STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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| In the Matter of the Petition of: | |
| SUSAN R. MELOCCARO, WARREN L. RICHMAN, AND CAREER AND EDUCATIONAL CONSULTANTS, INC. T/A CAREER AND EDUCATIONAL CONSULTANTS, | |
| Petitioners, | DOCKET NO. PR 18-059 |
| To Review Under Section 101 of the Labor Law: An Order to Comply with Articles 5, 6 and 19, dated August 2, 2018, | RESOLUTION OF DECISION |
| - against - | |
| THE COMMISSIONER OF LABOR, | |
| Respondent. | |

**APPEARANCES**

*Sheldon J. Fleishman, Esq.*, New York, for petitioners.

*Pico P. Ben-Amotz, General Counsel, NYS Department of Labor*, Albany (*Steven J. Pepe* of counsel), for respondent.[1]

**WITNESSES**

Susan Meloccaro and Warren Richman, for petitioners.

Senior Labor Standards Investigator Julio Rodriguez and Josephine Bubb, for respondent.

**WHEREAS:**

Petitioners Susan R. Meloccaro (hereinafter "Meloccaro"), Warren L. Richman (hereinafter "Richman"), and Career and Educational Consultants, Inc. T/A Career and Educational Consultants (hereinafter "CEC") filed a petition with the Industrial Board of Appeals (hereinafter "Board") in this matter on September 28, 2018, pursuant to Labor Law § 101, seeking review of an order issued against them by respondent Commissioner of Labor (hereinafter

[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.

"Commissioner" or "the Department") on August 2, 2018. The petition was amended on November 5, 2018. Respondent filed an answer to the petition on December 18, 2018.

Upon notice to the parties a hearing was held in this matter on March 20, 2019 and on May 1, 2019, in New York, New York, before Gloribelle J. Perez, member 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") with Articles 5, 6 and 19 of the Labor Law under review directs compliance with the Labor Law and payment to respondent for unpaid wages due to 19 claimants in the total amount of $296,484.67 for the time period from June 1, 2013 to July 26, 2013 and from October 14, 2013 to June 17, 2016, interest continuing thereon at the rate of 16% calculated to the date of the order in the amount of $106,905.66, 100% liquidated damages in the amount of $296,484.67, and assesses a 50% civil penalty in the amount of $148,242.34. The order further assesses separate civil penalties, each in the amount of $1,000.00, for violations of Article 19 of the Labor Law, Section 661, and Department of Labor Regulations (12 NYCRR) §§ 142-2.6, failure to maintain complete payroll records, and 142-2.7, failure to provide wage statements to employees. There is also a $500.00 civil penalty assessed for a violation of Article 5 of the Labor Law, Section 162, for failure to provide meal periods during work shifts. The total amount due in the order is $850,617.34.

Petitioners allege that the order is invalid and unreasonable because petitioners do not owe the amount of wages that respondent included in the order as evidenced by bank records, cancelled checks, and copies of money orders. Petitioners also allege that some of the claimants did not work for petitioners during some or all of the claim period and some of the claimants did not work full-time for petitioners during the claim period. Petitioners further assert that some of the claimants had excessive absences from work and any wages owed to those claimants should be reduced based on excessive absences. Petitioners further allege that Luciano Castro did not work overtime hours, which required pre-approval, but he chose to eat his lunch at his desk. Petitioners also assert that they provided records to the Department of Labor throughout the course of the investigation and attempted to resolve the matter prior to the issuance of the order to comply.

At the completion of petitioners' presentation of their prima face case, respondent moved to dismiss for petitioners' failure to make out a prima facie case. Decision was reserved on that motion. As discussed below, we deny respondent's motion.

## SUMMARY OF EVIDENCE

### Wage Claims in the Order to Comply

The order to comply that is under review includes wage claims for 19 claimants. One of the wage claims, for Luciano Castro, is an Article 19 overtime wage claim while the 18 other claims are Article 6 unpaid wages claims. The claims included in the order to comply are detailed as follows:

| Name | Dates | Amount |
|---|---|---|
| Denise Dobie | 10/5/2015 to 4/22/2016 | $10,150.00 |
| David Genaro | 10/5/2015 to 4/22/2016 | $20,769.00 |
| Louise Johnson | 10/5/2015 to 4/22/2016 | $13,860.00 |
| Wael Karkour | 8/1/2014 to 10/31/2014 | $ 900.00 |
| Nelson Maldonado | 10/5/2015 to 4/22/2016 | $23,200.00 |
| Dexter Rodney | 10/5/2015 to 4/22/2016 | $22,703.52 |
| Ann Marie Thomas | 10/5/2015 to 4/22/2016 | $25,009.50 |
| Victoria Watson | 9/13/2015 to 6/17/2016 | $ 8,566.50 |
| Sherry Bryant | 10/5/2015 to 4/22/2016 | $22,307.67 |
| Josephine Bubb | 10/5/2015 to 4/22/2016 | $15,576.90 |
| Dana Matthew | 10/5/2015 to 4/22/2016 | $16,222.50 |
| Joseph Mongiela | 10/5/2015 to 4/22/2016 | $24,750.00 |
| Joe Rodriguez | 3/25/2016 to 4/11/2016 | $ 1,040.62 |
| Eduardo Rosa | 10/5/2015 to 4/22/2016 | $15,000.00 |
| Mildred Santos | 10/5/2015 to 4/22/2016 | $28.845.90 |
| Peter Shea | 10/5/2015 to 4/22/2016 | $10,875.00 |
| Svetlana Shumskaya | 10/14/2013 to 4/22/2016 | $15,529.38 |
| Pierce Sullivan | 10/5/2015 to 6/10/2016 | $20,970.50 |
| Luciano Castro | 6/1/2013 to 7/26/2013 | $ 207.68 |

