

STATE OF NEW YORK  
INDUSTRIAL BOARD OF APPEALS

-----X  
In the Matter of the Petition of:

CHARLES S. CHA AND MILLENNIUM DAE  
DONG INC.,

Petitioners,

To Review Under Section 101 of the Labor Law:  
An Order to Comply with Articles 6 and 19 of the  
Labor Law dated December 28, 2018,

- against -

THE COMMISSIONER OF LABOR,

Respondent.  
-----X

DOCKET NO. PR 19-013

RESOLUTION OF DECISION

**APPEARANCES**

*Zabell & Collotta, P.C.*, Bohemia (*Saul D. Zabell* of Counsel) for petitioners.

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

**WITNESSES**

Supervising Labor Standards Investigator Frank King, Sung San Bang and Charles S. Cha, for petitioners.

Frank King, for respondent.

**WHEREAS:**

Petitioners Charles S. Cha (hereinafter “Cha”) and Millennium Dae Dong, Inc. (hereinafter “Millennium”) filed a petition with the Industrial Board of Appeals (hereinafter “Board”) in this matter on January 28, 2019, pursuant to Labor Law § 101, seeking review of an order issued against them by respondent Commissioner of Labor (hereinafter “Commissioner” or “the Department”) on December 28, 2018. Respondent filed an answer to the petition on February 26, 2019.

---

<sup>1</sup> 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.

Upon notice to the parties a hearing was held in this matter on June 4 and June 5, 2019, in New York, New York, before Molly Doherty, the Chairperson of the Board and a 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 with Article 19 of the Labor Law under review (hereinafter “minimum wage order”) directs compliance with Article 19 and payment to respondent for \$127,089.86 in unpaid wages due to seven claimants for the time period from February 26, 2012, to February 22, 2015, with interest continuing thereon at the rate of 16% calculated to the date of the order in the amount of \$79,838.65, liquidated damages in the amount of \$127,089.86, and assesses a 200% civil penalty in the amount of \$254,179.72.

The order to comply with Article 6 of the Labor Law under review (hereinafter “wage order”) directs compliance with Article 6 and payment to respondent for \$800.00 in unpaid wages due to one claimant for the time period from June 23, 2013, to November 2, 2014, with interest continuing thereon at the rate of 16% calculated to the date of the order in the amount of \$559.69, liquidated damages in the amount of \$800.00, and assesses a 200% civil penalty in the amount of \$1,600.00.

The order also assesses non-wage related civil penalties under Article 19 of the Labor Law (hereinafter “penalty order”) in the amount of \$2,000.00 for each of two counts for violating the following provisions of law: Labor Law § 661 and Department of Labor Regulations (12 NYCRR) § 146-2.1 by failing to keep and/or furnish true and accurate payroll records for each employee during the period from on or about February 26, 2012, to February 22, 2015; and, Labor Law § 661 and Department of Labor Regulations (12 NYCRR) § 146-2.3 by failing 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 February 26, 2012, to February 22, 2015. The order also assessed a \$1,000.00 civil penalty for a violation of Labor Law § 661 and Department of Labor Regulations (12 NYCRR) § 146-2.5 by failing to pay employees other than commissioned salespersons an hourly rate of pay from February 26, 2012, to February 22, 2015.

The total amount due for all orders is \$596,957.78.

The petition alleges that the orders are invalid and unreasonable because petitioners do not owe the claimants any wages, petitioners did not violate any laws, rules or statutes, and petitioners have time and wage records detailing compensation for the relevant time, which respondent did not review during the investigation. The petition also challenges the penalties assessed in each of the orders but the petition does not state the grounds upon which the penalties are contested. For the reasons discussed below, we affirm the minimum wage order as modified in the discussion below, the wage order and the penalty order issued against petitioners.

