STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of: MOSHE MAMAN AND LOLA 8 WEST LTD. (T/A FILICORI ZECCHINI), Petitioners, To Review Under Section 101 of the Labor Law: An Order to Comply With Article 19 of the Labor Law, and An Order Under Article 19 of the Labor Law, both dated July 15, 2015; - against - THE COMMISSIONER OF LABOR, Respondent.	DOCKET NO. PR 15-281 RESOLUTION OF DECISION

APPEARANCES

Law Office of Allen B. Breslow (Allen B. Breslow of counsel), for petitioners.

Pico P. Ben-Amotz, General Counsel, NYS Department of Labor (John-Raphael Pichardo), for respondent.

WITNESSES

Moshe Maman and Shlomo Levi for petitioners.

Christian Ferreyra and Labor Standards Investigator Kenneth Hartnett for respondent.

WHEREAS:

The petition in this matter was filed with the Industrial Board of Appeals (Board) on September 11, 2015, and seeks review of two orders issued against Levi Shlomo A/K/A Shlomo Levi and Moshe Maman and Filicori Zecchini USA Corp. and Lola 8 West Ltd (T/A Filicori Zechhini) on July 15, 2015. Shlomo and Filicori Zecchini did not appeal the orders and are not parties to this proceeding. Respondent Commissioner of Labor filed an answer to the petition on October 28, 2015, and respondent withdrew the orders against Filicori Zecchini USA Corp. at hearing.

Upon notice to the parties a hearing was held in this matter on May 27, 2016, in New York, New York, before Devin A. Rice, Counsel to the Board, and the designated hearing officer in this

proceeding. Each party was afforded a full opportunity to present documentary evidence, to examine and cross-examine witnesses, and make statements relevant to the issues raised in the proceeding. Respondent moved after petitioners rested to dismiss the petition on the ground that petitioners failed to make a prima facie case that the orders are invalid or unreasonable. The motion is denied. Respondent also moved during the hearing after petitioners had rested to amend the orders to include violations of Article 6 of the Labor Law. The motion was denied by the hearing officer. We confirm the hearing officer's denial of the motion to amend the orders to include new violations after petitioners had rested.

The order to comply with Article 19 (minimum wage order) under review directs compliance with Article 19 of the Labor Law and payment to the Commissioner for unpaid minimum wages due and owing to Christian Ferreyra and Eduardo Puebla for the time period from July 1, 2012 to September 20, 2014, in the amount of $9,633.63, with interest continuing thereon at the rate of 16% calculated to the date of the order in the amount of $3,302.63, 25% liquidated damages in the amount of $2,408.41, and assesses a 100% civil penalty in the amount of $9,633.63, for a total amount due of $24,978.30.

The order under Article 19 of the Labor Law (penalty order) assesses a $1,000.00 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 July 1, 2012 through September 20, 2014; a $1,000.00 civil penalty for violating Labor Law § 661 and 12 NYCRR 146-2.3 by failing to furnish to each employee a statement with every payment of wages listing the hours worked, rates paid, gross wages earned, any allowances claimed, deductions and net wages during the period from on or about July 1, 2012 through September 20, 2014; a $1,000.00 civil penalty for violating Labor Law § 661 and 12 NYCRR 146-2.5 by failing to pay employees hourly rates of pay from on or about July 1, 2012 through September 20, 2014; and a $1,000.00 civil penalty for violating Labor Law § 661 and 12 NYCRR 146-2.2 by failing to furnish to each employee at the start of employment, written notice in English and any other language spoken by the new employee as their primary language, of the employee's regular hourly rate of pay, overtime hourly rate of pay, the amount of tip credit if taken, and the regular pay day, from on or about July 1, 2012 through September 20, 2014.

Petitioners allege the orders are invalid or unreasonable because (1) Christian Ferreyra was a manager, and therefore exempt from Article 19 of the Labor Law, and (2) petitioners did not employ Christian Ferreyra and Eduardo Puebla. We find, as discussed below, that Lola 8 West Ltd. is not an employer, Moshe Maman was an employer, Christian Ferreyra was not exempt under Article 19 of the Labor Law for the entire claim period, and petitioners did not employ Eduardo Puebla.

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SUMMARY OF EVIDENCE

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

Petitioners' evidence

Testimony of Moshe Maman

Petitioner Moshe Maman testified that he is a store manager at Espresso Dream, a coffee shop located on West 46th Street in New York, New York. Espresso Dream has another location on East 46th Street, but Maman does not work at that location except to organize the storage space. Maman explained that Espresso Dream is a franchisee of an Italian company, Filicori Zecchini. Maman is not an owner or investor of Espresso Dream and has no authority to write checks. Maman manages the West 46th Street location and claimant Christian Ferreyra, whom he knows as Martin Lucero, was the manager of the East 46th Street store. Maman testified he did not have the power to hire or fire employees for the East 46th Street location, did not control or supervise employees there, did not set employee schedules for the East 46th Street store, did not determine rates of pay for employees at East 46th Street, and did not maintain records related to the East 46th Street location of Espresso Dream.

Maman testified that Ferreyra was the manager of the East 46th Street location of Espresso Dream from July 2012 to December 2012, that he made his own schedule, and the maximum he could have worked was ten hours a day. Maman further testified that the store was only open Monday through Friday and that it was impossible for Ferreyra to have worked on Saturdays because the café was not open on the weekend. Maman testified that he interviewed job applicants, but did not interview Ferreyra. Maman's supervisor was Shlomo Levi. Levi made the work schedules and signed checks for Espresso Dream. Maman did not work in the same store as Ferreyra and never gave him instructions.

Maman testified that Lola 8 West is a clothing store located in Bronx, New York, that has an office in the same building as the West 46th Street location of Espresso Dream. Maman explained that Ferreyra may have been paid once by a Lola 8 West check because they owed Espresso Dream money for catering. Maman testified he is not and has never been an owner or employee of Lola 8 West. Maman also testified that he "has never heard about" Eduardo Puebla and does not know who he is.

Testimony of Shlomo Levi

Shlomo Levi testified that he is the representative for a group of investors who own Espresso Dream. Levi testified that he hired Ferreyra, who started as a barista, and "right away" became the store manager of the East 46th Street location within a month and a half. Levi testified that Ferreyra's starting salary as a manager was $800.00 a week, which was eventually raised to $950.00 a week. According to Levi, Espresso Dream sometimes paid Ferreyra by check and sometimes by cash, and he worked 8 to 11 hours a day as a manager. Levi further testified that he made sure the baristas did not work more than 40 hours a week and that when Ferreyra was a barista his schedule changed every week. As a manager, Ferreyra made the work schedules for the employees at the East 46th Street store and hired employees. The East 46th Street store was open

five days a week and depending on the day and time three to five employees worked each shift. Levi testified that the store closed at 6:00 p.m. and was not open Saturday and Sunday.