Petitioners' Evidence

*Testimony of Susan Meloccaro and Petitioners' Documentary Evidence*

Meloccaro co-founded CEC with her husband, Richman, and it became fully operational in 1989. CEC provided job training, counseling and job placement services. CEC progressively grew until it had three locations and 88 employees in 2012. CEC lost a large contract with New York City in 2012 to a larger company. The larger company subcontracted with CEC to provide services, but there was gap between when CEC's primary contract ended in 2012 and when the subcontracts began in 2013, so CEC closed offices and laid off 60 employees at the end of 2012. CEC continued to operate with four subcontracts and about 18 or 19 employees and it downsized to one location in a small office on West 30th Street in Manhattan. Most employees worked in the West 30th Street office but some employees worked offsite in Brooklyn, Harlem and the Bronx, at offices of the larger companies with which CEC had subcontracts.

Once CEC only received money through subcontracts, rather than through direct payment from primary contracts, it became difficult to manage the finances of the company. CEC often had problems with cash flow because there was a delay between when CEC submitted an invoice to the primary contractor for payment and when CEC received payment for its work. CEC closed in March 2017 after its revenue continued to decline. When CEC closed, it had about 14 employees.

CEC had a 30-page employee handbook, which Meloccaro testified that employees were provided with when they began employment with CEC. Each employee had to sign, upon being hired, that the employee handbook was received. As indicated in the employee handbook admitted into evidence and which indicates that it was last amended in February 2004, during the first three

years of employment, employees would accrue one day per month to use as vacation, personal, or sick leave time, for a total of 12 paid leave days per year. After the first three years of employment, the paid leave time accrued at the rate of 1.25 days per month, for a total of 15 days per year. Meloccaro testified that employees also received 11 paid holidays each year, which is also stated in the employee handbook. According to the employee handbook, if an employee had more absences than the provided number of paid leave days, the employee was not to receive pay for the additional days. The employee handbook also states that if an employee violates the policy on absences, CEC can deny pay or benefits, take disciplinary action, or terminate an employee. Meloccaro testified that there was a problem with employees having excessive absences.

Employees, generally, were paid on Fridays, but at times there were cash flow problems and CEC did not timely pay employees in full. When that occurred, CEC paid about ½ of the paycheck on the usual Friday pay day and paid the rest of the wages that were owed on the following Tuesday, when they received more money the primary contractors. The claimants were salaried employees who received the same amount in pay each pay period.

Meloccaro testified that a Department of Labor investigator, Shaela Montes De Oca (hereinafter "Montes De Oca"), visited the CEC offices in April 2016 after receiving complaints from employees about unpaid wages. Meloccaro testified that she explained to Montes De Oca that they were having trouble making payroll and that Montes De Oca advised that they could reduce salaries provided it remained above minimum wage. CEC then reduced salaries and informed the employees of the reduced salaries in a memo dated April 22, 2016. The memo also stated ". . . additional payments will be applied to amounts presently owed to employees" and directs employees to ". . . bring their amounts owed to be reconciled to Company records." After that, employees were not happy that their pay was reduced and the problem of excessive absences became worse.

In June 2016, some employees asked to be laid off. Meloccaro testified that Dana Matthews (hereinafter "Matthews"), a claimant in this matter, requested to be laid off and she signed a statement saying that she had received all pay that was owed to her at the time that she stopped working at CEC. Petitioners offered both a letter of resignation and a receipt signed by Matthews acknowledging receipt of $200.00. There is nothing in the record that is a signed statement by Matthews saying that she received all pay that was owed. Meloccaro testified that Victoria Watson and Pierre Sullivan also requested lay-offs and Joe Rodriguez was laid off in May 2016 after he took some unpaid leave and then returned before being laid off.

Meloccaro testified that after Montes De Oca's visit in April 2016, CEC provided documents to her, including spreadsheets showing payments that had been made to employees and the wages that employees were owed. In January 2017, CEC received a letter and report from Montes De Oca which, Meloccaro testified, made it look like CEC had not paid employees at all between October 2015 and April 2016. CEC then provided copies of paychecks to the Department of Labor. CEC had all of the paychecks from October 2015 to April 2016 but when CEC first sent the copies of the paychecks to the Department of Labor, they did not have copies of the backs of the checks indicating that they were cashed. Meloccaro attended a compliance conference with Suk Chan Leung from the Department of Labor in September 2017.

In about February 2018, CEC sent the Department of Labor copies of the backs of the checks after receiving them from the bank and Meloccaro began speaking with Julio Rodriguez

(hereinafter "Rodriguez"), an investigator at the Department of Labor sometime in or around February 2018. Rodriguez told Meloccaro that some of the claimants told him that they did not receive some of the paychecks that CEC sent records showing were cashed. Meloccaro testified that Rodriguez said that some of the claimants believed that their signatures on some of the paychecks were forged, or that their signatures were copied and pasted from other documents onto those paychecks. Meloccaro found this to be "mind boggling" since they had received these records directly from the bank. Meloccaro attended another compliance conference at the Department of Labor on May 18, 2018 and brought documents to that conference, including attendance records and copies of paychecks that had been cashed.