## SUMMARY OF EVIDENCE

### *Testimony of Supervising Labor Standards Investigator Frank King and Department of Labor's Documentary Evidence*

Frank King (hereinafter "King") is employed by respondent in the Division of Labor Standards. King did not conduct the investigation in this matter and the investigator who did conduct the investigation, Allen Kim (hereinafter "Kim"), no longer worked in the Division of Labor Standards when the hearing was held. An investigator under King's supervision, Emy Bautista (hereinafter "Bautista"), supervised the investigation but King did not begin supervising Bautista's work on this investigation until about December 2018 or January 2019. King reviewed the investigative file and documents prepared by Bautista and Kim. King testified that petitioners did not provide any time and attendance or payroll records when they were requested during the investigation, but that respondent would have accepted payroll records from the employer if they had been submitted later in the investigation. King testified that he did not find anything wrong with the investigation and that he directed Bautista to verify that no payroll records were provided during the investigation, as well as to verify that the interview sheets were missing an investigator's signature.

Through King, respondent introduced into evidence certain Department of Labor investigation documents including a narrative report, Sung San Bang's (hereinafter "Bang") claim form, John Seo's (hereinafter "Seo") claim form, employee interview sheets completed during the initial on-site visit, a spreadsheet of underpayment calculations, a letter sent to the employer explaining the investigation's findings, and the order to comply referral. The order to comply referral references petitioners' prior history of labor law violations. King testified that the underpayments in the order were calculated using the information provided by the claimants in the claim forms and interviews.

#### Sung San Bang

Bang's claim form states that he worked from March 2013 to August 2013 and was paid by check. Bang's claim form states he was paid \$600.00 per week and worked from 10:00 a.m. to 8:00 p.m., 10 hours a day, 5 days a week and that he received a half hour lunch, making 9.5 hours of work per day, or 47.5 hours of work per week. The claim form also states that despite this general schedule, Bang would sometimes work more or less hours in any given week.

According to the Department's narrative report, Bang's claim, in relevant part, is that he was employed from March 18, 2013 to August 28, 2013, working 5 days a week, Monday to Friday, working "10.50 hours daily, from 10:00 a.m. to 9:00 p.m. with an uninterrupted minimum 30-minute meal break. [Bang] also received one free meal daily.... [receiving] a weekly salary of \$600.00."

The Department's calculation spreadsheet lists Bang's hours as fluctuating between 8.5 and 12.5 hours per day. The calculation spreadsheet indicates that the overtime underpayment for Bang was calculated by deriving a regular rate from his salary by taking his weekly salary and dividing it by the hours worked that week to get a regular hourly rate of pay. Overtime was then calculated based on that hourly rate. The derived rate in the calculation spreadsheet varies from week to week based on hours worked each week and a salary which sometimes fluctuates based

on number of days worked per week. The calculation spreadsheet also contains calculations for call in pay and spread of hours as well as a credit for 2 meals per day.

King testified that the claim form did not explicitly state that Bang did not get a half hour for each of his two meals and did not state that the employer refused to give him time off for meals. King testified that Bang's underpayment was calculated based on a set schedule of Bang working 10 hours a day with a 30-minute meal period. King also testified that petitioners were credited with two meals Bang received; but, for only one meal period. King testified that the claim form and the narrative report were not consistent with one another. King later clarified that the information on the narrative report regarding Bang's weekly underpayment was only a sample for that particular week listed to show how calculations were done. The hours listed for that particular week were not applicable to all the weeks included in the claim.

#### Elmer Chilla

The interview sheet entered into evidence for Elmer Chilla (hereinafter "Chilla") states that he worked for the employers starting in February 2014. A chart on the form indicates that he worked from between 9:30 a.m. and 10:00 a.m. to between 8:30 p.m. and 9:30 p.m. Sunday through Tuesday, Friday and Saturday. A handwritten note next to the chart states that he worked a "maximum of 40 hours." With respect to the question "Do you get paid at time and a half your hourly rate for your work in excess of 40 weekly hours?" both the "Yes" and "No" boxes were left blank. The interview sheet also states that Chilla received an hour and a half meal break, two free meals, and earned \$530.00 per week, which was paid in cash.

The calculation spreadsheet entered into evidence for Chilla shows a weekly rate of \$530.00 and that the weekly hours worked were 52.5. The spreadsheet also lists a derived rate and a derived overtime rate, spread of hours pay, meal credit, total wages earned at the derived rate and the total weekly underpayment.

King testified that an underpayment calculation was done based on the information provided by Chilla in the interview as documented in the interview sheet. King agreed that it was not reasonable to calculate overtime wages for Chilla because the interview sheet indicated that he did not work more than 40 hours per week.