Levi explained that he managed the books for Lola 8 West and sometimes signed checks for them, but they are not in the coffee business. Levi further explained that he paid Ferreyra once with a check from Lola 8 West because Espresso Dream did catering for Lola 8 West and was short of cash when the payment came in.

Levi testified that he does not know an individual named Eduardo Puebla and "he didn't work for sure" for Espresso Dream.

Respondent's evidence

Claims

On May 12, 2014, Christian Ferreyra filed a minimum wage/overtime claim with DOL for unpaid overtime hours he worked as a barista at Filicori Zecchini Espresso Dream, a coffee shop located on East 46th Street in New York, New York. Ferreyra's claim alleges that Shlomo Levi and petitioner Moshe Maman are the owners and responsible persons at the firm. Ferreyra further alleges in his claim that he was hired and supervised by Maman and terminated by Levi. The claim alleges unpaid overtime for the time period Ferreyra worked as a barista from July 1, 2012 to December 31, 2012. Ferreyra claimed he worked from 6:00 a.m. to 8:00 p.m. with a 30 minute meal break (13 ½ hours) Monday through Friday and that his rate of pay was $9.00 an hour from July 1, 2012 to October 31, 2012, and $10.00 an hour from November 1, 2012 to December 31, 2012. Ferreyra also filed a claim for unpaid wages on May 12, 2014, alleging Espresso Dream did not pay him his salary of $950.00 a week for his work as a manager for the weeks ending May 3 and May 10, 2014.

Eduardo Puebla filed a claim for unpaid wages on September 26, 2014 related to his employment as a barista at Espresso Dream. Puebla's claim alleges that petitioner Moshe Maman hired him and was the responsible person at the firm. Puebla claims he was not paid $48.00 in owed wages for each of the weeks ending July 19, July 26, August 2, August 9, August 16, August 23, and August 30, 2014, and that he was not paid $624.00 in owed wages for each of the weeks ending September 6, September 13, and September 20, 2014.

Testimony of Senior Labor Standards Investigator Kenneth Harnett

Senior Labor Standards Investigator Kenneth Harnett, who is stationed in Albany, New York, testified he investigated the claims filed at DOL's New York City offices by Ferreyra and Puebla against Espresso Dream. Harnett was not present when the claims were filed and never spoke to either claimant during DOL's investigation. When the claims were received Hartnett assigned them to Labor Standards Investigator Dave Carey, who sent a letter to "the employer" requesting payroll and other records related to Puebla and Ferreyra. No correspondence was copied to Maman until April 20, 2015, because investigator Carey did not notice until then that Maman had been named as a responsible party by the claimants.

Harnett testified that time cards provided by Ferreyra were not considered by DOL during its investigation, because the time cards "were supplied by the claimant, not by the employer and

there are multiple errors . . . [and] it was not the responsibility of the employee to maintain the records."

Harnett further testified that DOL determined Maman was an employer because he was named in the claim forms as a responsible party and petitioners never provided any information during the investigation to show that Maman was not an owner or agent for the company.

With respect to whether Lola 8 West should have been named as an employer, Hartnett conceded that based on the testimony "Lola 8 more than likely should not be the employer."

Testimony of Christian Ferreyra

Christian Ferreyra testified he worked at Espresso Dream from 2012 to 2014. He started as a barista and was promoted to manager during the last year of his employment. Ferreyra testified that he was interviewed and hired by Maman, who told him to start the next day. Ferreyra testified he worked from 6:00 a.m. to 8:00 p.m. Monday to Friday as a barista, that he had only a 30 minute break each day, and that he was supervised by Maman, who he believed to be an owner. Ferreyra further testified that Maman told him what hours to work and set his pay rate of $8.50 an hour. Ferreyra testified he was not paid a higher rate for overtime hours and made $20.00 to $25.00 a week in tips, which were divided among all the employees. Ferreyra also explained that he was always paid by cash and did not receive a wage statement when he was paid.

Ferreyra testified that Maman promoted him to manager in 2013 or 2014. He later testified that although he does not recall the exact date he became a manager, he believes it was in January 2013. As a manager he worked Monday to Friday from 6:00 a.m. to 5:30 p.m. His duties included supervising 7 to 10 employees. He also testified that he sometimes worked on Saturdays to train baristas. Ferreyra's starting salary as a manager was $800.00 a week which was raised to $950.00 a week. Ferreyra testified he was usually paid in cash, and received a check "two to three times, no more than that." Ferreyra testified that Maman set his schedule when he was a barista and also when he was a manager, and that Levi "almost never" came to the store, "[a]lways Moshe Maman was the person in the store."

Ferreyra testified that baristas worked 14 hours a day and explained that, "in order for them not to work all the hours in that same store, they will place the barista in one store, eight hours, and at the other store, another eight hours, in the same day." Ferreyra further explained that some employees came to work before the store opened to "prepare things," and that when he was manager he scheduled, for example, an employee named "Anna" to work from 3:00 a.m. to 12:00 p.m. at one store and then from 12:00 p.m. to 4:00 or 5:00 p.m. at the other location. Ferreyra testified that the "owner" told him to schedule Anna in this way and that he could not tell her what to do without consulting with the owner.[1] Ferreyra testified that the owner was Maman, and that he knew Maman to be the owner because Maman told him he owned the store. Ferreyra, however, later testified that Levi had terminated him and then offered to rehire him, and that he had complained to Levi about having to work with a certain employee. Ferreyra also testified that Maman and Levi were both owners.

[1]It is not clear from the record who Ferreyra is referring to here as the owner.

Ferreyra testified that he filed a claim with DOL because he had not been paid overtime during the time he had worked as a barista at Espresso Dream, and that he was owed for the last week he had worked as a manager. He clarified in his testimony that his claim for overtime is only from November 1, 2012 to December 31, 2012, and that before then he only worked five to six hours per shift.

Burden of proof

The petitioners' burden of proof in this matter is to establish by a preponderance of the evidence that the orders issued by the Commissioner are invalid or unreasonable (State Administrative Procedure Act § 306 [1]; Labor Law §§ 101, 103; 12 NYCRR 65.30; *see also Matter of Ram Hotels, Inc.*, PR 08-078, at 24 [2011]). We find petitioners met their burden of proof that Lola 8 West Ltd. was not liable as an employer for unpaid wages, that Eduardo Puebla was not an employee, and that the minimum wage order must be modified to reduce the wages owed to Christian Ferreyra. Petitioners failed to meet their burden of proof to show Maman was not an employer.

Petitioner Moshe Maman was an employer

Petitioner Moshe Maman alleges respondent's determination he is individually liable for wages owed to the claimants is unreasonable because he was not an employer. We find as discussed below that Maman failed to meet his burden of proof to show respondent's determination that he was an employer is invalid or unreasonable.