Meloccaro testified that the petitioners agreed that they owed Wael Karkour (hereinafter "Karkour") the $900.00 included in the order. Meloccaro also testified that Luciano Castro's (hereinafter "Castro") claim in the amount of $207.68 was for overtime because he did not get a lunch hour was not correct. Meloccaro testified that Castro had the right to take a lunch hour but chose to eat his lunch at his desk. Overtime had to be pre-approved, as documented by the employee manual offered into evidence, but it was never approved for Castro. Petitioners did not offer any documents regarding Castro's actual work hours during the relevant period, such as documents showing his times in and times out. The employee manual references time sheets that are required to be filled out each day, totaled at the end of the work week and submitted to a supervisor. No such time sheets were offered into evidence.

Meloccaro's testimony regarding claims for the other claimants are detailed below. They can be categorized as (1) claimants for which checks and money orders show they are owed less than the amount in the order; (2) claimants who split their work time between petitioners and another employer; (3) claimants who did not work for petitioners for the all or some of the claim period; and (4) claimants who had excessive absences.

(1) Claimants for which checks and money orders show they are owed less than the amount in the order.

Meloccaro testified that some claimants were not owed the wages included in the order because petitioners' evidence of cancelled checks and money orders showed some of the wages were paid.

*Ann Marie Thomas* - Meloccaro testified that petitioners agree that they owe Ann Marie Thomas (hereinafter "Thomas") $6,650.25 but not the $25,009.50 included in the order. She testified that petitioners had cancelled checks and copies of money orders showing Thomas had been paid $18,359.25 between the date of October 2, 2015 and August 11, 2016, leaving a balance of $6,650.25.

*Victoria Watson* - Meloccaro testified that petitioners do not owe Victoria Watson (hereinafter "Watson") any wages. She testified that petitioners had cancelled checks and copies of money orders that fall within the date range of October 9, 2015 to June 28, 2016 showing Watson was paid $10,615.45 during that period. Watson claimed the checks and money orders were forged. Meloccaro testified that the checks and money orders were not forged, but rather had been endorsed by Watson and, thus, petitioners owed her no wages.

*Dana Matthew* - Meloccaro testified that petitioners do not owe Matthew any wages because they paid her $10,516.37 during the claim period. Meloccaro asserted that when

Matthew resigned in July 2016, she agreed that she was only owed $403.50. Matthew acknowledged receipt of $200.00 in a signed document that petitioners submitted into evidence but there is no document that states Matthew acknowledged she is owed no wages.

*Joseph Mongiela* - Meloccaro testified that petitioners paid Joseph Mongiela (hereinafter "Mongiela") $20,493.14 in wages during the relevant period and that they do not owe Mongiela any wages, as evidenced by cancelled checks and copies of money orders. The cancelled checks and copies of money orders fall within the date range of September 25, 2015 and October 13, 2016.

*Mildred Santos* - Meloccaro testified that petitioners owe Mildred Santos (hereinafter "Santos") wages in the amount of $804.23, not the $28,845.90 in the order. Petitioners paid Santos $16,938.55 in wages during the relevant period as evidenced in cancelled checks and copies of money orders that fall within the date range of October 2, 2015 and May 11, 2016.

*Pierce Sullivan* - Meloccaro testified that petitioners owe $1,614.09 in unpaid wages to Pierce Sullivan (hereinafter "Sullivan"), as evidenced by the cancelled checks and copies of money orders showing what he was paid during the relevant period. The cancelled checks and copies of money orders fall within the date range of October 2, 2015 to April 29, 2016.

(2) Claimants who split their work time between petitioners and another employer.

Meloccaro testified that some claimants worked part-time for CEC and part-time for another entity or left CEC to work for another entity during the relevant period. She also testified that they were not owed the wages included in the order because petitioners' evidence of cancelled checks and money orders showed some of the wages were paid.

*Louise Johnson* – Meloccaro testified that Louise Johnson's (hereinafter "Johnson") split schedule is documented in a March 21, 2016 memorandum. That memorandum does not contain specific information about the specific hours that Johnson worked for CEC and the specific hours worked for the other entity. Meloccaro further testified that petitioners owe Johnson $1,326.21 because they have cancelled checks and copies of money orders showing that they paid Johnson $12,533.79 between the dates of October 2, 2015 and September 9, 2016.

*Sherry Bryant* - Meloccaro testified that petitioners did not owe Sherry Bryant (hereinafter "Bryant") the $22,307.67 set forth in the order. She testified that Bryant primarily worked for another entity that shared space with petitioners, as reflected in a March 21, 2016 memo which states that commencing March 21, 2016, Bryant will be on the payroll of another company. The memo also states that petitioners ". . . will continue to compensate you for placement and retention services on an as needed basis, however you are primarily providing services to [the other entity]." Meloccaro testified that Bryant only worked for petitioners during the relevant period on an as needed basis, but not full-time and that she was paid wages that she was owed. Bryant's claim that the checks that petitioners offered as proof of wages paid were forged and that she did not endorse them was not true.

Meloccaro testified that they only owed Bryant $1,220.00 for the relevant period as evidenced by the cancelled checks and copies of money orders that fall within the date range of October 2, 2015 to October 14, 2016.

(3) Claimants who did not work for petitioners for the entirety of the claim period.

Meloccaro testified that some claimants did not work for petitioners for the entire duration of the claim period. She also testified that some of those claimants were not owed the wages included in the order because petitioners' evidence of cancelled checks and money orders showed some of the wages were paid.

*Nelson Maldonado* - Meloccaro testified that on March 21, 2016, Nelson Maldonado (hereinafter "Maldonado") became an employee of another entity that shared space with petitioners and, thus, was no longer an employee of petitioners on that date. Petitioners offered a memo documenting this arrangement. Meloccaro further testified that she had cancelled checks showing that Maldonado was paid wages owed to him during the relevant period. The checks fall within the date range of October 13, 2015 to March 28, 2016.