#### Miguel Eloque

The interview sheet for Miguel Eloque (hereinafter "Eloque") entered into evidence states that he worked for the employers for two years. The chart in the hours section of the interview sheet states that Eloque worked Sunday from 10:00 a.m. to 10:00 p.m. The chart then contains two lines each ending with an arrow that extend through Monday and Tuesday, the word "Off" for Wednesday and Thursday, the hours 10:00 a.m. to 10:00 p.m. in the Friday column with two more lines drawn in each box for Saturday. The question below this chart states "Do you work the same schedule every week?" is checked "Yes" but a handwritten note states "but varies depending on schedule." The interview sheet states that Eloque received an hour and a half hour meal period and two free meals per day. Eloque earned a weekly salary of \$450.00, paid in cash. A box on the interview sheet is checked indicating that Eloque did not get paid time and a half for hours worked over 40 per week.

The calculation spreadsheet entered into evidence for Eloque shows a weekly rate of \$450.00 and that the weekly hours worked were 52.5. The spreadsheet also lists a derived rate and a derived overtime rate, spread of hours pay, meal credit, total wages earned at the derived rate and the total weekly underpayment.

King testified that the interview sheet for Eloque indicated that he worked the same five days as Chilla, and that he also worked in the kitchen with Chilla. King stated the interview sheet for Eloque indicated he worked a set schedule, but also that his schedule varied, so King did not know how many hours a week Eloque actually worked. King further testified that while the interview sheet indicated that Eloque worked 12 hours a day, his underpayment was calculated at 10.5 hours a day based on an hour and a half lunch break credited to the employer.

### Segundo Garcias

The interview sheet entered into evidence for Segundo Garcias (hereinafter "Garcias") states that he worked for the employers for four years. The chart in the hours section of the interview sheet states that he worked from 9:30 a.m. to 10:00 p.m. on Sunday, with two lines extending through Tuesday. The chart further states Garcias was off Wednesday and Thursday, and two more lines drawn in each box for Friday and Saturday. The interview sheet states that Garcia received an hour and half meal period. The question below this chart states "Do you work the same schedule every week?" is checked "Yes" but a handwritten note states "but varies depending on schedule." The interview sheet indicates Garcias earned a daily rate of \$95.00 which was paid in cash. A box is checked indicating that Garcias did not get paid time and a half for hours worked over 40 per week but does not indicate how Garcias was paid for hours worked beyond 40. The interview sheet also states that Garcias received a half hour meal period and two free meals per day.

The calculation spreadsheet entered into evidence for Garcias shows a weekly rate of \$570.00 and that the weekly hours worked were 55 during five days of work per week. The spreadsheet also lists a derived rate and a derived overtime rate, spread of hours pay, meal credit, total wages earned at the derived rate and the total weekly underpayment.

King testified that the interview sheet for Garcias stated that he was a kitchen helper and indicated both a set and varied schedule, with Garcias working the same days as Chilla and Eloque. King stated that there is no indication on his interview sheet as to whether Garcias was working more than 40 hours per week. King testified that this should have been asked by the investigator, and that an accurate underpayment could not be calculated because of the varied schedule. King testified that he did not know why an underpayment had been calculated for Garcias.

### Angelica Gonzalez

The interview sheet for Angelica Gonzalez (hereinafter "Gonzalez") states that she worked for the employers for four years and was paid a weekly salary of \$350.00 in cash. The chart on the interview sheet indicates she worked from 10:00 a.m. to 8:00 p.m. on Sundays with two lines drawn through both boxes in the Monday column. The chart states that she was "off" Tuesday and Wednesday, worked from 10:00 a.m. to 8:00 p.m. on Thursday with two additional lines drawn through the Friday and Saturday columns.

A box on the interview sheet is checked indicating that Gonzalez worked the same schedule every week. Another box on the interview sheet is checked indicating that Gonzalez did not get paid time and a half for hours worked over 40 per week. The interview sheet also indicates that Gonzalez received two free meals per day.