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

The federal Fair Labor Standards Act, like the New York Labor Law defines "employ" to include "suffer or permit to work" (29 USC § 203 [g]), and "the test for determining whether an entity or person is an 'employer' under the New York Labor Law is the same test . . . for analyzing employer status under the Fair Labor Standards Act" (*Chu Chung v The New Silver Palace Rest., Inc.*, 272 F Supp 2d 314, 319 n6 [SDNY 2003]; *Ovadia v Industrial Bd. of Appeals*, 81 AD3d 457 [1st Dept 2011] *revd on other grounds* 19 NY3d 138 [2012]).

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

> "Because the statute defines employer in such broad terms, it offers little guidance on whether a given individual is or is not an employer. In answering that question, the overarching concern is whether the alleged employer possessed the power to control the workers in question with an eye to the 'economic reality' presented by the facts of each case. Under the 'economic reality' test, the relevant factors include whether the alleged employer (1) had the power to hire and fire employees, (2) supervised and controlled employee work schedules or conditions of employment, (3)

> determined the rate and method of payment, and (4) maintained employment records" (internal quotations and citations omitted).

When applying this test, "no one of the four factors standing alone is dispositive. Instead the 'economic reality' test encompasses the totality of the circumstances, no one of which is exclusive." (*Id.* [internal citations omitted]).

Maman testified that he did not hire Ferreyra, supervise him or make his work schedules, or determine his rate or method of payment. Having provided testimony indicating he was not an employer under Article 19 of the Labor Law, the burden shifted to respondent to produce credible evidence showing Maman was an employer. We find respondent produced sufficient credible and unrebutted evidence to support her determination that Maman was Ferreyra's employer.

Ferreyra provided detailed, specific and credible testimony of Maman's status as his employer. He credibly testified that Maman interviewed him for a barista position at Espresso Dream, hired him, told him what to wear to work, set his wage rate, supervised his work as a barista, promoted him to manager, and supervised his work as manager. Ferreyra also credibly testified that Levi was rarely present at the store and that Maman held himself out to employees and the public as an owner. Ferreyra's testimony concerning Maman's role in the business, which was not rebutted by petitioners, establishes by a totality of the circumstances that Maman was Ferreyra's employer as a matter of economic reality in that he hired and promoted Ferreyra, supervised him and made his work schedules, and determined his rate and method of payment.

Petitioner Lola 8 West Ltd is not an employer

Respondent determined Lola 8 West Ltd. was an employer in this matter because Ferreyra received wages on one occasion by a check from Lola 8 West. There is no other evidence linking Lola 8 West as an employer of Ferreyra or Puebla. Maman and Levi testified that Lola 8 West is a clothing store in Bronx, New York, that shares an office with Espresso Dream, and that Lola 8 West owed Espresso Dream for catering. Levi explained that he manages the books for Lola 8 West and paid Ferreyra on one occasion with a Lola 8 West check because Lola 8 West owed money to Espresso Dream and Espresso Dream was short of funds. We credit the testimony of Maman and Levi. Absent evidence other than one check indicating Lola 8 West employed Ferreyra or Puebla, the order is revoked as to Lola 8 West Ltd.

Maman failed to maintain or produce required records

Article 19 of the Labor Law requires employers to maintain for no less than six years payroll records that show for each employee, among other things, the wage rates, number of hours worked daily and weekly, including the time of arrival and departure of each employee working a spread of hours exceeding ten, the amount of gross wages, and the net wages paid (12 NYCRR 146-2.1 [a]; *see also* Labor Law § 661). Article 19 also requires every employer to provide each employee a statement with each payment of wages showing the hours worked, rates paid, gross wages, allowances, if any, claimed as part of the minimum wage, deductions and net wages (12 NYCRR 146-2.3). Payroll records must be produced to DOL for inspection when requested (Labor Law §§ 660, 661). Throughout the course of its investigation of Espresso Dream, DOL requested records for employees of Espresso Dream. The requests were made to Shlomo Levi and Fillicori Espresso Dream as well as their attorney, who also represents Moshe Maman. The requested

records were never produced to DOL during its investigation, nor at hearing. Having found Maman was an employer under Article 19 of the Labor Law, it was his obligation to maintain the required records for no less than six years and produce them to DOL upon request. Maman provided no evidence that he maintained the required records.

The minimum wage order

Article 19 of the Labor Law, entitled the "Minimum Wage Act," sets forth the minimum wage that every employer must pay each of its non-exempt employees for each hour of work (Labor Law § 652 [1]), and its implementing regulations for the hospitality industry require payment of time and one-half a non-residential employee's regular hourly rate for each hour worked over 40 in a week (12 NYCRR 146-1.4).

The minimum wage order finds petitioners owe Ferreyra unpaid minimum wages (overtime) in the amount of $7,425.63 for the period from July 1, 2012 to May 10, 2014, and owe Eduardo Puebla unpaid minimum wages in the amount of $2,208.00 for the time period from July 14, 2014 to September 20, 2014. In the absence of required records, petitioners bear the burden of proving that the disputed wages were paid (Labor Law § 196-a; *Angello v Natl. Fin. Corp.*, 1 AD3d 850, 851 [3d Dept 1989]; *Heady v Garcia*, 46 AD3d 1088 [3d Dept 2007]). As the Appellate Division stated in *Matter of Mid Hudson Pam* Corp v Hartnett, 156 AD2d 818, 821 [3d Dept 1989], "[w]hen an employer fails to keep accurate records as required by statute, the commissioner is permitted to calculate back wages due to employees by using the best available evidence and to shift the burden of negating the reasonableness of the Commissioner's calculation to the employer" (*see also Matter of Bae v Industrial Board of Appeals*, 104 AD3d 571 [1st Dept 2013], *cert denied* 21 NY3d 858 [2013]). The petitioners have the burden of showing that the minimum wage order is invalid or unreasonable by a preponderance of the evidence of the specific hours that the employees worked and that they were paid for those hours, or other evidence that shows the Commissioner's findings to be invalid or unreasonable (*Ram Hotels, supra*). Where no wage and hour records are available, DOL is "entitled[d] to make just and reasonable inferences and use other evidence to establish the amount of underpayments, even though the results may be approximate" (*Hy-Tech Coatings v New York State Dept. of Labor,* 226 AD2d 378, [1st Dept 1996], *citing Mid-Hudson Pam Corp.*; *see also Matter of Bae v Industrial Board of Appeals*, 104 AD3d 571). We find petitioners met their burden of proof to show that the minimum wage order is unreasonable and must be modified for Christian Ferreyra and revoked as to Eduardo Puebla.