*Denise Dobie* - Denise Dobie (hereinafter "Dobie") came and went as an employee. She was employed by petitioners from April 9, 2013 to January 24, 2014; April 13, 2015 to September 15, 2015; and, March 17, 2016 to April 18, 2016. Petitioners offered into evidence copies of a termination notice stating that Dobie's employment was terminated effective September 15, 2015 and a copy of a re-hire letter stating that she was rehired effective March 17, 2016. Thus, Meloccaro testified, the only part of the claim period during which Dobie was employed was from March 17, 2016 to April 18, 2016 and petitioners offered copies of checks that fall within the date range of March 21, 2016 to May 3, 2016 showing that Dobie was paid.

*David Genaro* - Meloccaro testified that David Genaro (hereinafter "Genaro") was out on leave in November and December 2015 but offered no documentary evidence regarding that leave. Petitioners agreed that they owe Genaro $339.81 but not the $20,769.00 that is included in the order, as evidenced by cancelled checks that were offered. The cancelled check and copies of money orders offered by petitioners fall within the date range of October 6, 2015 and October 11, 2016 and include checks for the months of November and December 2015, when Meloccaro testified Genaro was on leave.

*Peter Shea* - Meloccaro testified that Peter Shea (hereinafter "Shea") moved to Florida in October 2014. After he moved to Florida, Shea was paid per project that he did remotely and was no longer a salaried employee. Meloccaro testified that they do not owe Shea any wages for the relevant period and that they paid him for any projects that he did during the relevant period. The documentation regarding Shea includes a memo dated October 9, 2014 which states that Shea's last day in the office was October 10, 2014 and that he will "continue to work on the document imaging and other consulting functions to be determined." Petitioners did not offer any documentation regarding wages paid to Shea.

(4) Claimants who had excessive absences or lateness.

Meloccaro also testified that some claimants were not owed all of the wages included in the order because they had attendance or call-in problems, thereby reducing the wages that they earned. She also testified that they were not owed the wages included in the order because petitioners' evidence of cancelled checks and money orders showed some of the wages were paid.

*Josephine Bubb* - Meloccaro testified that Josephine Bubb (hereinafter "Bubb") had 34.75 absences in 2016, as evidenced by a 2016 attendance report and 2015 and 2016 calendars which had handwritten "A"s on various dates throughout the calendars, which Meloccaro and Richman referred to as "attendance cards." Meloccaro further testified that petitioners owe Bubb $408.64 because they paid her $12,037.50 during the relevant period as evidenced by cancelled checks.

*Joe Rodriguez* - Meloccaro testified that petitioners do not owe Joe Rodriguez (hereinafter "Rodriguez") any wages because Rodriguez had excessive absences that exceeded his earned paid leave during the relevant period. Petitioners provided copies of annual calendars with Rodriguez's name on the top and with "A" handwritten on dates throughout the calendars. Petitioners also provided cancelled checks and copies of money orders for Rodriguez that fell within the date range of October 2, 2015 to June 3, 2016.

*Eduardo Rosa* - Meloccaro testified that petitioners did not owe Eduardo Rosa (hereinafter "Rosa") any wages because they paid him $11,620.17 during the relevant period, as evidenced in cancelled checks and copies of money orders. The cancelled checks fall within the date range of October 2, 2015 to October 14, 2016. Additionally, Meloccaro testified that Rosa had excessive absences during the relevant period, which is documented generally in memorandums. There is no documentation specifically tracking absences for Rosa, such as a marked annual calendar, or "attendance card," as was offered for other claimants.

*Svetlana Shumskaya* - Meloccaro testified that Svetlana Shumskaya (hereinafter "Shumskaya") had excessive absences, as evidenced by "attendance cards." In 2016, Shumskaya was absent 40.5 days. Petitioners offered annual calendars for 2016 and 2017 into evidence that had Shumskaya's name at the top and handwritten "A" marked on certain dates on the calendars. Meloccaro testified that, as evidenced in cancelled checks and copies of money orders that fall within the date range of May 8, 2015 to September 30, 2016, petitioners owe Shumskaya $1,511.52 for the relevant period of her claim, not the $15,529.38 included in the order.

*Dexter Rodney* - Meloccaro testified that petitioners do not owe Dexter Rodney (hereinafter "Rodney") any wages. She testified that petitioners had cancelled checks showing Rodney was paid during the relevant period and he had disciplinary problems because he would not properly call in to report that he was working. The cancelled checks and copies of money orders fall within the date range of October 13, 2015 to April 25, 2016. Petitioners also offered a memo into evidence that stated that Rodney was coming to work late but did not contain specific information regarding dates that Rodney was late or absent from work.

*Testimony of Warren Richman*

Richman became the vice president of CEC in 1989 and he held that job until CEC closed. Richman testified that his wife, Meloccaro, founded CEC in 1982 and was its president until it closed. Richman's responsibilities for CEC included monitoring all of the expenses and revenue, reconciling bank statements, and overseeing all of the financial activities related to CEC's funding contracts.

Richman testified that CEC progressively lost all of their primary contracts between 2009 and 2012 and then beginning in January 2013 only operated as subcontractors. CEC's business was reduced by about 90%. CEC's employees were reduced from 80 in December 2012 to about 10 or 12 in January 2013. Richman testified that after they downsized in January 2013 until about September 2015, they were able to "sustain the daily operations" but beginning in October 2015, CEC began having "difficulties paying the staff." Richman testified during this time in 2015, they had about 14 employees. CEC generally paid employees every Friday but if some employees' paychecks were short, they would pay them the remaining amount on the following Tuesday or Wednesday in another check. Richman testified that generally CEC did not give employees pay stubs with their checks, though sometimes they did. Richman further testified that paychecks did not indicate the dates of the pay period covered by the check. CEC also paid employees with money orders at times. CEC did not have any records to show that the money order payments had been negotiated. Richman testified that there are no signed receipts that the intended recipient received the money order.

