STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of:	
ELIZABETH SANTAMARIA AKA ELISABETH SANTAMARIA AND TROPICANA REST INC. T/A TROPICANA RESTAURANT,	
Petitioners,	DOCKET NO. PR 18-048
To Review Under Section 101 of the Labor Law: An Order to Comply with Articles 5, 6 and 19, dated June 21, 2018,	RESOLUTION OF DECISION
- against -	
THE COMMISSIONER OF LABOR,	
Respondent.	

APPEARANCES

Law Office of Michael R. Curran, Esq., Rego Park *(Michael R. Curran, Esq.* of counsel), for petitioners.

Pico P. Ben-Amotz, General Counsel, NYS Department of Labor, Albany (*Kevin E. Jones* of counsel), for respondent.[1]

WITNESSES

Elisabeth Santamaria and Jessica Mendoza Feria for petitioners.

Xiomara Fernanda Mera Perez, Milay Velasquez Perez, Miryam Eugenia Calle Jara, and Senior Labor Standards Investigator Jose Medina, for respondent.

WHEREAS:

Petitioners Elizabeth Santamaria A/K/A Elisabeth Santamaria (hereinafter "Santamaria") and Tropicana Rest Inc. T/A Tropicana Restaurant (hereinafter "Tropicana" or "the restaurant") filed a petition with the Industrial Board of Appeals (hereinafter "Board") in this matter on August 22, 2018, pursuant to Labor Law § 101, seeking review of an order issued against them by

[1] Pico P. Ben-Amotz was respondent's General Counsel at the time of the hearing. Jill Archambault is respondent's Acting General Counsel at the time of decision.

respondent Commissioner of Labor (hereinafter "Commissioner" or "the Department") on June 21, 2018. Respondent filed an answer to the petition on January 7, 2019.[2]

Upon notice to the parties a hearing was held in this matter on March 28 and June 21, 2019, in New York, New York, before Molly Doherty, Chairperson of the Board and the designated hearing officer in this proceeding. Each party was afforded a full opportunity to present documentary evidence, to examine and cross-examine witnesses, and to make statements relevant to the issues.

The order to comply (hereinafter "the order") under review directs compliance with Article 19 and payment to respondent for minimum wage underpayments due to four claimants in the total amount of $9,646.41 from June 6, 2015 to January 16, 2016, interest continuing thereon at the rate of 16% calculated to the date of the order in the amount of $4,041.22, 100% liquidated damages in the amount of $9,646.41, and assesses a 100% civil penalty in the amount of $9,646.41.

The order also directs compliance with Article 6 and payment to three claimants for unlawful deductions in the amount of $2,082.00 from June 6, 2015 to November 14, 2015, interest continuing thereon at the rate of 16% calculated to the date of the order in the amount of $755.20, 100% liquidated damages in the amount of $2,082.00, and assesses a 100% civil penalty in the amount of $2,082.00. The order also directs compliance with Article 6 and payment to one claimant for unpaid wages in the amount of $140.00 from July 4, 2015 to November 14, 2015, interest continuing thereon at the rate of 16% calculated to the date of the order in the amount of $57.87, 100% liquidated damages in the amount of $140.00, and assesses a 100% civil penalty in the amount of $140.00.

The order further assesses separate civil penalties in the amount of $3,500.00, each in the amount of $500.00. More specifically, the order includes a civil penalty for violation of Article 19 of the Labor Law, Section 661, and Department of Labor Regulations (12 NYCRR) § 146-2.1 for failure to keep and/or furnish true and accurate payroll records for each employee during the period from June 6, 2015 to January 16, 2016; Labor Law § 661 and Department of Labor Regulations (12 NYCRR) § 146-2.2 for failure to issue employees wage rate notices from June 6, 2015 to January 16, 2016; Labor Law § 661 and Department of Labor Regulations (12 NYCRR) § 146-2.3 for failure to furnish to each employee with a statement with every payment of wages listing hours worked, rates paid, gross wages earned, allowances claimed, deductions and net wages from June 6, 2015 to January 16, 2016; Labor Law § 661 and Department of Labor Regulations (12 NYCRR) § 146-2.4 for failure to post the minimum wage notice in the workplace from June 6, 2015 to January 16, 2016; and, Labor Law § 661 and Department of Labor Regulations (12 NYCRR) § 146-2.5 for failure to pay employees an hourly rate from June 6, 2015 to January 16, 2016. The order also includes a civil penalty for violation of Article 5, Section 162 of the Labor Law for failure to provide employees with at least a 30 minute meal period during shifts of more than 6 hours from June 6, 2015 to January 16, 2016; and, for violation of Article 6, Section 193.1 of the Labor Law for making prohibited deductions from employees' wages from June 6, 2015 to January 1, 2016.

[2] Respondent filed a motion seeking leave to file a late answer with a proposed answer attached as an exhibit and petitioners opposed that motion. On January 7, 2019, the Board granted the motion and deemed the answer attached to the motion as filed.

The total amount due in the order is $43,959.52.

Petitioners allege that the order is unreasonable and invalid because the Department of Labor did not afford the petitioners due process during the course of the investigation and mediation; the business was a "mom and pop" business so the penalties assessed are unreasonable; the business practice is identical to other business practices in the neighborhood but the Department of Labor targeted only petitioners; the Department of Labor employee who investigated the matter conspired with the claimants against the petitioners; the claimants were independent contractors, not employees; one claimant, Mariana Leal Ramirez, did not work for petitioners nor do petitioners know who she is; the claimants worked fewer shifts and less hours on those shifts than what was included in the order; and, the claimants were paid the same or higher than the going daily rate for similar businesses in the neighborhood. For the reasons discussed below, we deny the petition and we affirm the order that was issued against petitioners.

During the hearing, the Department of Labor moved to withdraw the $73.90 claim for Mariana Layal Ramirez that was included in the order to comply and petitioners did not oppose that motion. The motion was granted by the hearing officer and the order to comply was deemed amended to reduce the total amount of wages being sought by $73.90 and the interest, liquidated damages and civil penalties would be reduced proportionally to reflect the amended amount.

At the conclusion of the hearing, the parties requested to submit post-hearing written briefs in lieu of oral closing summations. The request was granted and a subsequent request for an extension of time to submit the briefs was granted. Neither party submitted a post-hearing written brief.