Wages owed to Christian Ferreyra

Ferreyra credibly testified he worked as a barista for Espresso Dream from July 2012 through December 2012, at which time Maman promoted him to manager. We credit Ferreyra's testimony, which was not rebutted by petitioners. Ferreyra claimed he was not paid overtime during the time period he worked as a barista and supplied DOL with time records he printed from the register at Espresso Dream showing the actual hours he worked. In computing the overtime owed to Ferreyra, DOL did not consider these time records because they contained errors and were provided by an employee instead of the employer. While we agree an employer has an obligation under the Labor Law to maintain wage and hour records and furnish them to respondent upon request (Labor Law §§ 660, 661), it was unreasonable for respondent to refuse to consider the time records provided by Ferreyra, which are the best available evidence of the overtime hours he worked. Based on our review of Ferreyra's time records and testimony, we find that the overtime

due and owing must be reduced from $7,425.63 to $1,804.82 using the hours of work indicated by Ferreyra's time records and the wage rates stated in his claim form.[2] Petitioners did not produce any records or other credible evidence that Ferreyra did not work these hours or was properly compensated for overtime.

It is unclear from the record whether the two weeks Ferreyra claimed he was not paid while working as a manager were included by respondent in the minimum wage order. Our computation above does not include these wages. It is undisputed and the record shows that Ferreyra was a manager during the period he claimed he was not paid, and therefore was not covered by Article 19 of the Labor Law (Labor Law § 651 [5] [c]; 12 NYCRR 146-3.2 [c] [1] [i]).

Wages owed to Eduardo Puebla

Maman testified he does not know an individual by the name of Eduardo Puebla, and that no such person worked at Espresso Dream. Maman's testimony was corroborated by Levi. In the absence of any other evidence that an individual named Eduardo Puebla worked at Espresso Dream, we credit the testimony of Maman and Levi that no such person worked there. Respondent offered no testimony to establish Puebla's identity or that he worked at Espresso Dream and there is no evidence in the record other than the claim form concerning Puebla. Because Puebla did not testify and petitioners offered credible and unrebutted testimony that he was not employed by Espresso Dream, we revoke the order as to Eduardo Puebla (*Matter of Hugo Fernandez et al.*, PR 12-149 [September 16, 2015]).[3]

Civil penalty revoked as to Moshe Maman

Labor Law § 218 (1) provides that if respondent determines an employer has violated certain provisions of Article 19, including failure to pay overtime, must assess an "appropriate civil penalty." The civil penalty assessed must be 200 % if respondent finds the violation was willful or egregious, or if the employer has previously violated the Labor Law. Otherwise, in assessing the amount of the penalty, the respondent must "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 . . . the failure to comply with recordkeeping or other non-wage requirements" (Labor Law § 218 [1]).

Respondent assessed a 100 % civil penalty against petitioners. We revoke the penalty as to Moshe Maman. Respondent did not address any correspondence to Maman or mention him as a potential employer during the course of the investigation except that he was copied on one letter addressed to Levi and Espresso Dream. Hartnett testified that Maman was not included in DOL's original notices in this matter due to an oversight. Because of this oversight respondent could not have properly considered the statutory factors where Maman had no opportunity to establish a

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[2] The time records contain errors for some days due to Ferreyra punching in but not punching out so that the hours worked accumulated and exceeded 24 hours. We determined based on the records that Ferreyra worked 13.86 hours on an average day and used 13.86 hours in our computations for the days where there were hours in the work times recorded.

[3] We also note that the order should have been issued under Article 6 of the Labor Law where respondent sought to recover unpaid wages and had we affirmed the order with respect to Puebla under Article 19 his recovery would have been limited to what he was owed under the applicable minimum wage rate.

good faith belief that his conduct was in compliance with the Labor Law and no records were requested of him.

Liquidated damages

Labor Law § 218 (1) also requires respondent to include liquidated damages of 100 % of the wages found due with the order. Liquidated damages must be paid by the employer unless the employer "proves a good faith basis to believe that its underpayment was in compliance with the law." Liquidated damages in the amount of 25% were assessed against petitioners in this matter[4] We uphold respondent's assessment of liquidated damages in this matter. Petitioners presented no evidence to show a good faith basis to believe the underpayment was in compliance with the law.

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 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." The Commissioner's determination of interest due was required by statute and did not exceed the statutory limit, and is therefore not unreasonable or invalid, but must be recalculated based on the modified principle amount.

The penalty order is affirmed in part and revoked in part

The penalty order assesses a $1,000.00 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 July 1, 2012 through September 20, 2014; a $1,000.00 civil penalty for violating Labor Law § 661 and 12 NYCRR 146-2.3 by failing to furnish to each employee a statement with every payment of wages listing the hours worked, rates paid, gross wages earned, any allowances claimed, deductions and net wages during the period from on or about July 1, 2012 through September 20, 2014; a $1,000.00 civil penalty for violating Labor Law § 661 and 12 NYCRR 146-2.5 by failing to pay employees hourly rates of pay from on or about July 1, 2012 through September 20, 2014; and a $1,000.00 civil penalty for violating Labor Law § 661 and 12 NYCRR 146-2.2 by failing to furnish to each employee at the start of employment, written notice in English and any other language spoken by the new employee as their primary language, of the employee's regular hourly rate of pay, overtime hourly rate of pay, the amount of tip credit if taken, and the regular pay day.

Count 1: Penalty for failure to keep and/or furnish true and accurate payroll records revoked as to Moshe Maman

Article 19 of the Labor Law requires employers to keep true and accurate payroll records for each employee and furnish such records to DOL upon request. It is undisputed that DOL requested payroll records in this matter. However, due to an oversight, the records were never

[4] While Labor Law § 218 (1) requires the Commissioner to include 100 % liquidated damages in her orders to comply, Labor Law § 663 (2) provides that liquidated damages shall be calculated by the Commissioner as "no more than" 100 % of the underpayments found due.

requested from Moshe Maman prior to issuance of the order. The $1,000.00 penalty for failure to keep and/or furnish payroll records is revoked as to Maman.

Count 2: Penalty for failure to give wage statement with each payment of wages affirmed

Article 19 of the Labor Law requires employers to give a wage statement to each employee with each payment of wages. Christian Ferreyra credibly testified that he did not receive a wage statement with each payment of wages. The $1,000.00 civil penalty for failing to give wage statements to employees with each payment of wages is affirmed where Maman presented no evidence on the issue.

Count 3: Penalty for failing to pay hourly rates revoked

Article 19 of the Labor Law requires employers to pay employees an hourly rate of pay. The $1,000.00 penalty for failing to pay hourly rates is revoked because Ferreyra's claim form and testimony show he was paid an hourly rate while working as a barista at Espresso Dream.

Count 4: Penalty for failing to provide written notice of rate of pay affirmed

Article 19 of the Labor Law requires employers in the hospitality industry to furnish to each employee at the start of employment, written notice in English and any other language spoken by the new employee as their primary language, of the employee's regular hourly rate of pay, overtime hourly rate of pay, the amount of tip credit if taken, and the regular pay day. Maman, who had the burden of proof, presented no evidence on this issue. The $1,000.00 penalty for failing to provide written notice of pay rates is affirmed.

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Moshe Maman and Shlomo Levi for petitioners.

Christian Ferreyra and Labor Standards Investigator Kenneth Hartnett for respondent.