Richman testified that only one employee, Thomas, was not paid outstanding wages in less than a week, but all others were paid in less than a week after the usual Friday pay day.

Richman testified that CEC had sign-in/sign-out logs that employees who worked in the office signed when they arrived at work and signed when they left work, but did not sign for meal breaks. If someone was not going to be at work, that employee was to call the office to say that they would not be at work. These logs were CEC's records showing whether someone came to work. CEC also had cards for each employee that had calendars and showed days that they did not work. Employees would see those cards approximately monthly. The logs were not provided to the Department of Labor during the investigation because CEC no longer had those records.

Richman also testified that Louise Johnson and Sherry Bryant worked for another organization that shared space with CEC during part of the claim period.

Respondent's Evidence

*Testimony of Senior Labor Standards Investigator Julio Rodriguez and Department of Labor's Documentary Evidence*

Julio Rodriguez (hereinafter "Rodriguez") is a senior labor standards investigator with the Department of Labor. Rodriguez first became involved in this matter in 2017 when there was a compliance conference scheduled. Rodriguez testified that during a September 18, 2017 compliance conference, petitioners provided additional records showing payments made to claimants. Some of those claimants stated that they had never received those payments and believed the records were fraudulent or that their signatures were forged. Rodriguez testified that

he had no other information or documentation to support the claimants' assertions that some payments were fraudulent or contained their forged signatures. Rodriguez testified that the checks that petitioners submitted as evidence of payment did not indicate what period the payment was for and, thus, were insufficient to prove that payments were made for the relevant period for which claimants stated they were not paid. Rodriguez testified that while the law permits up to a 200% civil penalty for a wage violation, he recommended a 50% civil penalty in this matter because "the employer was responsive throughout the inspection and attempted to resolve the matter."

The claim filed by Castro states that from October 23, 2012 to September 4, 2015, Castro worked from 10:00 a.m. to 7:00 p.m. Monday through Friday and he was only permitted to take a one hour lunch on two days per week. Respondent determined that petitioners owed $207.68 in unpaid overtime hours to Castro from June 1, 2013 to July 26, 2013 because he did not get a lunch break for three days during each of those weeks. Respondent's investigative records state that Castro's claim period was being shortened because of a July 22, 2013 memo issued to Castro by petitioners that states that Castro's work schedule is 11:00 a.m. to 7:00 p.m., different from the 10:00 a.m. to 7:00 p.m. schedule that Castro claimed to work during the period he included in his claim form.

*Testimony of Claimant Josephine Bubb*

Josephine Bubb was employed by CEC for almost 6 years, until July 2016. Bubb was a full-time employee with several different titles throughout the course of her employment. She handled retention, data entry and billing, among other tasks. Bubb was paid an annual salary of $27,000.00. Bubb testified that if she missed a day of work, money was taken out of her paycheck and that she did not receive vacation time or sick time. Bubb was paid weekly by check or money order. Bubb testified that toward the end of her employment she was only getting paid by money order, not check. Her weekly net paycheck was about $513.60 or $513.65.

Beginning approximately October 2015, Bubb never received her full pay on time and CEC never caught up on what they owed her. Bubb testified that no one from Department of Labor showed her documents of payments that petitioners said they made to her. Bubb maintained her own records of what she was owed and what she was paid but she never saw the records of payments that petitioners said they made to her. Bubb's own records were not offered into evidence. Bubb believed that petitioners owed her about $6,000.00.

## 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

Petitioner's 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, 103; Board Rules [12 NYCRR] § 65.30; *Matter of Garcia v Heady*, 46 AD3d 1088, 1090 [3d Dept 2007]; *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]). The hearing before the Board is de novo (Board Rules [12 NYCRR] § 66.1 [c]). For the reasons discussed below, we find that petitioners failed to establish a prima facie case or otherwise meet their burden of proof that the Commissioner's order is invalid or unreasonable but that the order must be modified as discussed below.

Petitioners' Failure to Maintain Payroll Records

Articles 6 and 19 of the Labor Law requires that an employer pay wages to its employees (Labor Law §§ 191 and 661). Articles 6 and 19 also require employers to maintain, for six years, certain records of the hours their employees worked and the wages they paid them (Labor Law §§ 195 [4] and 661). The records must show for each employee, among other things, the number of hours worked weekly, the rate of pay, the amount of gross wages, deductions from gross wages, and allowances, if any (*id.*). 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]; Department of Labor Regulations [12 NYCRR] § 142-2.6]). The required recordkeeping provides proof to the employer, the employee, and the Commissioner that the employee has been properly paid.

Petitioners did not maintain the required records as their payroll records simply consisted of cancelled checks or copies of money orders made out to employees but did not include information about gross wages, deductions and allowances, or hours or days of work. Without that information, the checks and money orders were not proof that an employee was correctly paid for work during a particular pay period. Additionally, while for some claimants petitioners offered annual calendars with "A" marked on certain dates and documents stating cumulative paid days off earned in a year and cumulative paid days off used in a year, they were not offered for all claimants. Petitioners otherwise offered no records showing actual days worked by claimants. The petitioners' employee manual references daily and weekly time keeping records that employees were required to maintain and submit to supervisors, yet, petitioners did not offer those records and conceded that they were not aware of the exact current location of these records. The records offered by petitioners are insufficient to satisfy the recordkeeping requirement of the Labor Law and, thus, the $1,000.00 civil penalty for failure to maintain the required records in violation of Article 19 of the Labor Law, Section 661, and Department of Labor Regulations (12 NYCRR) § 142-2.6 is affirmed.