SUMMARY OF EVIDENCE

Petitioners' Evidence

Testimony of Elisabeth Santamaria

Santamaria immigrated to the United States from Puebla, Mexico and she has primarily lived in Corona, Queens since coming to the United States. Santamaria testified that she opened Tropicana, which was located in Corona, in 2014. The corporate certificate was issued in 2013 but the restaurant did not actually open until 2014. She leased the space for the restaurant. The restaurant closed in March 2019 because there were not enough customers and she owed a lot of rent. Santamaria testified that the restaurant was owned by Luis Martinez. Santamaria worked there as a manager and her husband also worked there, sometimes as a cook. She testified that other than her and her husband, five employees worked at the restaurant, including waitresses and a cook. Three waitresses worked at night and one waitress worked during the day.

Santamaria testified that she hired the waitresses, told them what their hours would be, what clothes they had to wear and that if they could not make it for a shift to call her. Santamaria managed the payroll by counting the hours and days worked and by paying the employees in cash. The waitresses were required to wear the same color shirt for a week period and some of the waitresses that Santamaria hired needed to buy clothes to meet this requirement. Santamaria later

clarified this, testifying that different colors were required on Fridays, Saturdays and Sundays but one color would be worn Monday through Thursday, which would change each week.

Santamaria testified that Tropicana sold Mexican food and beer and also did a karaoke night. She testified that Tropicana opened at noon each day; the daytime shift worked from noon to 7:00 p.m. and the nighttime shift worked from 7:00 p.m. to 4:00 a.m. During the daytime shift, one waitress and a cook worked, and sometimes Santamaria was there. If Santamaria was not present for the opening of the restaurant, the waitresses had keys to open the restaurant. Santamaria testified that she stayed two, three or four hours during the daytime shift. She sometimes was there during the nighttime shift too, but usually only for two or three hours. Later Santamaria testified that if her kids did not have school the next day, she was sometimes at the restaurant until it closed at 4:00 a.m. or her husband was there during the night shift, but he stayed in the basement office rather than up in the restaurant. When Santamaria was not present for closing, her husband or the cook closed the restaurant. If Santamaria was not present, the employees managed the restaurant themselves. Santamaria testified that there were no bartenders working for the restaurant because it only sold beer so a bartender was not needed. Santamaria testified that the waitresses received a 30 minute break to eat during their shifts but if there were no customers, they took longer breaks. She testified that the waitresses were permitted to eat food from the restaurant for which they did not have to pay. Santamaria also testified that sometimes waitresses started the night shift earlier than 7:00 p.m., which she permitted. She also testified that the restaurant closed its doors at 4:00 a.m. but if there were customers still there at closing time, they closed the restaurant at 4:00 a.m. and then the waitresses cleaned up, including sweeping, mopping and doing their accounting.

Santamaria testified that she paid the waitresses $35.00 per day, which was more than the going rate for similar restaurants in the neighborhood. Santamaria testified that there were about 12 or more similar restaurants in the neighborhood and that they generally paid $25.00 to $30.00 per day. Santamaria testified that if the restaurant lost beer inventory, she required the waitresses to pay for the loss since they maintained responsibility for selling the beer, counting the beer, and keeping track of the beer. Santamaria testified that waitresses also received tips, sometimes $80.00 to $150.00 a shift. Waitresses did not always tell Santamaria what they received in tips. Santamaria initially testified that she always paid weekly and later testified “I always paid them. Sometimes late, but I always paid them.”

Santamaria testified that she did not maintain employment records. She did have a notebook in which employees signed when they were paid. She testified that she wrote down the days of the week, the dates, the person’s name, how many days they worked, what hours they worked, and how much she paid them. The employees then signed. Entered into evidence were copies of some handwritten pages from a notebook with handwritten names of employees on their own page. The page for an employee also listed the start date for the week, the number of days and hours worked, the amount and date of pay and had a signature line with, according to Santamaria’s testimony, that employee’s signature. For example, for Xiomara Mera (hereinafter “Mera”), a claimant in this matter, the notebook listed 8 weeks, June 22, 2015, June 29, 2015, July 6, 2015, July 13, 2015, July 20, 2015, July 27, 2015, August 3, 2015 and August 10, 2015. For each of those weeks, the number of days worked and hours worked for the week were listed, as was the date of pay, amount of pay and Mera’s signature. For the weeks of June 22, 2015 and August 10, 2015, the notebook reflects that Mera worked 4 days and was paid $140.00. For every other week on the notebook page, Mera is recorded as having worked 5 days and she was paid $175.00 for the weeks when she worked 5 days. The notebook page also has recorded that Mera worked 28 hours

on the weeks that she worked 4 days and 35 hours on the weeks that she worked 5 days. There is a similar page for Milay Velasquez (hereinafter "Velasquez"), also a claimant. The page for Velasquez has the weeks of July 13, 2015, July 20, 2015, August 3, 2015, August 10, 2015, August 17, 2015, August 24, 2015, and August 31, 2015. It reflects that Velasquez worked 3.5 days for the week of August 10, 2015, 4 days for the weeks of July 13 and August 17, 2015, 5 days for the weeks of July 27, August 3, August 24, and August 31, 2015, and 6 days for the week of July 20, 2015. The 4 day and 5 day work weeks show total hours of 28 and 35 respectively. The 3.5 day week shows 24.5 hours and the 6 day week shows 41 hours. The weekly pay for Velasquez was $122.50 for 3.5 days, $140.00 for 4 days, $175.00 for 5 days, and $210.00 for 6 days. The page also purportedly has Velazquez's signature although only as the handwritten first name and surname initial.

There is also a notebook page for an employee named Miriam Vidal but Santamaria testified that she does not have a page for Miriam Talle, which is the name of a claimant, because no one named Miriam Talle worked for her. The notebook evidence also does not contain a page for Miryam Calle.

Santamaria testified about Mera's schedule stating that she worked from 7:00 p.m. to 4:00 a.m. on Sundays and worked the same schedule on Mondays, that she sometimes worked on Tuesdays and that the schedule varied each week. Santamaria testified that no one ever worked an 11 hour shift and that the most they worked in a shift was 9 hours. She testified that Mera and Velasquez sometimes worked four days a week and sometimes five days a week. When Santamaria hired the waitresses, they told her what days they could work and what days they wanted to have off and they came up with a schedule. She always let them have the days off that they needed off. Santamaria testified that the night shift waitress worked 8.5 hours, which was a 9 hour shift with a 30 minute break. She also testified that the notebook pages of days and hours worked that were submitted into evidence only reflect 7 hours per shift because the hours varied and there was no set number of hours.