WHEREAS:

The petition in this matter was filed with the Industrial Board of Appeals (Board) on September 11, 2015, and seeks review of two orders issued against Levi Shlomo A/K/A Shlomo Levi and Moshe Maman and Filicori Zecchini USA Corp. and Lola 8 West Ltd (T/A Filicori Zecchini) on July 15, 2015. Shlomo and Filicori Zecchini did not appeal the orders and are not parties to this proceeding. Respondent Commissioner of Labor filed an answer to the petition on October 28, 2015, and respondent withdrew the orders against Filicori Zecchini USA Corp. at hearing.

Upon notice to the parties a hearing was held in this matter on May 27, 2016, in New York, New York, before Devin A. Rice, Counsel to the Board, and the designated hearing officer in this

proceeding. Each party was afforded a full opportunity to present documentary evidence, to examine and cross-examine witnesses, and make statements relevant to the issues raised in the proceeding. Respondent moved after petitioners rested to dismiss the petition on the ground that petitioners failed to make a prima facie case that the orders are invalid or unreasonable. The motion is denied. Respondent also moved during the hearing after petitioners had rested to amend the orders to include violations of Article 6 of the Labor Law. The motion was denied by the hearing officer. We confirm the hearing officer's denial of the motion to amend the orders to include new violations after petitioners had rested.

The order to comply with Article 19 (minimum wage order) under review directs compliance with Article 19 of the Labor Law and payment to the Commissioner for unpaid minimum wages due and owing to Christian Ferreyra and Eduardo Puebla for the time period from July 1, 2012 to September 20, 2014, in the amount of $9,633.63, with interest continuing thereon at the rate of 16% calculated to the date of the order in the amount of $3,302.63, 25% liquidated damages in the amount of $2,408.41, and assesses a 100% civil penalty in the amount of $9,633.63, for a total amount due of $24,978.30.

The order under Article 19 of the Labor Law (penalty order) assesses a $1,000.00 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 July 1, 2012 through September 20, 2014; a $1,000.00 civil penalty for violating Labor Law § 661 and 12 NYCRR 146-2.3 by failing to furnish to each employee a statement with every payment of wages listing the hours worked, rates paid, gross wages earned, any allowances claimed, deductions and net wages during the period from on or about July 1, 2012 through September 20, 2014; a $1,000.00 civil penalty for violating Labor Law § 661 and 12 NYCRR 146-2.5 by failing to pay employees hourly rates of pay from on or about July 1, 2012 through September 20, 2014; and a $1,000.00 civil penalty for violating Labor Law § 661 and 12 NYCRR 146-2.2 by failing to furnish to each employee at the start of employment, written notice in English and any other language spoken by the new employee as their primary language, of the employee's regular hourly rate of pay, overtime hourly rate of pay, the amount of tip credit if taken, and the regular pay day, from on or about July 1, 2012 through September 20, 2014.

Petitioners allege the orders are invalid or unreasonable because (1) Christian Ferreyra was a manager, and therefore exempt from Article 19 of the Labor Law, and (2) petitioners did not employ Christian Ferreyra and Eduardo Puebla. We find, as discussed below, that Lola 8 West Ltd. is not an employer, Moshe Maman was an employer, Christian Ferreyra was not exempt under Article 19 of the Labor Law for the entire claim period, and petitioners did not employ Eduardo Puebla.

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SUMMARY OF EVIDENCE

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

Petitioners' evidence

Testimony of Moshe Maman

Petitioner Moshe Maman testified that he is a store manager at Espresso Dream, a coffee shop located on West 46th Street in New York, New York. Espresso Dream has another location on East 46th Street, but Maman does not work at that location except to organize the storage space. Maman explained that Espresso Dream is a franchisee of an Italian company, Filicori Zecchini. Maman is not an owner or investor of Espresso Dream and has no authority to write checks. Maman manages the West 46th Street location and claimant Christian Ferreyra, who he knows as Martin Lucero, was the manager of the East 46th Street store. Maman testified he did not have the power to hire or fire employees for the East 46th Street location, did not control or supervise employees there, did not set employee schedules for the East 46th Street store, did not determine rates of pay for employees at East 46th Street, and did not maintain records related to the East 46th Street location of Espresso Dream.

Maman testified that Ferreyra was the manager of the East 46th Street location of Espresso Dream from July 2012 to December 2012, that he made his own schedule, and the maximum he could have worked was ten hours a day. Maman further testified that the store was only open Monday through Friday and that it was impossible for Ferreyra to have worked on Saturdays because the café was not open on the weekend. Maman testified that he interviewed job applicants, but did not interview Ferreyra. Maman's supervisor was Shlomo Levi. Levi made the work schedules and signed checks for Espresso Dream. Maman did not work in the same store as Ferreyra and never gave him instructions.

Maman testified that Lola 8 West is a clothing store located in Bronx, New York, that has an office in the same building as the West 46th Street location of Espresso Dream. Maman explained that Ferreyra may have been paid once by a Lola 8 West check because they owed Espresso Dream money for catering. Maman testified he is not and has never been an owner or employee of Lola 8 West. Maman also testified that he "has never heard about" Eduardo Puebla and does not know who he is.

Testimony of Shlomo Levi

Shlomo Levi testified that he is the representative for a group of investors who own Espresso Dream. Levi testified that he hired Ferreyra, who started as a barista, and "right away" became the store manager of the East 46th Street location within a month and a half. Levi testified that Ferreyra's starting salary as a manager was $800.00 a week, which was eventually raised to $950.00 a week. According to Levi, Espresso Dream sometimes paid Ferreyra by check and sometimes by cash, and he worked 8 to 11 hours a day as a manager. Levi further testified that he made sure the baristas did not work more than 40 hours a week and that when Ferreyra was a barista his schedule changed every week. As a manager, Ferreyra made the work schedules for the employees at the East 46th Street store and hired employees. The East 46th Street store was open

five days a week and depending on the day and time three to five employees worked each shift. Levi testified that the store closed at 6:00 p.m. and was not open Saturday and Sunday.

Levi explained that he managed the books for Lola 8 West and sometimes signed checks for them, but they are not in the coffee business. Levi further explained that he paid Ferreyra once with a check from Lola 8 West because Espresso Dream did catering for Lola 8 West and was short of cash when the payment came in.

Levi testified that he does not know an individual named Eduardo Puebla and "he didn't work for sure" for Espresso Dream.

Respondent's evidence

Claims

On May 12, 2014, Christian Ferreyra filed a minimum wage/overtime claim with DOL for unpaid overtime hours he worked as a barista at Filicori Zecchini Espresso Dream, a coffee shop located on East 46th Street in New York, New York. Ferreyra's claim alleges that Shlomo Levi and petitioner Moshe Maman are the owners and responsible persons at the firm. Ferreyra further alleges in his claim that he was hired and supervised by Maman and terminated by Levi. The claim alleges unpaid overtime for the time period Ferreyra worked as a barista from July 1, 2012 to December 31, 2012. Ferreyra claimed he worked from 6:00 a.m. to 8:00 p.m. with a 30 minute meal break (13 ½ hours) Monday through Friday and that his rate of pay was $9.00 an hour from July 1, 2012 to October 31, 2012, and $10.00 an hour from November 1, 2012 to December 31, 2012. Ferreyra also filed a claim for unpaid wages on May 12, 2014, alleging Espresso Dream did not pay him his salary of $950.00 a week for his work as a manager for the weeks ending May 3 and May 10, 2014.