The calculation spreadsheet entered into evidence for Gonzalez shows a weekly rate of \$350.00 and that the weekly hours worked were 47.5. The spreadsheet also lists a derived rate and a derived overtime rate, spread of hours pay, meal credit, total wages earned at the derived rate and the total weekly underpayment.

King testified that he did not know if Gonzalez worked a set schedule or a varied schedule because that information is not in the interview sheet. King stated the interview sheet for Gonzalez indicated she received a half hour meal break and two meals per day.

#### Paolo Mastulul

The interview sheet entered into evidence for Paolo Mastulul (hereinafter "Mastulul") states he worked for the employers for one year. The chart on the interview sheet indicates that he worked from 10:00 a.m. to 10:00 p.m. on Sunday with two lines extending through the Tuesday column, was off on Wednesdays and Thursdays, worked from 10:00 a.m. to 10:00 p.m. on Friday with two more lines drawn, starting in the Friday column and extending through the Saturday column. The interview sheet indicated he worked varied hours depending on the schedule and earned a weekly salary of \$450.00, paid in cash. A box is left blank on the interview sheet where it would indicate whether Mastulul was paid time and a half for hours worked over 40 per week. He got a half hour meal period and two free meals per day.

The calculation spreadsheet entered into evidence for Mastulul shows a weekly rate of \$450.00 and that the weekly hours worked were 52.5. The spreadsheet also lists a derived rate and a derived overtime rate, spread of hours pay, meal credit, total wages earned at the derived rate and the total weekly underpayment.

King testified that Mastulul also indicated both a set schedule and a varied schedule, and that he received an hour and a half meal period each day.

#### John Seo

Seo filed a claim form dated June 2, 2015, entered into evidence, stating that he had been employed by Millennium from June 20, 2013, to November 1, 2014. The claim form indicates Seo earned a rate of \$15.00 for a half day (\$30 for a full day) from June 20, 2013, to September 13, 2013, and \$20.00 for a half day (\$40 for a full day) from September 16, 2013 to November 1, 2014. Seo's wages were paid by check. Seo indicates on the claim form that he did not work a regular schedule because the hours he worked depended on the party schedule. He got a half hour meal period and two free meals but was not paid overtime. Seo indicated on the claim form that the business needed an indoor safety person. The employer had him take a 50-hour class through the New York City Fire Department and promised to pay him \$800.00 for completing the course. He was not paid the promised \$800.00. The claim form does not indicate how many hours Seo worked per week and also indicates that Seo sometimes worked only half days.

The calculation spreadsheets entered into evidence to demonstrate how the underpayment for Seo was calculated contain detailed information on the days worked each separate week from June 23, 2014, to the week ending November 2, 2014. The hours worked vary from day to day, and from week to week. In many of the weeks, Seo did not work overtime hours. According to the narrative report in evidence, Seo brought in his written calendar book containing the specific hours worked each week and that was used in the calculations.

King testified that the claim form for Seo indicates a half hour meal period and two meals were given per day, Seo received \$200.00 in tips per day, and his wage rate was \$30.00 per day, then \$40.00 per day. King did not know from the interview sheet how many hours Seo worked per week, or if there was minimum wages and overtime owed. King testified that the calculations for the underpayment could not be based solely on the claim form because Seo indicated his hours varied too greatly to provide a regular schedule.

#### *Testimony of Sung San Bang and Bang's Wage Statements*

Bang testified that he worked for the petitioners' banquet facility as a handyman performing electrical, plumbing, repair, painting and general maintenance work. Bang testified that on paper the business is owned by Cha, but the "actual real owner was Mr. Kim and his daughter, Ms. Kim." The business is open every day of the year, including holidays and weekends. When he started working for the employer, it was for 40 hours per week, Monday through Friday and he was to be paid \$600.00 per week. But when it became busy, he was required to work weekends and holidays as well. Bang stated that the information on his claim form just represented a normal shift, and did not represent all the additional time that he also worked. Bang testified that he had given respondent his own record of the hours he worked during the claim period, including when he worked on Saturday and Sunday.