A photocopy of a notebook, referred to as the "beer sales book" or "beer inventory log," also came into evidence. The beer inventory log spans from March 20, 2015 to December 31, 2015 and it is for the night shift. A separate beer inventory log existed for the day shift but was not offered into evidence. Santamaria testified that the restaurant kept track of beer sales in the beer inventory log. Santamaria testified that the waitresses wrote down the number of each kind of beer left in the refrigerator from the shift before, and also noted any beer added to the refrigerator from inventory. Santamaria stated that these numbers were then compared with the amount of beer left in the refrigerator after the shift, the empty beer bottles, and the tickets turned in by the waitresses, all to determine how many beers were left unaccounted for at the end of each shift. She asserted that the waitresses were involved in these calculations. Santamaria testified that she did not deduct the cost of missing beer from pay but if beer was missing, the waitresses working the shift when the beer went missing divided the cost and paid Santamaria cash after receiving their wages from Santamaria.

Testimony of Jessica Mendoza Feria

Jessica Mendoza Feria (hereinafter "Mendoza") testified for petitioners, after petitioner's attorney called "Jessica Leal Ramirez" to the stand. Upon her swearing in, Mendoza stated that

her name is Jessica Mendoza Feria. Petitioners' attorney asked Mendoza "how does the name Ramirez come into the picture?" Mendoza testified that she did not know.

Mendoza testified that she worked at the restaurant as a waitress in 2015 or 2016 and that she was present when a Department of Labor investigator visited the restaurant one day in the afternoon. Mendoza testified that she told the investigator that she was paid $35.00 per day for her work. Mendoza testified that she and the cook were the only people present when the investigator visited the restaurant.

Mendoza testified that she saw an ad for a waitress job at Tropicana and she went into the restaurant and asked Santamaria for a job. She did not work a regular schedule and she worked the day shift. Mendoza testified that she was paid weekly and received tips. If she could not work one of her shifts, she told Santamaria. Mendoza testified that sometimes the restaurant opened at 9:00 a.m. and sometimes it opened at noon. On days that it opened at 9:00 a.m., Mendoza worked until 4:00 p.m. and on days that it opened at noon, she worked until 7:00 p.m.

Respondent's Evidence

Testimony of claimant Xiomara Fernanda Mera Perez

Xiomara Fernanda Mera Perez (hereinafter "Mera") worked at the restaurant for about a year. Mera testified that she worked five days per week, started her shift at 6:00 p.m. and normally left at 5:00, 5:30, or 6:00 a.m. The restaurant locked its outside doors at 4:00 a.m. but if customers remained, they had to keep working until those customers left. They also had to leave the restaurant clean. Mera testified that they continued to sell alcohol to the customers who remained after 4:00 a.m. Mera's salary was $35.00 per shift and money was sometimes deducted from her salary for beers that were missing. Mera was paid $175.00 for a five day workweek. Mera was not paid weekly but was paid after two or three weeks of work and she was paid in cash. When money was deducted from her pay for missing beer inventory, Mera did not learn about the deduction until she was paid. Mera testified that she was also required to purchase clothing for the job, but she did not get reimbursed for those purchases. Mera also testified that she made drinks for customers and that the restaurant did not only sell beer and wine. Mera testified that Santamaria had small and large Corona beers in the restaurant for the waitresses to drink when customers purchased them for the waitresses. A small Corona beer cost $10.00 and the waitress received $5.00 from that sale. A large Corona beer cost $20.00 and the waitress received $10.00 from that sale. Mera testified that those Corona beers were never missing.

Initially, Mera testified that she began working at the restaurant in 2016 when she was seventeen years old. During re-direct examination she testified that she was mistaken and she worked for the restaurant in 2015. Mera testified that the notebook page referencing her that was admitted into evidence did not contain the number or hours worked each week but only the number of days worked each week at the time that she signed it each week.

Mera testified regarding the process used with the beer inventory logs to calculate any missing inventory. However, Mera also testified that she was not involved in the calculations to determine beers that were sold, beers that were added to the inventory and whether, in fact, beer was missing. Rather, Mera testified, Santamaria did those calculations on her own. Mera testified that she had no knowledge as to whether beers in fact went missing during a shift.

Mera testified that Santamaria was hardly ever at the restaurant, but the cook watched her and the other waitresses to make sure they were nice to customers and wrote orders correctly. She testified that the cook also sometimes told her what time to start her next shift.

Mera testified that she filed a claim with the Department of Labor because Santamaria was not paying her for all of the hours that she worked. For example, Santamaria said she worked until 4:00 a.m. but she actually worked until 5:00 a.m. or 6:00 a.m. Mera testified that she did not speak to the Department of Labor investigator who visited the restaurant because Santamaria fired Mera before the investigator went to the restaurant. Mera did not recall the date that she was fired. Mera's claim form states that she worked for the restaurant as a bartender/server from June 1, 2015 to October 31, 2015. The claim form states that Mera was paid $35.00 plus tips that ranged from $80.00 to $100.00 per shift and that her schedule varied but her shifts were usually from 6:00 p.m. to 5:00 a.m. and she usually worked five days per week. The form also states that Mera did not get a meal break but did get free food from the restaurant. The claim form states that Mera was required to purchase two aprons at $12.00 each, two skirts at $18.00 each, and four blouses at $20.00 each and that she was told by her employer to purchase the uniform from a specific store. There is also a claim for unpaid wages for two weeks for $175.00 per week with a notation stating that "[t]he underpayments result from unlawful deductions from wages. The claimant stated that the employer deducted the cost of missing inventory from her wages."

Testimony of claimant Milay Velasquez Perez

Milay Velasquez Perez (hereinafter "Velasquez") worked at Tropicana. She was paid $35.00 per shift and the hours of the shift were supposed to be 6:00 p.m. to 4:00 a.m., but Velasquez testified that she often worked later than 4:00 a.m. because even though the restaurant's doors closed at 4:00 a.m., the waitresses had to wait for customers to leave and then clean the restaurant. Velasquez testified that she had to purchase clothes for a uniform. Velasquez testified that the notebook page that included her name and days and hours worked, as well as pay, did not have hours worked at the time that she signed her name to it for each week, but only the days of work. Velasquez also testified that she had money deducted from her wages for missing beer through the beer inventory log process. Velasquez testified that she may have been able to figure out how many beers were missing from a shift but since she did not get paid until two or three weeks later, she did not know when she was paid how many beers had been missing from two or three weeks prior.