Employers are also required to furnish each employee a statement with every payment of wages listing the hours worked, rate paid, gross and net wages, and any allowances claimed as part of the minimum wage (Labor Law § 661; Department of Labor Regulations [12 NYCRR] § 142-2.7). Petitioners concede that they did not provide employees with wage statements. As such, we affirm the $1,000.00 penalty issued by respondent for petitioners' failure to provide employees with the required wage statements.

The Unpaid Wages Order Is Affirmed, as Modified

In the absence of required payroll records, an employer bears the burden of proving that the disputed wages were paid (Labor Law § 196-a). Where the employer has failed to keep such records, the Commissioner may draw reasonable inferences and calculate unpaid wages based on the "best available evidence" drawn from employee statements or other evidence, even if results may be merely approximate (*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 petitioner has the burden of showing that the Commissioner's order is invalid or unreasonable by a preponderance of the evidence of the specific days that the claimants worked and that they were paid for those days, or other evidence that shows the Commissioner's findings to be invalid or unreasonable (*Matter of Joseph Baglio and the Club at Windham*, 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).

*Petitioners' canceled checks and copies of money orders alone are insufficient proof of payment.*

Petitioners assert that some claimants are not owed the amounts included in the order as evidenced by the cancelled checks and copies of money orders offered into evidence and that if petitioners are given credit for the payments reflected in those checks and money orders, the unpaid wages would be greatly reduced for each of those claimants. The Board does not agree with petitioners' assertion. Petitioners' records must permit a complete accounting of wages earned and wages paid (*Matter of Ali Araif AKA Araif Ali and Buffalo Financial Services LLC T/A Delavan Check Cashing*, Docket No. PR 18-040, at p. 7 [May 29, 2019]; *Matter of Michael Cave*, Docket No. PR 10-337, *and Richard Cave and U.S. Wood, LLC*, Docket No. PR 10-345, at p.5 [April 29, 2013] [the records did not allow the Board to make an accounting to determine that the claimant was paid for the weeks included in the order]).

First, the copies of money orders do not prove the Commissioner's order was incorrect because there is no evidence that each of those money orders were tendered and negotiated by the claimants that they are made out to (*Matter of Wilson Quiceno and Sendexpress Inc. (T/A Send Express)*, Docket No. PR 14-287, at p. 9 [July 13, 2016] ["Petitioners did not submit any cancelled checks signed by claimant. . . . Without proof that claimant actually received these wages, petitioners failed to meet their burden of proof that he was paid the precise wages owed for the work that he performed."]; *Matter of Michael Cave*, Docket No. PR 10-337, *and Richard Cave and U.S. Wood, LLC*, Docket No. PR 10-345, at p.5). Richman acknowledged that petitioners did not attempt to obtain or offer into evidence documents showing that the money orders were negotiated or even receipts showing that the money orders were given to the intended recipients. Thus, the Board gives no credit to the copies of money orders offered by petitioners as evidence that those payments were made to claimants.

Second, while the cancelled checks in evidence appear to have been endorsed by the claimants and cashed, as evidenced by the bank records that petitioners offered, and some of the

checks are dated during the claim period, the checks do not indicate what period of work they are payment for nor do they indicate the wage rate for the employee, which is necessary information to prove payment for actual work performed (*Matter of Dora E. Idez and Javier Roman Idez (T/A Subway)*, Docket No. PR 14-274, at p. 4 [May 3, 2017] [check submitted into evidence did not indicate what pay period it covers and is insufficient evidence to overcome the order]). In this matter, the check amounts vary widely even for the same claimant despite the claimants being salaried employees who were paid weekly and who generally worked a fixed set of hours, thereby earning the same amount each week. As an example, the checks issued for Mongelia starting on December 11, 2015 (in the order as listed in petitioners' records) are as follows: 12/11/15: $179.80; 12/15/15: $75.00; 11/27/15: $316.50; 12/18/15: $130.64; 12/02/15: $261.29 while Mongelia earned a weekly net salary of $288.55. There are also numerous instances of multiple checks being issued on the same day for different amounts. This pattern, which continues for other claimants as well, does not support petitioners' assertion that occasional partial wage payments were always made up in the following week. Petitioners did not have any records showing what each of the cancelled checks is intended to pay for. Nor did Meloccaro or Richman provide specific testimony about what wages those checks were intended to pay in lieu of the missing documentary records reflecting that necessary information. The Board has given employers credit for cancelled checks that are offered into evidence when petitioners have also provided other documentation or specific testimony that demonstrates a specific accounting of the hours or days worked and the wages paid for those hours and days (*see e.g. Matter of Shalini Mohabir Edwards and Suresh Construction Corp.*, Docket No. PR 14-020, at pp. 2-3 [May 25, 2016] [petitioner gave specific and unrebutted testimony about what the checks offered into evidence were intended to be payment for and how she typically paid employees]; *Matter of Liza J. Gattegno and Princess Jessie Rose Inc. and Jessierose Inc. (T/A Jessie Rose Boutique)*, Docket No. PR 09-032, at pp. 8-9 [January 28, 2009]). Petitioners' April 22, 2016 memo issued to employees directs the employees to bring their own records to reconcile outstanding payments owed, indicating that petitioners did not have that information themselves. Both Meloccaro and Richman conceded that they fell behind in timely paying wages to claimants, thus, without having the information about what pay period the checks are intended to cover, petitioners' records do not establish payment for all the wages included in the order.