Bang's complaint form was filled out by an investigator, who spoke both Korean and English and explained the contents of the form to him. On the form, Bang indicated a regular shift. He sometimes worked until 11:00 p.m., midnight or even 1:00 a.m., but did not include those occurrences on the claim form. Sometimes Bang would also be sent by the employers to work at another "wedding shop" they had at a different location or to work at one of the owner's homes. Bang testified that employees were required to report to work every day, but some days he and the other employees would be sent home, after waiting for an hour, and would not be paid for the day. During his five months of employment with petitioners, there was approximately one month in the summer during which he worked less than five days a week.

Bang testified that there was no time clock. When he started working, Bang was required to write his hours down for the first week and give them to the supervisor. The supervisor then wrote down different hours worked on the employer's record and had Bang sign it. The next week, the supervisor gave Bang the papers to sign with hours already filled in. Bang testified that after the second week, there were no further papers with hours on them for him to sign. Bang later clarified that he was presented with blank time sheets to sign. When it was not busy, Bang worked 8 hours a day. When it was busy, Bang worked up to 10 or 15 hours per day. Meal periods were a half hour, but he did not always get meal periods and had to eat while he worked when it was busy. Sometimes Bang received one or two half-hour meal periods per day, and sometimes he did not. Meals were provided free of charge. Bang believes he is owed a greater underpayment than that calculated by the Department of Labor.

Bang was shown what was purported to be petitioners' records of hours worked and wages paid. He testified that some of the signatures on the pages were his, but some were not, and the numbers contained on the pages were incorrect. He worked more than 8 hours a day for approximately 90-95% of his employment. Bang testified that he had never seen the alleged time records other than for the first two weeks prior to the hearing. He asked his supervisor, who he identified as "Mr. Oh," about his overtime pay a few times but was told that this was how the company was issuing pay, so Bang would just have to accept it. Bang also produced copies of his wage statements or pay stubs at the hearing, which were admitted as evidence. A check in the amount of \$720.00 signified that he also worked a day on the weekend. A check for \$120.00 meant that he worked one day that week. Even for weeks when Bang worked only three to four days, he testified that he still worked overtime because he worked more than the 8 hours shown in a day. He signed a time record with inaccurate hours because his supervisor, "Mr. Oh" told him that was how the company wanted it written.

Bang's wage statements show that Bang was paid \$720.00 for the week of April 29, 2013 to May 5, 2013; Bang was paid \$120.00 for one day of work during the week of June 17, 2013 to June 23, 2013; and that Bang was paid for work during the week of August 26, 2013 to September 1, 2013.

*Testimony of Charles S. Cha and Petitioners' Documentary Evidence*

Cha testified that Millennium Dae Dong is a banquet facility which holds weddings and other public events. It is not always fully booked so staff are hired for certain events and not all the same staff worked the same events.

Cha testified that he is the general manager of the business handling day to day operations and purchasing. He has been so employed for the past 15 years. When the Department of Labor investigator, Kim, requested the records during the investigation, Cha contacted his attorney and put him on speaker phone before Cha would talk with Kim. When asked about providing schedules, Cha explained that he had a horrible previous experience regarding such documentation, so he started regularly sending it to his attorney's office. That is why he immediately called his lawyer during the inspection of the premises. The lawyer had the requested documentation and Kim was told that he could review the records at the lawyer's office.

Cha stated that he kept a record of the hours worked and wages paid. Those records were introduced into evidence for each claimant. The records entered into evidence consist of two types of documents for each claimant. The first are summary sheets with a claimant's name and a date range on top, followed by a list of individual weeks, the total hours worked those weeks and the wages paid for that week. These summary documents are entirely type-written. The second type of documents are grid schedules of hours and days worked per week with the notations of such made in handwriting, total hours worked per week and total pay per week. Each weekly grid schedule contains a section for the employee's signature and some of the grid schedules contain a claimant's name on the top, whereas some do not. Additionally, there is some Korean writing on the grid schedule, which was not translated during testimony nor offered into evidence in translated written form.

Cha testified that the business used to have a time punch card machine, but they had a problem with people punching in the wrong card, so they used the handwritten time sheets instead.