Velasquez testified that she went to the Department of Labor and signed a claim form that a Department of Labor employee wrote on while talking to her. The claim form states that she worked for the restaurant as a bartender/server from July 1, 2015 to November 14, 2015. The claim form states that Velasquez was paid $35.00 plus tips that ranged from $80.00 to $100.00 per shift, her schedule varied but her shifts were usually from 6:00 p.m. to 5:00 a.m. and she usually worked five days per week. The claim form states that Velasquez did not receive a meal period and did receive free food from the restaurant. The form further states that Velasquez was required to purchase two aprons at $12.00 each, two skirts at $20.00 each, and five blouses at $18.00 each and that she was told by her employer to purchase the uniform from a specific store. There is also an unpaid wages claim form for Velasquez which states that she was not paid all of the wages that she earned for three weeks. More specifically, it states that she was paid $80.00 for the week ending October 31, 2015 when she earned $175.00 for five days of work; she was not paid at all for the week ending November 7, 2015 when she earned $175.00 for five days of work; and, she was not paid at all for the week ending November 14, 2015 when she earned $140.00 for four days

of work. There is also a notation on the claim stating "[t]he above underpayments represent a week of unpaid wages (period ending 11/14/15) and from unlawful deductions from wages. The claimant stated that the employer would deduct the cost of missing inventory from her wages."

Velasquez testified that the restaurant mostly sold wine and beer but she did make drinks for customers, including margaritas, piña coladas and micheladas. She testified that her job title was waitress, not bartender as indicated on the claim form. Velasquez also testified that she could buy the uniform from any place, not a specific place, as indicated on the claim form. Velasquez was no longer working at the restaurant when the Department of Labor investigator went to visit. She testified that she left because the restaurant owed her about a month's worth of wages, which she believed was more than $500.00 in wages but that she would only be paid somewhere around $300.00 in wages because of the deductions for missing beers. When the restaurant did not pay her that money, she quit.

Testimony of claimant Miryam Eugenia Calle Jara

Miryam Eugenia Calle Jara (hereinafter "Calle") worked as a waitress at Tropicana. Petitioners submitted documents to the Department of Labor during the investigation that used the names "Talle Miriam," and "Miriam Vidal." Other documentation from the Department of Labor's file that was admitted into evidence, used the name "Miriam Talle." Calle testified that she did not write on the Department of Labor interview sheet, which indicates it was a phone interview. Calle confirmed that she spoke to the Department of Labor investigator over the phone.

Calle was hired by Santamaria. Calle testified that Santamaria told her that she would have Thursdays off and work the other days of the week from 6:00 p.m. to 4:00 a.m. and that she had to wear a uniform of a certain color, which she would be required to purchase herself if she did not have the correct color. Calle testified that she had to have five different color shirts for five different days, as well as an apron, and a skirt. Calle testified that she would not have worn her uniform outside of work because it was a uniform. Calle testified that the restaurant's doors closed at 4:00 a.m. and that they had to stay to clean before they could leave.

Calle testified that money was deducted from her wages for missing beer but she was told about the deductions when she got paid two or three weeks later. Because she was paid every two or three weeks, Calle was only paid for her work three times. Calle testified that $225.00 was deducted from her pay three different times and she only received around $30.00 for her last payment. Calle testified that she could not verify the missing beer because she only counted the bottles that they brought up but never counted the empty bottles, so she never knew the final count.

Calle testified that she received 10 or 15 minute meal breaks during her shift and she received free food, two tacos or a small sandwich, from the restaurant. Calle also testified that Santamaria and her husband were not always at the restaurant, but they came for short periods of time or they watched the employees through cameras or put the cook in charge. She testified that the cook said that he was a family member of Santamaria.

Calle testified that when customers bought beer for her to drink, for which she was supposed to receive one-half of the cost of the beer and the restaurant received the other half, she did not always receive that money at the end of the shift. She gave the customer's money to a cashier, who was sometimes also a waitress, and she received one ticket for each beer that a

customer purchased for her. She was supposed to receive the money for those tickets at the end of a shift but sometimes the restaurant did not give her the money for those tickets until the next time that she was paid her wages.

Calle's interview sheet states that she worked Fridays, Saturdays, and Sundays from 6:00 p.m. until 5:00 a.m. and that she worked Mondays, Tuesdays, and Wednesdays from 7:00 p.m. until 4:00 a.m. Calle testified that on days with fewer customers, she worked until 4:00 a.m. The interview sheet states that Calle was paid $35.00 per day and that she worked from September 28, 2015 to November 15, 2015. The interview sheet also states that Calle had to purchase 5 shirts at $16.00 each, 1 apron for $10.00, a jacket for $16.00, and a skirt for $16.00. Calle testified that she was not required to purchase a jacket and that it was a mistake that a jacket was listed on the interview sheet. The interview sheet also states that $600.00 was deducted from her pay for missing beer and money shortages in the register.

Testimony of Senior Labor Standards Investigator Jose Hector Medina

Senior Labor Standards Investigator Jose Hector Medina (hereinafter "Medina") testified that as evidenced on the claim forms, Mera and Velasquez went to the Department of Labor and filed claims with the assistance of another investigator, Julio Rodriguez. Medina testified that a different investigator who no longer works for the Department of Labor, Melania Martinez, visited the restaurant and completed reports and calculations regarding wages due. Medina testified that he recommended a 100% civil penalty, not 200%, which is the maximum penalty that can be assessed, because the violations were not "totally egregious" because the claimants were being paid something. Medina testified that he recommended a 100% civil penalty should be assessed because the claimants were "being paid a shift, billed a state minimum wage, they had long hours, they were not being given meal breaks, they were forced to buy uniforms and the employer will – would demand – sending text messages saying the color of the day is fuchsia or something else."

Medina testified that in anticipation of his testimony, during the morning before he testified, he created a spreadsheet to delineate the unlawful deductions that the Department of Labor included in its order. Medina testified that he took the information in the spreadsheet from claim forms regarding the uniform items and cost of each item that the claim forms indicated that the claimants were required to purchase. Medina also included a column in the spreadsheet for beer, which Medina testified, was the amount of beer "more or less" that the claimants remembered being charged for. Medina later testified that he had "hard numbers" for the uniforms so he just deducted that from the total unlawful deductions and the balance was determined to be for deductions for missing beer. Medina testified that he could not locate a document that includes the numbers for the missing beer unlawful deduction. The spreadsheet that Medina created was not admitted into evidence because it was created between the first and second day of hearing; it was not part of the Department of Labor's investigative file; and because Medina did not rely on a document in the investigative file to determine what amount of money was included in the unlawful deductions portion of the order for deductions made for missing beer.

