had no knowledge or additional documentation evidencing how the payroll summary was completed and what data was provided to the company that prepared the payroll summary.

#### Respondent's investigation

Senior Labor Standards Investigator Fang Zou testified that respondent did not visit the employment site or spoke to anyone other than claimant and, otherwise, only sent letters to petitioners. He testified that despite requesting employment and payroll records from petitioners in writing, respondent received no such records from petitioners. Zou prepared a report and computation sheet regarding claimant's unpaid wages and sent a letter explaining such to petitioners.

Senior Labor Standards Investigator Guangming Liu testified that he calculated the 100% civil penalty amount assessed in the orders based on petitioners' underpayment of wages as well as information recorded in the order to comply cover sheet that was admitted into evidence.

### **ANALYSIS**

The Board makes the following findings of fact and conclusions of law pursuant to the provision of the Board Rules of Procedure and Practice [Board Rules] [12 NYCRR] § 65.39.

#### Standard of Review and Burden of Proof

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; Board Rules [12 NYCRR] § 65.30). 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 [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 Rule [12 NYCRR] § 65.30; State Administrative Procedure Act § 306; *Matter of Angello v. Natl. Fin. Corp.*, 1 AD3d 850, 854 [3d Dept 2003]).

### Petitioners Failure to Maintain Payroll Records

Articles 6 and 19 of the Labor Law require that an employer pay wages to its employees (Labor Law §§ 191, 652). Labor Law § 190 (1) defines “wages” as the earnings of the employee for labor or services rendered (*see also* Labor Law § 651 [7]). Articles 6 and 19 of the Labor Law also require employers to maintain, for six years, certain records of the hours their employees worked and the wages they paid them (Labor Law §§ 195 [4], 661). The records must show for each employee, among other things, the number of hours worked daily and weekly, the amount of gross wages, deductions from gross wages, allowances, if any, and money paid in cash (*id.*). Employers must keep such records open for inspection by the Commissioner or a designated representative. In the absence of required payroll records, the Commissioner may draw reasonable inferences and calculate unpaid wages based on the “best available evidence” drawn from employee statements or other evidence, even if results may be merely approximate (*Ramirez v. Commissioner of Labor*, 110 AD3d 901, 901-02 [2d Dep’t 2013]; *Matter of Mid-Hudson Pam Corp. v. Hartnett*, 156 AD2d 818, 820-21 [3d Dep’t 1989]).

In a proceeding challenging such determination, the employer must come forward with some evidence of the “precise” amount of work performed or with evidence to negate the reasonableness of the inferences to be drawn from the employee’s evidence (*Anderson v. Mt. Clemens Pottery*, 328 US 680, 687-88 [1949]; *Mid-Hudson Pam Corp.*, 156 AD2d at 821). Given the interrelatedness of wages and hours, the same burden shifting applies to wages and requires the employer to prove the “precise wages” paid for that work or to negate the inferences drawn from the employee’s credible evidence (*Doo Nam Yang v. ACBL Corp.*, 427 F Supp 2d 327, 332 [SDNY 2005]; *Matter of Kong Ming Lee*, PR 10-293 at 15-16 [April 10, 2014]).

### The Unpaid Wages Order is Affirmed

The unpaid wages order finds that petitioners failed to pay claimant for several weeks of work. Investigator Zou testified that he used the complaint form to calculate the unpaid wages for claimant. We find that the Commissioner used the best available evidence in determining the underpayment due. Petitioners’ only witness, Lipton, had no personal knowledge of any facts relevant to the orders under review. He was not involved with management of any of petitioners’ employees and he was not involved with petitioners’ payroll in any way. The only documents in evidence in support of petitioners’ challenge to the Commissioner’s orders are an I-9 form purportedly completed by claimant and a payroll summary sheet with a copy of a check purportedly issued to claimant. However, Lipton conceded that he was not present when claimant purportedly completed the I-9 form and he did not provide any admissible testimony to support his assertion that September 21, 2011 was claimant’s start date rather than September 4, 2011 as respondent determined. We give no weight to the federal I-9 form admitted into evidence since no one with personal knowledge testified about it. A signature and date in a document, without more, is not determinative of an employee’s work start date. Similarly, the payroll summary and copy of a check purportedly issued to claimant were not supported by any testimony from someone with personal knowledge as to the content of those documents, such as how and based on what information they were prepared. Neither document indicates which pay period it covers, or if the check was indeed received and negotiated by claimant. We do not credit petitioners’ evidence.

Petitioners did not meet their burden to produce evidence of the “precise” work performed and wages paid to claimant (*see Anderson v. Mt. Clemens Pottery*, 328 US at 687-88 [1949]; *Mid*

*Hudson-Pam Corp.*, 156 AD2d at 821; *Doo Nam Yang*, 427 F Supp 2d at 332; *Matter of Kong Ming Lee*, PR 10-293 at 15-16; *see also* Labor Law § 196-a [a]). We therefore affirm the Commissioner's wage calculations in the unpaid wages order as to Petitioners.

#### The Minimum Wage Order is Affirmed

An employer must pay each covered employee a minimum wage for each hour of work (Labor Law § 652 [1]; 12 NYCRR 146-1.2), and one and one-half times an employee's regular wage rate for hours worked over 40 each work week (12 NYCRR 146-1.4). Employers are also required to pay an additional hour's pay at the basic minimum hourly wage for each day in which the spread of hours exceeds ten (12 NYCRR 146-1.6). During the period for which claimant seeks payment of unpaid wages, the minimum wage was \$7.25 an hour (12 NYCRR 146-1.2).