Sometimes the employees wrote the information on the time sheets, sometimes the supervisor wrote it. The employees signed the bottom of the time sheet. Cha stated that he did not personally fill out any of the time sheets. Cha did not witness the employees signing the time sheets as that would have been done by a supervisor or manager. Cha did not know who the supervisor or manager was that signed or initialed the time sheets. Cha testified that he checked the schedules of all the employees for accuracy. Cha collected the documents each week and sent them to his lawyer about twice a month. When shown the cover sheets to the time records which summarized the time period, hours worked and total pay, Cha stated that he presumed his attorney created them but did not know when they were created. Where the records indicated that an employee received a tip, that meant that the employee either got a part of the tip for working at the function, or that the management gave the employee extra money for performing above and beyond their duty. Cha believed the records were accurate because they were signed by the employee and a supervisor.

Cha testified that he hired Bang as a handyman for the rate of \$120.00 per day. Bang was given a schedule but was paid for days in which he did not work because he was having financial difficulties. Cha testified that Gonzalez worked a five day a week shift most weeks, as shown in the records. Cha acknowledged that Chilla worked different days of the week in successive weeks.

When asked if he received any communication from the Department of Labor after the initial visit, Cha stated that he could not remember. Cha also stated that he did not know how many employees worked for Millennium Dae Dong during the claim period, but thought it was 10-20 employees during a year.

Looking at the purported time records for Bang and the wage statements for Bang, Cha was asked why the payroll period on the summary sheets did not match the payroll dates on the wage statements. Cha stated that he called the payroll company and that they used a different pay period, but that the employees were paid within a week of the pay period. Cha also did not know why the cover summary page for Bang stated that his first week of work was March 25, 2013, to March 31, 2013, while the grid schedule for that week with the same title indicated that the claimant worked March 11, 2013 through March 17, 2013. He stated that the office assistant puts the heading on the time sheets and could have made a mistake.

## **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, 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 affirm the minimum wage order as modified in the discussion below, the wage order and the penalty order issued against petitioners.

#### Petitioners Were Not Denied Due Process

Petitioners contend that respondent should have reviewed their payroll records during the investigation. Cha asserted during his testimony that records were offered during the investigation through a review at his attorney's office. King testified that the investigative file did not indicate that records were offered for review during this investigation. The Board need not reach a decision on which version of events regarding the records is accurate as it 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 submit these records at the hearing, the records were entered into evidence and duly considered in the rendering of this decision.

#### Petitioners' Failure to Maintain Payroll Records

Article 19 of the Labor Law requires employers to maintain, for six years, certain records of the hours their employees worked and the wages they paid them (Labor Law § 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 (*id.*; Department of Labor Regulations [12 NYCRR] § 146-2.1 [a]). 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] § 146-2.1 [e]). In the absence of required payroll records, the Commissioner may draw reasonable inferences and calculate unpaid wages based on the "best available evidence" drawn from employee statements or other evidence, even if results may be merely approximate (*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*, 110 AD3d 901, 901-902 [2d Dept 2013]; *Matter of Mid Hudson Pam Corp. v Hartnett*, 156 AD2d 818, 820-821 [3d Dept 1989]).

Petitioners' records consist of the summary sheets and grid schedules. The summary sheets have only a claimant's name and a date range on top, with a list of individual weeks, the total hours worked those weeks and the wages paid for that week. The grid schedules purport to show hours and days worked per week, total hours worked per week and total pay per week. Only some grid schedules have employee's name on top. Some grid schedules contain Korean writing which was not translated for the record. These records submitted by petitioners are not legally sufficient because they do not comply fully with the requirements of Department of Labor Regulations (12 NYCRR) § 146-2.1. The summary sheets, as Cha testified, were created by his lawyer, who did not testify in this matter. The summary sheets do not include the wage rate, daily hours worked, deductions or allowances or identifying information about the employee other than the name. The

purported time records are pre-printed grid schedules with work times written in by hand, as well as total hours worked in a week and the weekly pay. Cha stated that he did not create them. Sometimes supervisors created them, and sometimes claimants created them. No supervisor was called to testify, and Cha stated that he did not witness any of the grid schedules being signed by any employee, nor did he know which supervisor initialed any grid schedule. The grid schedules do not always have the name of the claimant, and do not include other employee identifying information. They also do not show the rate of pay, payroll deductions or allowances, or gross and net wages. Additionally, the claim period for this case begins on February 26, 2012, but petitioners' records do not start until December 31, 2012.