Medina testified that Calle filed a claim but he did not have a copy of the claim. He also testified that there should be a copy of the claim included in the investigative file. Medina testified that the employer was given a tip credit based on the tip amounts that the claim forms indicate the claimants received.

Medina testified that the investigator did not target Tropicana but she was assigned the case after Mera and Velasquez filed claims.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Board makes the following findings of fact and conclusions of law pursuant to the provisions of the Board's Rules of Procedure and practice (hereinafter "Board Rules") (12 NYCRR) § 65.39.

Burden of Proof

Petitioners' burden of proof in this matter is to establish, by a preponderance of the evidence, that the order issued by the Commissioner is invalid or unreasonable (State Administrative Procedure Act § 306 [1]; Labor Law §§ 101 and 103; Board Rules [12 NYCRR] § 65.30; *Matter of Angello v National Fin. Corp.*, 1 AD3d 850, 854 [3d Dept 2003]; *Matter of RAM Hotels, Inc. (T/A Rodeway Inn)*, Docket No. PR 08-078, at p. 24 [October 11, 2011]). 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 (*id*. § 103 [1]). Petitioners cannot meet their burden of proof through indirect means by attacking the Department of Labor's investigation (*Angello v National Fin. Corp.*, 1 AD3d at 820-821; *Matter of Mohammed Aldeen and Island Farm Meat Corp. (T/A Al-Noor Live Poultry)*, Docket No. PR 07-093, at pp. 12-15 [May 20, 2009] *affd sub nom. Matter of Aldeen v Industrial Appeals Bd.*, 82 A.D.3d 1220 [2d Dept 2011]). The hearing before the Board is *de novo* (Board Rules [12 NYCRR] § 66.1 [c]). For the reasons discussed below, we find that in the absence of sufficient records and detailed testimony, petitioners failed to meet their burden of proof to show that the order to comply is unreasonable or invalid.

Petitioners Were Not Denied Due Process

Petitioners contend that they were denied due process because the respondent did not fairly conduct the investigation, relied on hearsay statements and did not offer petitioners an opportunity to fully respond to claims and statements made by claimants. Petitioners also contend that the mediation process that respondent offered prior to issuing the order to comply was not a fair process. The Board has repeatedly held that due process is satisfied by the opportunity to contest the orders at a *de novo* hearing before the Board, where petitioners are able to present all relevant documentary evidence and witnesses, as well as challenge any evidence offered by respondent (*see Matter of Clifton J. Morello (T/A Iron Horse Beverage LLC)*, Docket No. PR 14-283, at p. 6 [Sept. 14, 2016]; *Matter of Angelo A. Gambino and Francesco A. Gambino (T/A Gambino Meat Market, Inc.)*, Docket No. PR 10-150, at p. 6 [July 25, 2013]; *Matter of David Fenske (T/A Amp Tech and Design, Inc.)*, Docket No. PR 07-031, at p. 8 [Dec. 14, 2011]). Petitioners had the opportunity to offer testimony from relevant witnesses and to submit relevant records at the hearing, and the testimony and documents that are part of the record were duly considered in the rendering of this decision.

Petitioners Claim of Bias and Targeted Enforcement is Unsupported

Petitioners also asserted that respondent's investigation of their business was biased because the claimants and the Department of Labor employee who conducted the investigation were all Ecuadorian and Santamaria, the individual petitioner, is Mexican. The only factual evidence that petitioners offered to support this assertion is that Santamaria is from Mexico. There is no evidence in the record regarding the national origin of the claimants or the Department of Labor investigator that visited the restaurant. The Board does not need to determine whether such a theory could be a basis to revoke an order since petitioners failed to assert a sufficient factual or legal basis to support their bias argument.

Petitioners also asserted that the Department of Labor targeted petitioners and no other similar businesses in the neighborhood, asserting that many similar businesses in the neighborhood use similar business practices to that of petitioners and also asserting that petitioners paid the same or a higher wage than similar businesses in the neighborhood. Petitioners only evidence to support this argument was Santamaria's testimony that she paid a higher wage than similar businesses in the neighborhood. This is insufficient evidence to support petitioners' theory. The testimony from Medina was that the investigation was initiated because the claimants filed complaints. There is no evidence that the Department of Labor considered the other businesses generally referred to by Santamaria, and then targeted only this restaurant. The Board does not need to determine whether such a theory could be a basis to revoke an order since petitioners' assertion is lacking any factual support.

Claimants were Employees not Independent Contractors

Petitioners had the burden to prove by a preponderance of the evidence that claimants were independent contractors, not employees. To meet this burden, petitioners needed to offer credible and reliable testimony that the claimants in the order were as a matter of economic reality in business for themselves and were not dependent upon someone else's business to render services (*Brock v Superior Care Inc.*, 840 F2d 1054, 1059 [2d Cir 1988]). We find that petitioners failed to meet that burden.

Under Article 19 of the Labor Law, "employee" is defined as "any individual employed or permitted to work by an employer" (Labor Law § 651 [5]; *see also* Labor Law § 190 [2] [similar definition under Article 6]). "Employer" is defined as "any individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons acting as an employer" (Labor Law § 651 [6]; *see also* Labor Law § 190 [3] [similar definition under Article 6]). "Employed" is defined as "permitted or suffered to work" (Labor Law § 2 [7]). The federal Fair Labor Standards Act (FLSA) also defines "employ" to include "suffer or permit to work" (29 USC § 203 [g]). Because the statutory language is nearly identical, the Labor Law and the FLSA follow the same test to determine the existence of an employment relationship (*Ansoumana v Gristede's Operating Corp.*, 255 FSupp2d 184, 189 [SDNY 2003]).

To determine whether an individual is an "employee" covered by the Labor Law, or an independent contractor excluded from its protections, "the ultimate concern is whether, as a matter of economic reality the workers depend upon someone else's business for the opportunity to render business or are in business for themselves" (*Brock*, 840 F2d at 1059). Factors to be considered in assessing such "economic reality" include:

> "(1) the degree of control exercised by the employer over the workers; (2) the workers' opportunity for profit or loss; (3) the degree of skill and independent initiative required to perform the work; (4) the permanence or duration of the working relationship; and, (5) the extent to which the work is an integral part of the employer's business" (*Brock*, 840 F2d at 1058-1059).

"No one of these factors is dispositive; rather, the test is based on the totality of the circumstances" (*Brock*, 840 F2d at 1059). Applying this test to the present case, we find that petitioners were the claimants' employer and credit Mera's, Velasquez's, and Calle's testimony establishing that, as a matter of economic reality, they were employees.