Eduardo Puebla filed a claim for unpaid wages on September 26, 2014 related to his employment as a barista at Espresso Dream. Puebla's claim alleges that petitioner Moshe Maman hired him and was the responsible person at the firm. Puebla claims he was not paid $48.00 in owed wages for each of the weeks ending July 19, July 26, August 2, August 9, August 16, August 23, and August 30, 2014, and that he was not paid $624.00 in owed wages for each of the weeks ending September 6, September 13, and September 20, 2014.

Testimony of Senior Labor Standards Investigator Kenneth Harnett

Senior Labor Standards Investigator Kenneth Harnett, who is stationed in Albany, New York, testified he investigated the claims filed at DOL's New York City offices by Ferreyra and Puebla against Espresso Dream. Harnett was not present when the claims were filed and never spoke to either claimant during DOL's investigation. When the claims were received Hartnett assigned them to Labor Standards Investigator Dave Carey, who sent a letter to "the employer" requesting payroll and other records related to Puebla and Ferreyra. No correspondence was copied to Maman until April 20, 2015, because investigator Carey did not notice until then that Maman had been named as a responsible party by the claimants.

Harnett testified that time cards provided by Ferreyra were not considered by DOL during its investigation, because the time cards "were supplied by the claimant, not by the employer and

there are multiple errors . . . [and] it was not the responsibility of the employee to maintain the records."

Harnett further testified that DOL determined Maman was an employer because he was named in the claim forms as a responsible party and petitioners never provided any information during the investigation to show that Maman was not an owner or agent for the company.

With respect to whether Lola 8 West should have been named as an employer, Hartnett conceded that based on the testimony "Lola 8 more than likely should not be the employer."

Testimony of Christian Ferreyra

Christian Ferreyra testified he worked at Espresso Dream from 2012 to 2014. He started as a barista and was promoted to manager during the last year of his employment. Ferreyra testified that he was interviewed and hired by Maman, who told him to start the next day. Ferreyra testified he worked from 6:00 a.m. to 8:00 p.m. Monday to Friday as a barista, that he had only a 30 minute break each day, and that he was supervised by Maman, who he believed to be an owner. Ferreyra further testified that Maman told him what hours to work and set his pay rate of $8.50 an hour. Ferreyra testified he was not paid a higher rate for overtime hours and made $20.00 to $25.00 a week in tips, which were divided among all the employees. Ferreyra also explained that he was always paid by cash and did not receive a wage statement when he was paid.

Ferreyra testified that Maman promoted him to manager in 2013 or 2014. He later testified that although he does not recall the exact date he became a manager, he believes it was in January 2013. As a manager he worked Monday to Friday from 6:00 a.m. to 5:30 p.m. His duties included supervising 7 to 10 employees. He also testified that he sometimes worked on Saturdays to train baristas. Ferreyra's starting salary as a manager was $800.00 a week which was raised to $950.00 a week. Ferreyra testified he was usually paid in cash, and received a check "two to three times, no more than that." Ferreyra testified that Maman set his schedule when he was a barista and also when he was a manager, and that Levi "almost never" came to the store, "[a]lways Moshe Maman was the person in the store."

Ferreyra testified that baristas worked 14 hours a day and explained that, "in order for them not to work all the hours in that same store, they will place the barista in one store, eight hours, and at the other store, another eight hours, in the same day." Ferreyra further explained that some employees came to work before the store opened to "prepare things," and that when he was manager he scheduled, for example, an employee named "Anna" to work from 3:00 a.m. to 12:00 p.m. at one store and then from 12:00 p.m. to 4:00 or 5:00 p.m. at the other location. Ferreyra testified that the "owner" told him to schedule Anna in this way and that he could not tell her what to do without consulting with the owner.[1] Ferreyra testified that the owner was Maman, and that he knew Maman to be the owner because Maman told him he owned the store. Ferreyra, however, later testified that Levi had terminated him and then offered to rehire him, and that he had complained to Levi about having to work with a certain employee. Ferreyra also testified that Maman and Levi were both owners.

[1]It is not clear from the record who Ferreyra is referring to here as the owner.

Ferreyra testified that he filed a claim with DOL because he had not been paid overtime during the time he had worked as a barista at Espresso Dream, and that he was owed for the last week he had worked as a manager. He clarified in his testimony that his claim for overtime is only from November 1, 2012 to December 31, 2012, and that before then he only worked five to six hours per shift.

Burden of proof

The petitioners' burden of proof in this matter is to establish by a preponderance of the evidence that the orders issued by the Commissioner are invalid or unreasonable (State Administrative Procedure Act § 306 [1]; Labor Law §§ 101, 103; 12 NYCRR 65.30; *see also Matter of Ram Hotels, Inc.*, PR 08-078, at 24 [2011]). We find petitioners met their burden of proof that Lola 8 West Ltd. was not liable as an employer for unpaid wages, that Eduardo Puebla was not an employee, and that the minimum wage order must be modified to reduce the wages owed to Christian Ferreyra. Petitioners failed to meet their burden of proof to show Maman was not an employer.

Petitioner Moshe Maman was an employer

Petitioner Moshe Maman alleges respondent's determination he is individually liable for wages owed to the claimants is unreasonable because he was not an employer. We find as discussed below that Maman failed to meet his burden of proof to show respondent's determination that he was an employer is invalid or unreasonable.

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

The federal Fair Labor Standards Act, like the New York Labor Law defines "employ" to include "suffer or permit to work" (29 USC § 203 [g]), and "the test for determining whether an entity or person is an 'employer' under the New York Labor Law is the same test . . . for analyzing employer status under the Fair Labor Standards Act" (*Chu Chung v The New Silver Palace Rest., Inc.*, 272 F Supp 2d 314, 319 n6 [SDNY 2003]; *Ovadia v Industrial Bd. of Appeals*, 81 AD3d 457 [1st Dept 2011] *revd on other grounds* 19 NY3d 138 [2012]).

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

> "Because the statute defines employer in such broad terms, it offers little guidance on whether a given individual is or is not an employer. In answering that question, the overarching concern is whether the alleged employer possessed the power to control the workers in question with an eye to the 'economic reality' presented by the facts of each case. Under the 'economic reality' test, the relevant factors include whether the alleged employer (1) had the power to hire and fire employees, (2) supervised and controlled employee work schedules or conditions of employment, (3)

> determined the rate and method of payment, and (4) maintained employment records" (internal quotations and citations omitted).