Further, the information on both types of petitioners' records is erroneous and inconsistent. As an initial example, the petitioners' summary sheets and grid schedules for Bang end the week of July 22, 2013, to July 28, 2013 but at the hearing, Bang produced wage statements including one that shows he continued to be paid for work performed the week of August 26, 2013, to September 1, 2013. A further comparison made between the evidence in the record shows that the summary sheets and grid schedules indicate that Bang worked for 24 hours and earned \$480.00 the week of June 17, 2013 to June 23, 2013; but, the wage statement produced by Bang states that he was only paid \$120.00 for that same pay period. Additionally, petitioners' summary sheet and grid schedule show Bang earned only \$600.00 for the week of April 29, 2013 to May 5, 2013; however, the wage statement issued to Bang for that same week shows he was paid \$720.00. Finally, with respect to the inconsistent records for Bang, the summary sheet for Bang and the grid schedule for Bang state that his first week of work was March 25 to March 31, 2013 but the actual dates listed on the days for the week on that particular grid schedule are for March 11 to March 17, 2013. Bang produced the only wage statements in evidence at the hearing, rather than petitioners, who only produced the incomplete payroll summaries and grid schedules. Petitioners failed to explain why the only wage statements introduced at the hearing were produced by Bang, and why no wage statements for any other claimants were offered into evidence.

In the case of Gonzalez, petitioners' records do not contain her last name or other identifying information. They also do not include all the other required information for legally sufficient time and payroll records, such as pay rate, payroll deductions and allowances, gross and net wages. The records also contain inconsistencies. For example, the pay period of February 2 to February 8, 2015 shows that she earned \$320.00, plus \$60.00 in tips for a weekly total of \$380.00 for 34 hours of work. Gonzalez worked exactly the same number of hours the following week (34), but earned \$350.00 in wages, plus the same \$60 in tips for a weekly total of \$410.00. There is no sufficient explanation as to why the same claimant performing work for the same employer for the same number of hours in successive weeks would earn different wage amounts, especially when the tips were the same.

Similarly, petitioners' payroll summaries and grid schedules show Chilla earned wages which vacillate between \$450.00 and \$413.00 for exactly the same 39 hours of work in successive weeks. Unexplained vacillations in pay for the same number of hours worked (not accounted for by different tip amounts), or the same pay for varying hours of work per week, also exist for Eloque, Mastulul, and Garcias. No payroll or time records were offered for Seo.

The numerous technical deficiencies, the lack of Cha's ability to explain who actually made the various notations on the records or which supervisors signed the records, and the inconsistencies in petitioners' records for Bang, Gonzalez, and Chilla, as detailed above, render

the petitioners records inaccurate and unreliable. Petitioners' records are not sufficiently reliable evidence to support an accurate estimate of the hours worked (*see Matter of James Michael Foley and Reel Fast Fishing Adventures, Inc. (T/A Hampton Lady Beach Bar and Grill)*, Docket No. PR 17-097, at p. 8 [January 30, 2019]; *Matter of Sodhi Longia and Guaran Ditta Corp. (T/A Happy Days Diner)*, Docket No. PR 11-276, at p. 10 [Sept. 16, 2010] [discrediting petitioners' handwritten payroll journals in part because "[w]hen weekly and then daily hours are listed, they are stated in exact even numbers to the minute"]).

Petitioners did not offer the legally required records for the actual hours that the claimants worked, and the wages paid to them either at the investigative phase of this matter or at the hearing before the Board. As such, the Commissioner's determination that petitioners failed to maintain legally required payroll records was reasonable and valid.

The Minimum Wage Order is Affirmed  
as Modified to the Amount of Wages Owed

In the absence of sufficient wage and hour records for the relevant period, petitioners then bear the burden of proving that the disputed wages were paid (Labor Law § 196-a; *Garcia v Heady*, 46 AD3d at 1090 [3d Dept 2007]; *Matter of Angello*, 1 AD3d at 854). 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 calculations 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 claimant worked and what he was paid for those 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.*, 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).