Petitioners failed to prove by a preponderance of the evidence that the claimants were independent contractors. The record shows that the claimants' schedule and rate of pay were determined by Santamaria and Santamaria told them they were required to wear uniforms consisting of certain color shirts on certain days of the week. With respect to Santamaria's control over the claimants' schedule, Santamaria may have permitted the waitresses to change their schedule as needed, but they had to inform her of a need for a schedule change. Santamaria also testified that sometimes waitresses started the night shift earlier than 7:00 p.m., which she allowed. Santamaria testified that she did not fire the claimants and that the claimants did what they wanted at work. Yet, Santamaria's failure to terminate waitresses that she had concerns about does not prove that the waitresses were independent contractors. Santamaria also testified to not being in the restaurant for the duration of either the day shift or the night shift, but this does not prove that the waitresses were not employees. The claimants credibly testified that if Santamaria was not present, her husband, or the cook, who both watched over the waitresses, were present. Santamaria's testimony clearly showed that she controlled the workers' schedule, how and when they got paid, and what they had to wear to work, evidencing that they were employees. Additionally, the work that the claimants' performed was an integral part of the restaurant since it was the waitresses that served the customers and the petitioners were dependent upon the claimants to serve the customers of the restaurant.

That the claimants may have had an opportunity to earn additional money if the customers purchased beer for the waitresses to drink, does not, by itself, indicate they were independent contractors with an opportunity for profit or loss because such opportunity was exclusive to and shared with petitioners' business. It was undisputed that in addition to selling food and drinks to the customers, the restaurant also had specific beer available for customers to buy for the waitresses to drink with them. Half of the price customers paid for those beers went to the waitresses and half to the restaurant. Calle testified that Santamaria did not always give her this extra money for beer that customers purchased for her to drink until weeks later. Petitioners never refuted this testimony, supporting that any independent opportunity for the waitresses was subject to petitioners' control and choice. Additionally, Santamaria's extensive testimony about logs or post-it notes that she required the waitresses to keep regarding beer sales and how she closely monitored those beer sales and deducted the cost of missing beer further supports the Department of Labor's determination that the claimants were employees, not independent contractors.

We find that Santamaria's testimony was inconsistent and not credible. She testified that she had no control over the waitresses and that they did what they wanted. However, she also testified that she permitted waitresses to start their shift early, which indicates her control. She

gave detailed testimony about how she managed the beer inventory log, stating, "I would say count your beers and I would just stand there; I wouldn't touch anything. I would say when they finished, you know, write down the number. So[,] I would tell them, you know, count your money, count your tickets, count your containers, and then afterwards when they finished, I would check it, you know, the tickets, the money, and the containers." This testimony also indicates Santamaria's control over the claimants. The burden rests with petitioners to prove the claimants were independent contractors, not employees, and their reliance on Santamaria's inconsistent testimony did not meet that burden.

Considering the factors identified in *Brock* to determine whether someone is an independent contractor, we find that the claimants were not independent contractors because petitioners controlled the means and manner in which the claimants performed their duties, set the schedule and rate of pay, required them to wear specific uniforms, and ultimately provided no persuasive evidence to show that the claimants were independent contractors (*Brock*, 840 F2d at 1058-1059). Additionally, petitioners offered no authority supporting the argument that there are circumstances under which restaurant waitresses could be classified as independent contractors. Accordingly, we find under the totality of the circumstances that the claimants were not as a matter of economic reality in business for themselves, but rather, that they were dependent on petitioners for their work as waitresses. The claimants are employees under the Labor Law.

Petitioners' Failure to Maintain Payroll Records

Articles 6 and 19 of the Labor Law require employers to maintain, for six years, certain records of the hours their employees worked and the wages they paid them (Labor Law §§ 195 and 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, and allowances, if any (Labor Law §§ 195 and 661). Employers must keep such records open for inspection by the Commissioner or a designated representative or face issuance of a penalty (Labor Law §§ 661 and 662 [2]).

It is undisputed that petitioners did not maintain the payroll records required by the Labor Law and Department of Labor Regulations (Labor Law §§ 195 and 661; Department of Labor Regulations [12 NYCRR] § 146-2.1) and that petitioners did not pay the claimants an hourly rate as required by Department of Labor Regulations (12 NYCRR) § 146-2.5. Petitioners' only evidence of hours that claimants worked, and wages paid to claimants were incomplete handwritten notebook pages, which we find are unreliable. The notebook pages also did not cover the entire time period for Mera or Velasquez. It is unclear whether the notebooks contain information regarding Calle, whose credible testimony about working at the restaurant was not refuted by petitioners. Additionally, Mera and Velasquez both credibly testified that when they signed their names in the notebook acknowledging pay received, only the days that they worked, not purported hours worked, were written in the notebook. Despite Santamaria's testimony that the night shift waitresses worked from 7:00 p.m. to 4:00 a.m., which is 9 hours, the notebook always indicated 7 hour shifts, which Santamaria failed to explain with credible testimony, only stating that their hours varied. The record is clear that claimants were paid a daily rate, not an hourly rate and petitioners admitted as much through Santamaria's testimony. Petitioners conceded that they did not have other records showing the actual hours that claimants worked during the relevant period. The Board affirms the civil penalty assessed for petitioners' failure to maintain

payroll records and pay an hourly rate, each in the amount of $500.00 (Department of Labor Regulations [12 NYCRR] §§ 146-2.1 and 146-2.5).

Petitioners also offered no evidence showing that they provided claimants with wage statements with their pay during the relevant period as required by Department of Labor Regulations (12 NYCRR) § 146-2.3. The notebook that petitioners offered do not substitute for the wage statements that are required to be issued to employees because they do not indicate an hourly rate or an overtime rate, or deductions. Petitioners also did not offer evidence proving that they provided employees with wage notices in the employee's primary language that contained the hourly rate of pay, overtime hourly rate of pay, the amount of tip credit and the regular pay day, as required by Department of Labor Regulations (12 NYCRR) § 146-2.2. The Board affirms the civil penalties included in the order for failure to provide employees with wage statements and for failure to provide employees with wage notices, each in the amount of $500.00 for those violations.

Petitioners also failed to offer any evidence to challenge the issuance of a violation for failure to have a minimum wage provision notice posted in the restaurant in violation of Department of Labor Regulations (12 NYCRR) § 146-2.4. The Board affirms the $500.00 penalty order for that violation.