The minimum wage order finds that petitioners owe claimant \$483.75 in overtime wages for the period of the claim. The amount of the underpayment was calculated by respondent based on the claim forms because, as discussed above, petitioners failed to provide required records. Petitioners allege that they do not owe claimant such wages because they paid him for all the hours worked and that he did not work any overtime hours. Petitioners assert that claimant only worked for a total of 20 hours as a trainee and that he was paid in full for those 20 hours of work but introduced no credible or reliable evidence of such claim other than incomplete payroll records that were not supported by testimony of a witness with any personal knowledge of their content. We find that petitioners failed to meet their burden of proof that claimant was not entitled to the wages claimed or that respondent's order is unreasonable or invalid.

We affirm the minimum wage order.

#### The Unlawful Deduction Order is Affirmed

The unlawful deduction order finds that petitioners failed to reimburse claimant \$30.00 for a required uniform that he paid for himself in violation of Labor Law § 193 and 12 NYCRR 146-1.8. Petitioners failed to challenge the unlawful deduction order thereby waiving their right to challenge it pursuant to Labor Law § 101 (2). We affirm the unlawful deduction order.

#### Interest

Labor Law § 219 (1) provides that when respondent 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. Further, petitioners did not challenge the imposition of interest for any of the wage orders thereby waiving their right to challenge it under Labor Law § 101 (2). We affirm the interest imposed in the minimum wage, unpaid wages, and unlawful deduction orders.

### Liquidated Damages

Where respondent determines an employee has not been paid all wages owed, Labor Law § 218 (1) requires her to assess 100% liquidated damages of the amount of unpaid wages unless the employer proves a good faith basis to believe that its underpayment was in compliance with the law. Here, respondent correctly determined that claimant was not paid all wages. Additionally, petitioners failed to challenge the imposition of liquidated damages. The issue is thereby waived pursuant to Labor Law § 101 (2). Accordingly, we affirm the imposition of liquidated damages in the minimum wage, unpaid wages, and unlawful deduction orders.

### The Civil Penalties are Affirmed

The minimum wage order, unpaid wages order, and unlawful deduction order each include a 100% civil penalty. Labor Law § 218 (1) provides that when determining an amount of civil penalty to assess against an employer who has violated a provision of Articles 6 or 19 or § 162 (meal periods) of the Labor Law, respondent shall give:

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

Petitioners asserted that they opposed the civil penalties but offered no testimony or documentary evidence in support of their opposition at hearing. We affirm the civil penalties assessed in the minimum wage, unpaid wages, and unlawful deduction orders.

### The Penalty Order is Affirmed

Labor Law § 218 (1) provides that where a violation is for a reason other than an employer’s failure to pay wages, the order shall direct payment to respondent of a civil penalty in an amount not to exceed \$1,000.00 for a first violation. In determining this penalty, respondent is required to “give due consideration to the size of the employer’s business, the good faith basis of the employer to believe that its conduct was in compliance with the law, the gravity of the violation, and the history of previous violations” (*id.*). Petitioners failed to introduce any evidence at hearing that they kept required records, gave required wage statements with each payment of wages, did not take prohibited deductions, and provided sufficient meal time during work shifts. The penalty order is affirmed.

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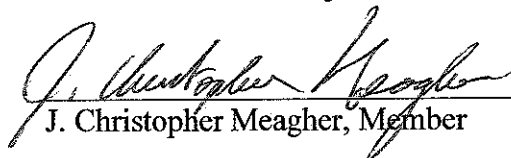
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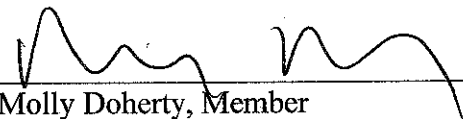
**NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:**

1. The minimum wage order is affirmed in its entirety; and
2. The unpaid wages order is affirmed in its entirety; and
3. The unlawful deduction order is affirmed in its entirety; and
4. The penalty order is affirmed; and
5. The petition for review is denied consistent with this decision.

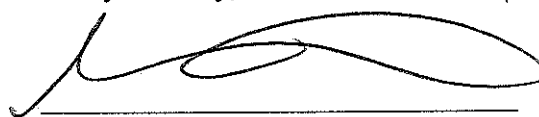
  
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Vilda Vera Mayuga, Chairperson

  
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J. Christopher Meagher, Member

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Michael A. Arcuri, Member

  
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Molly Doherty, Member

Date and signed by the Members  
of the Industrial Board of Appeals  
in New York, New York, on  
May 3, 2017.


  
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Gloribelle J. Perez, Member

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

1. The minimum wage order is affirmed in its entirety; and
2. The unpaid wages order is affirmed in its entirety; and
3. The unlawful deduction order is affirmed in its entirety; and
4. The penalty order is affirmed; and
5. The petition for review is denied consistent with this decision.

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Vilda Vera Mayuga, Chairperson

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J. Christopher Meagher, Member

  
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Michael A. Arcuri, Member

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Molly Doherty, Member

Date and signed by a Member  
of the Industrial Board of Appeals  
in Utica, New York, on  
May 3, 2017.

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Gloribelle J. Perez, Member