When applying this test, "no one of the four factors standing alone is dispositive. Instead the 'economic reality' test encompasses the totality of the circumstances, no one of which is exclusive." (*Id.* [internal citations omitted]).

Maman testified that he did not hire Ferreyra, supervise him or make his work schedules, or determine his rate or method of payment. Having provided testimony indicating he was not an employer under Article 19 of the Labor Law, the burden shifted to respondent to produce credible evidence showing Maman was an employer. We find respondent produced sufficient credible and unrebutted evidence to support her determination that Maman was Ferreyra's employer.

Ferreyra provided detailed, specific and credible testimony of Maman's status as his employer. He credibly testified that Maman interviewed him for a barista position at Espresso Dream, hired him, told him what to wear to work, set his wage rate, supervised his work as a barista, promoted him to manager, and supervised his work as manager. Ferreyra also credibly testified that Levi was rarely present at the store and that Maman held himself out to employees and the public as an owner. Ferreyra's testimony concerning Maman's role in the business, which was not rebutted by petitioners, establishes by a totality of the circumstances that Maman was Ferreyra's employer as a matter of economic reality in that he hired and promoted Ferreyra, supervised him and made his work schedules, and determined his rate and method of payment.

Petitioner Lola 8 West Ltd is not an employer

Respondent determined Lola 8 West Ltd. was an employer in this matter because Ferreyra received wages on one occasion by a check from Lola 8 West. There is no other evidence linking Lola 8 West as an employer of Ferreyra or Puebla. Maman and Levi testified that Lola 8 West is a clothing store in Bronx, New York, that shares an office with Espresso Dream, and that Lola 8 West owed Espresso Dream for catering. Levi explained that he manages the books for Lola 8 West and paid Ferreyra on one occasion with a Lola 8 West check because Lola 8 West owed money to Espresso Dream and Espresso Dream was short of funds. We credit the testimony of Maman and Levi. Absent evidence other than one check indicating Lola 8 West employed Ferreyra or Puebla, the order is revoked as to Lola 8 West Ltd.

Maman failed to maintain or produce required records

Article 19 of the Labor Law requires employers to maintain for no less than six years payroll records that show for each employee, among other things, the wage rates, number of hours worked daily and weekly, including the time of arrival and departure of each employee working a spread of hours exceeding ten, the amount of gross wages, and the net wages paid (12 NYCRR 146-2.1 [a]; *see also* Labor Law § 661). Article 19 also requires every employer to provide each employee a statement with each payment of wages showing the hours worked, rates paid, gross wages, allowances, if any, claimed as part of the minimum wage, deductions and net wages (12 NYCRR 146-2.3). Payroll records must be produced to DOL for inspection when requested (Labor Law §§ 660, 661). Throughout the course of its investigation of Espresso Dream, DOL requested records for employees of Espresso Dream. The requests were made to Shlomo Levi and Fillicori Espresso Dream as well as their attorney, who also represents Moshe Maman. The requested

records were never produced to DOL during its investigation, nor at hearing. Having found Maman was an employer under Article 19 of the Labor Law, it was his obligation to maintain the required records for no less than six years and produce them to DOL upon request. Maman provided no evidence that he maintained the required records.

The minimum wage order

Article 19 of the Labor Law, entitled the "Minimum Wage Act," sets forth the minimum wage that every employer must pay each of its non-exempt employees for each hour of work (Labor Law § 652 [1]), and its implementing regulations for the hospitality industry require payment of time and one-half a non-residential employee's regular hourly rate for each hour worked over 40 in a week (12 NYCRR 146-1.4).

The minimum wage order finds petitioners owe Ferreyra unpaid minimum wages (overtime) in the amount of $7,425.63 for the period from July 1, 2012 to May 10, 2014, and owe Eduardo Puebla unpaid minimum wages in the amount of $2,208.00 for the time period from July 14, 2014 to September 20, 2014. In the absence of required records, petitioners bear the burden of proving that the disputed wages were paid (Labor Law § 196-a; *Angello v Natl. Fin. Corp.*, 1 AD3d 850, 851 [3d Dept 1989]; *Heady v Garcia*, 46 AD3d 1088 [3d Dept 2007]). As the Appellate Division stated in *Matter of Mid Hudson Pam* Corp v Hartnett, 156 AD2d 818, 821 [3d Dept 1989], "[w]hen an employer fails to keep accurate records as required by statute, the commissioner is permitted to calculate back wages due to employees by using the best available evidence and to shift the burden of negating the reasonableness of the Commissioner's calculation to the employer" (*see also Matter of Bae v Industrial Board of Appeals*, 104 AD3d 571 [1st Dept 2013], *cert denied* 21 NY3d 858 [2013]). The petitioners have the burden of showing that the minimum wage order is invalid or unreasonable by a preponderance of the evidence of the specific hours that the employees worked and that they were paid for those hours, or other evidence that shows the Commissioner's findings to be invalid or unreasonable (*Ram Hotels, supra*). Where no wage and hour records are available, DOL is "entitled[d] to make just and reasonable inferences and use other evidence to establish the amount of underpayments, even though the results may be approximate" (*Hy-Tech Coatings v New York State Dept. of Labor,* 226 AD2d 378, [1st Dept 1996], *citing Mid-Hudson Pam Corp.*; *see also Matter of Bae v Industrial Board of Appeals*, 104 AD3d 571). We find petitioners met their burden of proof to show that the minimum wage order is unreasonable and must be modified for Christian Ferreyra and revoked as to Eduardo Puebla.

Wages owed to Christian Ferreyra

Ferreyra credibly testified he worked as a barista for Espresso Dream from July 2012 through December 2012, at which time Maman promoted him to manager. We credit Ferreyra's testimony, which was not rebutted by petitioners. Ferreyra claimed he was not paid overtime during the time period he worked as a barista and supplied DOL with time records he printed from the register at Espresso Dream showing the actual hours he worked. In computing the overtime owed to Ferreyra, DOL did not consider these time records because they contained errors and were provided by an employee instead of the employer. While we agree an employer has an obligation under the Labor Law to maintain wage and hour records and furnish them to respondent upon request (Labor Law §§ 660, 661), it was unreasonable for respondent to refuse to consider the time records provided by Ferreyra, which are the best available evidence of the overtime hours he worked. Based on our review of Ferreyra's time records and testimony, we find that the overtime

due and owing must be reduced from $7,425.63 to $1,804.82 using the hours of work indicated by Ferreyra's time records and the wage rates stated in his claim form.[2] Petitioners did not produce any records or other credible evidence that Ferreyra did not work these hours or was properly compensated for overtime.

It is unclear from the record whether the two weeks Ferreyra claimed he was not paid while working as a manager were included by respondent in the minimum wage order. Our computation above does not include these wages. It is undisputed and the record shows that Ferreyra was a manager during the period he claimed he was not paid, and therefore was not covered by Article 19 of the Labor Law (Labor Law § 651 [5] [c]; 12 NYCRR 146-3.2 [c] [1] [i]).