The Minimum Wage Order is Affirmed

Where the employer has failed to keep 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 and the petitioner has the burden of proving the Commissioner's order was incorrect (*Matter of Baudo v New York State Indus. Bd. of Appeals*, 154 AD3d 535, 536 [1st Dept 2017]; *Matter of Ramirez v Commissioner of Labor of State of N.Y.*, 110 AD3d 901, 901-902 [2d Dept 2013]; *Matter of Mid Hudson Pam Corp. v Hartnett*, 156 AD2d 818, 820-821 [3d Dept 1989]). As the Appellate Division stated in *Matter of Mid Hudson Pam Corp. v Hartnett* (156 AD2d at 821), "[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." Therefore, the petitioners have the burden of showing that the Commissioner's order is invalid or unreasonable by a preponderance of the evidence of the specific hours that the claimants worked and that they were paid for these hours, or other evidence that shows the Commissioner's findings to be invalid or unreasonable (*Matter of Joseph Baglio and the Club at Windham, LTD.*, Docket No. PR 11-394, at p. 7 [December 9, 2015]; *Matter of RAM Hotels, Inc. (T/A Rodeway Inn)*, Docket No. PR 08-078, at p. 24). In this matter, petitioners failed to meet their burden.

As discussed above, petitioners had insufficient records of actual daily hours worked, incomplete and unreliable records of weekly hours worked and wages paid, and no records of wage notices. Santamaria's testimony was insufficient to overcome the lack of records evidencing compliance with the Labor Law because her testimony was inconsistent and not credible. After testifying that she was frequently not at the restaurant for the duration of the shifts at least in part due to the fact that she had young children, Santamaria also testified that the waitresses never worked past 4:00 a.m. and the restaurant closed at 4:00 a.m. The claimants consistently and credibly testified that they worked past 4:00 a.m. either because customers were still in the restaurant purchasing beer or because they had to clean up once the last customer left. The record

reflects that when Santamaria was not at the restaurant, her husband was sometimes present or the cook was present; yet, neither Santamaria's husband nor the cook testified about what time the waitresses stopped working for the night shift. Petitioners' evidence of how much the claimants worked was too vague and not credible, nor was it sufficient to refute the claimants' testimony about how much they worked. With respect to the claims for Mera and Velasquez, petitioners did not meet their burden to prove that those claims were unreasonable or incorrect (*see e.g. Matter of Roberto C. Guendjian A/K/A Roberto Guengin and Grilled Steak, Corp. [T/A Chivito D'Oro]*, Docket No. PR 15-313, at pp. 6-8 [July 26, 2017] *appeal dismissed sub nom. Matter of Guendjian v Reardon*, 170 A.D.3d 1288, 1289-1290 [3d Dept 2019]). As such, we affirm the minimum wage order as to Mera and Velasquez. We also affirm the minimum wage claim as to Calle. Petitioners only challenged the order as to Calle by testifying that Miriam Talle never worked for petitioners. While the order includes wages for Miriam Talle not Miryam Calle, we find that Calle's testimony, along with petitioners' own documentation submitted to respondent during the investigation which also misspelled this claimant's name as "Talle," was sufficient to prove that this claimant's name had merely been misspelled. Petitioners did not refute Calle's testimony that she worked for petitioners nor did they explain that they themselves included the same misspelling of Calle's name in documents they submitted to respondent during the investigation. The Board deems the order amended to reflect Miryam Calle to be the claimant included in the order, not Miriam Talle. Based on this amendment, the Board affirms the wages included in the order for Miryam Calle.

As discussed above, the wage claim as to Mariana Leal Ramirez was withdrawn during the hearing and the order was deemed amended to reflect such.

The Article 6 Unpaid Wages Order is Affirmed

Included in the order under review is a $140.00 unpaid wages claim pursuant to Article 6 for wages that were not paid to Velasquez. Petitioners did not offer any evidence to challenge the unpaid wages claim that was included in the order; thus, the issue is thereby waived pursuant to Labor Law § 101 (2). The Board affirms the $140.00 unpaid wages claim due to Velasquez that is included in the order.

The Article 6 Unlawful Deduction Order is Affirmed as Modified and the Civil Penalty for Unlawful Deductions is Affirmed

The Commissioner's order also finds that petitioners unlawfully deducted $2,082.00 from Mera's, Calle's, and Velasquez's wages by requiring the claimants to purchase uniforms without reimbursement and for charging the claimants for missing beer inventory in violation of Labor Law § 193. Respondent further assessed a $500.00 civil penalty for making prohibited deductions from wages of employees in violation of Labor Law § 193.1.

Petitioners do not dispute making claimants pay for missing beer. Their own beer inventory logs confirm the impermissible practice. Thus, we affirm the $500.00 penalty that respondent assessed for making prohibited deductions from wages of employees in violation of Labor Law § 193.1.

The issues remaining are whether claimants were required to purchase and wear a uniform that could not be worn for everyday use and whether there is any evidence in the record to establish how much petitioners unlawfully deducted for missing beer inventory.

The Hospitality Industry Wage Order regulates uniforms. Specifically, Department of Labor Regulations (12 NYCRR §) 146-3.10 (a) provides "[a] *required uniform* is that clothing required to be worn while working at the request of an employer, or to comply with any federal, state or local law, rule or regulation, *except* clothing that may be worn as part of an employee's ordinary wardrobe." "Ordinary wardrobe" is defined as "ordinary basic street clothing selected by the employee where the employer permits variations in details of dress" (Department of Labor Regulations [12 NYCRR] § 146-3.10 [b]). The question of whether a uniform constitutes an "ordinary wardrobe" is best left to the fact finder to determine whether a particular type of clothing might be part of a particular employee's "ordinary wardrobe" (*Bodon v Domino's Pizza, Inc.*, 2013 U.S. Dist. LEXIS 181961 at *9 [ED NY November 25, 2013 09-cv-2941 (SLT)]). Santamaria's limited and conflicting testimony did not address whether or not the specific colored shirts, skirts and aprons were considered part of an employee's ordinary wardrobe. Rather, Santamaria testified that one color would be worn for a week, such as Wednesday to Wednesday. She then also stated that there would be a different color for Friday, Saturday and Sunday. Calle testified that she would not have worn her uniform outside of work. When asked why she would not, she stated that it was because it was a uniform. Velasquez testified that she did not already have the correct colored garments which made up the uniform. Based on the credible testimony from Velasquez that these garments were not already part of her ordinary wardrobe, and from Calle that these garments were not be part of what she wore when not at work, we find that petitioners failed to prove that the clothing at issue could be worn as part of the claimants' ordinary wardrobe.