We credit Rodriguez's testimony that the Department of Labor could not credit petitioners for the cancelled checks because they did not know what each of those payments was intended to cover. Bubb's testimony further evidences that petitioners' records are incomplete evidence of what wages were paid. Bubb testified that she believes she is owed around $6,000.00, which is less than the wages included in the order that the Department of Labor assessed for Bubb, but more than the $408.64 Meloccaro testified is owed to Bubb. Petitioners' records and testimony are not sufficiently specific or reliable to allow the Board to make a full accounting of what wages are owed to Bubb or any of the other claimants for which checks and money orders were offered (*see Matter of Ali Araif AKA Araif Ali and Buffalo Financial Services LLC T/A Delavan Check Cashing*, Docket No. PR 18-040, at p. 7; *Matter of Michael Cave*, Docket No. PR 10-337, *and Richard Cave and U.S. Wood, LLC*, Docket No. PR 10-345, at p.5). It is petitioners' burden to prove that the Commissioner's order is invalid or unreasonable by a preponderance of the evidence and we find that petitioners' evidence of payments made to claimants was insufficient to meet this burden.

We do not need to determine whether the vague and unsubstantiated assertion that the checks or money orders offered into evidence were forged or otherwise fraudulent because we find these records to be insufficient proof of payment.

We affirm the wage order as to Thomas, Watson, Matthew, Mongiela, Santos and Sullivan. We also affirm the wage order as to Bubb because, despite her testimony that she thought petitioners owed her about $6,000.00, we find that petitioners did not present sufficient evidence to do a correct accounting as was their burden nor is there sufficient evidence upon which to perform such a calculation in the record.

*Petitioners did not prove that some claimants worked for another employer for part of each week.*

Petitioners assert that some of the claimants worked for another entity for part of each work week but other than documents that generally state a claimant works for both entities, there is no specific information in the record about how the claimant split their work time between the two entities. Thus, the Board cannot account for what hours or days of work were for time worked for petitioners and what hours or days of work were for the other entity. As the burden rests with petitioners to prove that the Commissioner's order was invalid or unreasonable, we find that petitioners did not prove that the order should be reduced for those claimants who also worked for another entity. We affirm the wage order as it applies to Johnson and Bryant.

*Petitioners did prove that Maldonado and Dobie did not work for petitioners for the duration of the claim period but did not prove that Genaro and Shea did not work for the duration of the claim period.*

Petitioners offered evidence that Maldonado and Dobie were not their employees for the entirety of the claim period. Specifically, petitioners offered a document showing that on March 21, 2016, Maldonado became an employee of another entity that shared space with petitioners and, thus, was no longer an employee of petitioners on that date. Petitioners also offered into evidence copies of a termination notice stating that Dobie's employment was terminated effective September 15, 2015 and a copy of a re-hire letter stating that she was rehired effective March 17, 2016. Respondent offered no testimony to refute the dates of employment for Maldonado and Dobie and respondent did not offer claim forms or interview sheets for Maldonado or Dobie into evidence. We find petitioners met their burden to prove that the Department of Labor's order with respect to the claim periods for Maldonado and Dobie were invalid. We, otherwise, do not credit petitioners' evidence of payments purportedly made to Maldonado and Dobie for the reasons detailed above. The respondent is directed to modify and recalculate Maldonado's and Dobie's wages included in the order so the claim period for Maldonado is October 5, 2015 to March 20, 2016 and for Dobie is March 17, 2016 to April 22, 2016. We affirm the part of the order as to wages owed to Maldonado and Dobie, as modified to shorten the claim period.

Petitioners also asserted that Genaro was on leave for November and December 2015, which fell during the claim period for Genaro. However, not only did petitioners offer no written documentation of this leave, but petitioners offered cancelled checks into evidence showing payments to Genaro in November and December 2015.[2] We do not credit Meloccaro's testimony

[2] The Board notes that this inconsistency further supports the Board's conclusion that the cancelled checks offered by petitioners are not sufficiently reliable evidence of the wages earned during the claim period being paid.

that Genaro was on leave during November and December 2015 and affirm the wage order as to Genaro.

Petitioners assert that they do not owe Shea the wages included in the order because he was no longer working in the office during the claim period and was instead working on projects remotely for petitioners and he was paid for those projects. The only evidence that petitioners offer to support this conclusory assertion is a memo dated October 9, 2014, which states that Shea's last day in the office was October 10, 2014 and that he will "continue to work on the document imaging and other consulting functions to be determined." Petitioners did not offer any evidence of a different pay structure for Shea nor did they offer evidence that he was not an employee during the claim period and, in fact, petitioners concede that Shea continued to perform work for petitioners. Petitioners also did not offer any evidence of any payments made to Shea for the claim period despite their admission that he did perform work for them. We find that petitioners failed to meet their burden of proof that the Commissioner's order regard wages owed to Shea was invalid or unreasonable and we affirm that part of the order.