Wages owed to Eduardo Puebla

Maman testified he does not know an individual by the name of Eduardo Puebla, and that no such person worked at Espresso Dream. Maman's testimony was corroborated by Levi. In the absence of any other evidence that an individual named Eduardo Puebla worked at Espresso Dream, we credit the testimony of Maman and Levi that no such person worked there. Respondent offered no testimony to establish Puebla's identity or that he worked at Espresso Dream and there is no evidence in the record other than the claim form concerning Puebla. Because Puebla did not testify and petitioners offered credible and unrebutted testimony that he was not employed by Espresso Dream, we revoke the order as to Eduardo Puebla (*Matter of Hugo Fernandez et al.*, PR 12-149 [September 16, 2015]).[3]

Civil penalty revoked as to Moshe Maman

Labor Law § 218 (1) provides that if respondent determines an employer has violated certain provisions of Article 19, including failure to pay overtime, must assess an "appropriate civil penalty." The civil penalty assessed must be 200 % if respondent finds the violation was willful or egregious, or if the employer has previously violated the Labor Law. Otherwise, in assessing the amount of the penalty, the respondent must "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 . . . the failure to comply with recordkeeping or other non-wage requirements" (Labor Law § 218 [1]).

Respondent assessed a 100 % civil penalty against petitioners. We revoke the penalty as to Moshe Maman. Respondent did not address any correspondence to Maman or mention him as a potential employer during the course of the investigation except that he was copied on one letter addressed to Levi and Espresso Dream. Hartnett testified that Maman was not included in DOL's original notices in this matter due to an oversight. Because of this oversight respondent could not have properly considered the statutory factors where Maman had no opportunity to establish a

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[2] The time records contain errors for some days due to Ferreyra punching in but not punching out so that the hours worked accumulated and exceeded 24 hours. We determined based on the records that Ferreyra worked 13.86 hours on an average day and used 13.86 hours in our computations for the days where there were hours in the work times recorded.

[3] We also note that the order should have been issued under Article 6 of the Labor Law where respondent sought to recover unpaid wages and had we affirmed the order with respect to Puebla under Article 19 his recovery would have been limited to what he was owed under the applicable minimum wage rate.

good faith belief that his conduct was in compliance with the Labor Law and no records were requested of him.

Liquidated damages

Labor Law § 218 (1) also requires respondent to include liquidated damages of 100 % of the wages found due with the order. Liquidated damages must be paid by the employer unless the employer "proves a good faith basis to believe that its underpayment was in compliance with the law." Liquidated damages in the amount of 25% were assessed against petitioners in this matter[4] We uphold respondent's assessment of liquidated damages in this matter. Petitioners presented no evidence to show a good faith basis to believe the underpayment was in compliance with the law.

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 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." The Commissioner's determination of interest due was required by statute and did not exceed the statutory limit, and is therefore not unreasonable or invalid, but must be recalculated based on the modified principle amount.

The penalty order is affirmed in part and revoked in part

The penalty order assesses a $1,000.00 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 July 1, 2012 through September 20, 2014; a $1,000.00 civil penalty for violating Labor Law § 661 and 12 NYCRR 146-2.3 by failing to furnish to each employee a statement with every payment of wages listing the hours worked, rates paid, gross wages earned, any allowances claimed, deductions and net wages during the period from on or about July 1, 2012 through September 20, 2014; a $1,000.00 civil penalty for violating Labor Law § 661 and 12 NYCRR 146-2.5 by failing to pay employees hourly rates of pay from on or about July 1, 2012 through September 20, 2014; and a $1,000.00 civil penalty for violating Labor Law § 661 and 12 NYCRR 146-2.2 by failing to furnish to each employee at the start of employment, written notice in English and any other language spoken by the new employee as their primary language, of the employee's regular hourly rate of pay, overtime hourly rate of pay, the amount of tip credit if taken, and the regular pay day.

Count 1: Penalty for failure to keep and/or furnish true and accurate payroll records revoked as to Moshe Maman

Article 19 of the Labor Law requires employers to keep true and accurate payroll records for each employee and furnish such records to DOL upon request. It is undisputed that DOL requested payroll records in this matter. However, due to an oversight, the records were never

[4] While Labor Law § 218 (1) requires the Commissioner to include 100 % liquidated damages in her orders to comply, Labor Law § 663 (2) provides that liquidated damages shall be calculated by the Commissioner as "no more than" 100 % of the underpayments found due.

requested from Moshe Maman prior to issuance of the order. In the circumstances of this case, we find respondent failed to duly consider the statutory factors when imposing the penalty against Maman for failure to maintain and/or furnish accurate payroll records (*see* Labor Law § 218 [1] [setting forth factors to consider when determining amount of civil penalty]). The $1,000.00 penalty for failure to keep and/or furnish payroll records is revoked as to Maman.

Count 2: Penalty for failure to give wage statement with each payment of wages affirmed

Article 19 of the Labor Law requires employers to give a wage statement to each employee with each payment of wages. Christian Ferreyra credibly testified that he did not receive a wage statement with each payment of wages. The $1,000.00 civil penalty for failing to give wage statements to employees with each payment of wages is affirmed where Maman presented no evidence on the issue.

Count 3: Penalty for failing to pay hourly rates revoked

Article 19 of the Labor Law requires employers to pay employees an hourly rate of pay. The $1,000.00 penalty for failing to pay hourly rates is revoked because Ferreyra's claim form and testimony show he was paid an hourly rate while working as a barista at Espresso Dream.

Count 4: Penalty for failing to provide written notice of rate of pay affirmed

Article 19 of the Labor Law requires employers in the hospitality industry to furnish to each employee at the start of employment, written notice in English and any other language spoken by the new employee as their primary language, of the employee's regular hourly rate of pay, overtime hourly rate of pay, the amount of tip credit if taken, and the regular pay day. Maman, who had the burden of proof, presented no evidence on this issue. The $1,000.00 penalty for failing to provide written notice of pay rates is affirmed.

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NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. Respondent's motion to withdraw the orders against Filicori Zecchini USA Corp. is granted; and

2. The minimum wage and penalty orders are revoked as to Lola 8 West Ltd.; and

3. The minimum wage order is modified to reduce the wages due and owing to Christian Ferreyra to $1,804.82 and Eduardo Puebla to $0.00, to revoke the civil penalty as to Moshe Maman, and otherwise affirm the civil penalty, liquidated damages, and interest as recalculated on the new principal amount due and owing; and

4. Count 1 of the penalty order is revoked as to Moshe Maman but otherwise affirmed, Count 2 of the penalty order is affirmed, count 3 of the penalty order is revoked, and count 4 of the penalty order is affirmed; and

5. The petition for review be, and the same hereby is, granted in part and denied in part consistent with this decision.

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
in New York, New York on
October 26, 2016.