Mera's claim form indicates that she spent $136.00 on a required uniform; Velasquez's claim form indicates that she spent $154.00 on a required uniform; and, Calle's interview sheet provides that she spent $106.00 on a required uniform (not including the jacket expense as she testified at hearing that she did not have to purchase a jacket). We affirm these amounts for uniforms that are included in the unlawful deduction order.

Regarding the impermissible deductions for beer which remained unaccounted for at the end of each shift, Article 6, Labor Law § 193 generally prohibits deductions from wages unless such deductions fall under certain enumerated categories, none of which are applicable to these facts and none of which have been asserted by petitioners (Labor Law § 193 [1]). All three claimants, Velasquez, Mera and Calle, credibly testified that the deductions took place. Santamaria confirmed that the deductions took place, although she characterized them as the equally impermissible practice of making employees pay the employer for missing inventory, regardless of whether it was done as a deduction or a direct payment (Labor Law § 193 [2]). The beer inventory logs submitted into evidence by petitioners' further support that these deductions were made. However, Medina testified that he did not know how respondent calculated the total contained in the deductions order for missing beer, other than by taking the total contained on the order, subtracting the amount for uniform deductions, and presuming the remainder was for missing beer. This is not a rational basis upon which to determine the total owed for impermissible deductions for missing beer as it ignores the problem of the basis for the original calculation.

The claim form for Velasquez states that she suffered $270.00 worth of deductions made by petitioners for the missing inventory. However, the order directs payment of $686.00 total for Velasquez, of which $154.00 is for the uniform cost. The difference of $532.00 is not accounted for by the claim form, which states that deductions of $270.00 were made. The claim form for Mera states the $350.00 was deducted for the missing inventory. The order directs payment of $754.00, of which $136.00 is for the uniform. The difference of $618.00 is not accounted for by

the claim form, which states that deductions of $350.00 for beer had been made. The interview sheet for Calle states that she suffered $600.00 in deductions for missing beer and money shortages from the register and $106.00 in deductions for required uniforms (not including the jacket expense as discussed above), but the order directs payment of only $642.00." Under the circumstances of this case, where there is no question that deductions were made for missing beer, the claimants have provided specific information on the claim forms regarding the amount, and respondent cannot explain the rational basis for its total deductions calculations, the amounts must be reduced based on the best available evidence which we determine to be the information contained on the claim forms and interview sheet (*see Matter of Angel Moina and Maria J. Moina and Napoleon Moina and La Posada Rest Inc. and Gaviota's Restaurant and Sports Bar Inc. and Tequila Song Corp.*, Docket No. PR 10-069, at pp. 15-16 [July 25, 2013]). The total owed for deductions for both beer and uniform to Velasquez is reduced to $424.00. The total owed for deductions for both beer and uniform to Mera is reduced to $486.00. As the missing beer amount claimed by Calle is greater than the amount already contained in the order, that amount will remain unchanged.

As such, the unlawful deductions order is reduced to $1,552.00, as itemized above, and the interest, liquidated damages and civil penalties should be reduced consistent with this. As modified, the unlawful deductions order is affirmed.

Interest

Labor Law § 219 [1] provides that when the Commissioner determines that wages are due, the order directing payment of those wages shall include "interest at the rate of interest 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." Petitioners did not offer any evidence to challenge the imposition of interest. The issue is thereby waived pursuant to Labor Law§ 101 (2). As such, we affirm the interest in the minimum wage, unpaid wages, and unlawful deduction order.

Liquidated Damages

Labor Law § 218 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 failed to offer evidence challenging the imposition of liquidated damages. The issue is thereby waived pursuant to Labor Law§ 101 (2). As such, we affirm the liquidated damages in the minimum wage, unpaid wages, and unlawful deduction order.

Civil Penalties

The minimum wage, unpaid wages, and unlawful deduction order includes 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 Article 6 or Article 19 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."

Medina testified that he recommended a 100% civil penalty, not 200%, which is the maximum penalty that can be assessed, because the violations were not "totally egregious" because the claimants were being paid something. He further testified that he recommended a 100% civil penalty should be assessed because the claimants were "being paid a shift, billed a state minimum wage, they had long hours, they were not being given meal breaks, they were forced to buy uniforms and the employer will – would demand – sending text messages saying the color of the day is fuchsia or something else." While Medina's testimony did not evidence that respondent considered all of the required factors to determine the amount of civil penalties to be assessed; petitioners did not introduce sufficient evidence or authority for their challenge to the civil penalties. The petition states that the business was a mom-and-pop business and, thus, the penalties are unreasonable. At the hearing, Santamaria testified that she did not own the business but was a manager and the owner did not testify. There was no evidence introduced to support the claim of the business being a mom-and-pop business, nor did petitioners explain what that means with respect to how civil penalties should be assessed. Petitioners did not introduce any evidence to challenge the civil penalty. The issue is thereby waived pursuant to Labor Law§ 101 (2). As such, we are required to affirm the civil penalty in the unpaid wages order.

The Article 5 Civil Penalty is Affirmed

The Commissioner assessed a $500.00 penalty against petitioners for failing to provide at least 30 minutes for a meal break, in violation of Labor Law § 162. Petitioners failed to present sufficient evidence to prove that they provided a 30 minute meal break to each employee beyond general testimony that they were given 30 minute meal breaks and often took longer breaks. Petitioners had no documentary evidence of meal breaks being provided to claimants. The claimants each credibly testified that they were not provided with a 30 minute break during their shifts. Without documentary evidence, petitioners' general testimony that the claimants received 30 minute meal breaks is insufficient to negate the reasonableness of respondent's order. Thus, we affirm the Article 5 civil penalty.

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NOW, THEREFORE, IT IS HEREBY RESOLVED AND ORDERED THAT:

1. The Article 19 minimum wage order as to Mera, Velasquez and Calle is affirmed;

2. The Article 6 unpaid wages order is affirmed;

3. The Article 6 unlawful deductions order is modified to $1,552.00 plus interest, liquidated damages and civil penalties, and is affirmed as modified;

4. The penalty order is affirmed; and

5. The petition for review be, and the same hereby is, otherwise denied.

Dated and signed by the Members of the Industrial Board of Appeals on November 18, 2020.

Molly Doherty, Chairperson
New York, New York

Michael A. Arcuri, Member
Utica, New York

Gloribelle J. Perez, Member
New York, New York

Patricia Kakalec, Member
Brooklyn, New York

Najah Farley, Member
Brooklyn, New York