*Petitioners cannot retroactively reduce wages because of absences.*

Petitioners assert that the wages owed to some of the claimants should be reduced based on absences beyond the allotted paid days off of work. Petitioners' evidence of absences are handwritten notations on annual calendars with the claimant's name on the top. For some claimants, petitioners also had documents listing total paid days off that were earned and total paid days off that were used. The records were missing details of when those days were earned or used, which would be required to determine if the assertions in the handwritten notations on the annual calendars or listing of the balances for total paid days off were accurate. Based on petitioners' records, testimony and the petition filed in this matter, petitioners appear to be seeking a cumulative reduction in wages owed based on the purported excessive absences rather than asserting that payment on any given week was less than the full salary because of excessive absences. In other words, petitioners are attempting to retroactively deduct pay for unpaid days off of work, which they never attempted to deduct at the time that the unpaid day off of work was taken. Without determining the issue of whether petitioners were permitted to deduct wages for days that claimants were absent, we find here that petitioners do not offer any legal authority, nor do they offer a sufficient factual basis, to permit them to retroactively deduct, using a running total of absences, from an accumulation of the pay owed when there was no evidence presented of the same deduction at the time that such absences allegedly occurred. The Board rejects petitioners' assertions that the wage claims for Bubb, Rodriguez, Rosa, Shumskaya and Rodney should be reduced based on their absences and we affirm the the order as to wages owed to those claimants.

Meloccaro conceded owing Karkour the wages included in the order; thus, the Board affirms that part of the order.

The Article 19 Overtime Wage Claim and Article 5 Penalty are Affirmed

The order to comply includes unpaid overtime wages for Castro. The claim filed by Castro states that from October 23, 2012 to September 4, 2015, Castro worked from 10:00 a.m. to 7:00 p.m. Monday through Friday and he was only permitted to take a one hour lunch on two days per week. Respondent determined that petitioners owed $207.68 in unpaid overtime hours to Castro from June 1, 2013 to July 26, 2013 because he did not get a lunch break for three days during each

of those weeks. Respondent's investigative records state that Castro's claim period was being shortened because of a July 22, 2013 memo issued to Castro by petitioners that states that his work schedule is 11:00 a.m. to 7:00 p.m., different from the 10:00 a.m. to 7:00 p.m. schedule that Castro claimed to work during the period he included in his claim form. Meloccaro testified that Castro was permitted a lunch hour but chose to eat his lunch at his desk. She also testified that employees were not permitted to work overtime without prior approval, as documented by the employee manual offered into evidence. Petitioners did not offer any documents regarding Castro's actual work hours during the relevant period, such as documents showing his times in and times out, which the employee manual references as time sheets that are required to be filled out each day, totaled at the end of the work week and submitted to supervisor.

An employer does not meet the burden of proving that the Commissioner's order was incorrect or unreasonable by making bare, uncorroborated assertions about an employee's work schedule or that the employer never worked overtime (*Matter of Frank Lobosco and 1378 Coffee, Inc. (T/A Juliano Gourmet Coffee)*, Docket No. PR 15-287, at p. 6 [May 3, 2017] *citing Matter of James A. Kane and A&A Private Investigations & Security, Ltd. (T/A A&A Investigation & Security)*, Docket No. PR 11-092, at p. 7 [April 29, 2015]). Because petitioners did not have any records of Castro's actual hours and days worked during the relevant period, the Commissioner was permitted to rely on the best available evidence and draw an approximation of Castro's hours worked and wages owed drawn from his statements (*Anderson v Mt. Clemens Pottery Co.*, 328 US 680, 687-688 [1949]). Even if employee claims are imprecise, "reasonable estimates are allowed since it is the employer's burden to maintain accurate records" (*Matter of Karl Geiger A/K/A Karl Richard Geiger and Geiger Roofing Co.*, Docket No. PR 10-303, at p. 8 [Jan. 16, 2014], *affd sub nom. Matter of Geiger v New York State Dept. of Labor*, 131 AD3d 887 [1st Dept 2015]; *see also Reich v Southern New England Telecoms. Corp.*, 121 F3d 58, 67 n 3 [2d Cir 1997] [finding no error in damages that "might have been somewhat generous" but were reasonable in light of the evidence and "the difficulty of precisely determining damages when the employer has failed to keep adequate records"]). In this matter, the Commissioner's determination of overtime wages due to claimant was based on his statements that he was not permitted a lunch hour for three days of each work week and petitioners attempted to counter that through conclusory testimony that Castro chose to eat his lunch at his desk. Petitioners did not overcome that determination with sufficient and reliable evidence establishing the precise hours that Castro worked each day and that he was paid for those hours or with other credible and reliable evidence showing the Commissioner's determination was unreasonable. We affirm the overtime wage order as it applies to Castro.

We also affirm the $500.00 Article 5, § 162 penalty included in the order for failure to provide a required meal time to employees because petitioners did not provide records of actual hours worked to prove that the Commissioner's determination that Castro was not provided with a required meal time was incorrect or unreasonable.

## 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 unpaid wages 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 unpaid wages order.

Civil Penalty

The unpaid wages order includes a 50% 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 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."

Rodriguez testified that he recommended a 50% civil penalty in this matter because "the employer was responsive throughout the inspection and attempted to resolve the matter." Rodriguez did not testify about the respondent's consideration of all of the statutory factors and the application of such factors to this case to determine how much to assess in civil penalties. Petitioner, however, 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.

We deny respondent's motion to dismiss in light of the substantive decision detailed above.

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

1. The respondent's motion to dismiss is denied;

2. The unpaid wages order is affirmed as modified in that:

   a. The wages found due and owing to Maldonado and Dobie are reduced to reflect the claim period as detailed above;

   b. The wages found due and owing to all other claimants are affirmed as assessed in the order;

c. The interest, liquidated damages, and civil penalty assessed in the order reduced proportionally based on the reduced wages due to Maldonado and Dobie;

3. The minimum wage claim for Castro included in the order is affirmed;

4. The Article 19 and 5 penalties are 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 August 12, 2020.

Molly Doherty, Chairperson
New York, New York

ABSENT
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