As discussed above, the records offered by petitioners lack the sufficiency and the reliability to establish by a preponderance of the evidence the specific hours that the claimants worked and that they were paid for these hours (*Matter of Garcia v Heady*, 46 AD3d at 1090; *Matter of Angello v National Fin. Corp.*, 1 AD3d at 854; *Matter of RAM Hotels, Inc. (T/A Rodeway Inn)*, Docket No. PR 08-078, at p. 24).

Because petitioners provided insufficient evidence of legally required records of the daily and weekly hours worked and proof that the claimants were paid for those hours, as discussed above, the Commissioner was entitled to use the best available evidence as a basis for her calculation of underpayment (Labor Law §196-a; *Matter of Baudo v New York State Indus. Bd. of Appeals*, 154 AD3d at 536; *Matter of Ramirez v Commissioner of Labor*, 110 AD3d at 901-902; *Matter of Joseph Baglio and the Club at Windham, Ltd.*, PR 11-394, at p. 7; *Matter of RAM Hotels, Inc. (T/A Rodeway Inn)*, Docket No. PR 08-078, at p. 24).

Petitioners, through King's testimony, pointed out inconsistencies between the claim forms, interview sheets and the narrative report. A comparison of the claim forms and interview sheets to the narrative report and calculation spread sheets reveals that the narrative report was not the basis of the calculation spreadsheets, rather the claim forms and interview sheets were, which

were consistent with the calculation spreadsheet. King explained in his testimony that the weekly hours used on the narrative report were just an example of hours worked for that particular week to demonstrate the methodology for the underpayment calculation. King testified, and the calculation sheets indicate, that the hours in the sample week used in the narrative report were not used as the hours worked by Bang each week of the claim period. Bang testified that the weekly schedule on his claim form was just an estimation, and that he provided the Department of Labor with his exact hours worked for the claim period, which fluctuate from week to week on the calculation sheets. These fluctuations include weeks Bang did not work any overtime and there is no overtime underpayment calculated for that week. Thus, while the narrative report may have had errors or not been indicative of every week of a claim period, the narrative report was not the basis of the final determination of wages owed as included in the order.

Petitioners also, through King's testimony, asserted that the interview sheets for claimants did not clearly indicate a particular day of the week was a work day when there was merely a line written through that day, rather than the hours worked that day. This argument confuses petitioners' burden of proof. Petitioners do not meet their burden through indirect means by attacking the Commissioner's investigation (*see 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] *citing Angello v National Finance Corp.*, 1 AD3d at 820-821 [assertions that Commissioner's order was not based on "credible proof" does not shift burden from employer with inadequate records]). Further, we find that it was reasonable for the Department of Labor to determine that those lines reflected that the same schedule was worked on the day marked with a line as a previous day that listed the actual schedule of hours since the claimant's also affirmatively indicated the days they had off on the interview sheets and those days did not correspond to the days in which a line was written through the day.

Here, we find the hours utilized by the Commissioner from the claim forms or from interviews to be the best evidence and a reasonable approximation of the hours worked by the claimants and their rates of pay during the relevant period because petitioners did not offer sufficiently specific evidence of daily and weekly hours worked or wages paid. We affirm the Commissioner's wage calculations in the minimum wage order, with modifications only for Chilla and Garcias, detailed below.

#### *Elmer Chilla*

Chilla's signed interview sheet indicates his hours varied, but also that he did not work more than 40 hours a week. Despite the lack of legally sufficient payroll records, there is an insufficient rational basis to determine that he is owed any overtime underpayment since his interview sheet states that he did not work more than 40 hours per week. Respondent is directed to recalculate any possible underpayment for Chilla to exclude a finding that Chilla worked more than 40 hours per week.

#### *Segundo Garcias*

Garcias indicated on his interview sheet that he was paid \$95.00 per day and that he worked five days a week, which was the number of days included in the calculation spreadsheet for Garcias. The underpayment should have been calculated by using an hourly rate derived from a weekly wage of \$475.00 (5 days at \$95.00/day), not the \$570.00 weekly rate that respondent used.

Respondent is directed to recalculate the underpayment for Garcias consistent with this finding. As modified, the minimum wage order with respect to the wages owed to Garcias is affirmed.

#### The Wages in the Wage Order are Affirmed

Petitioners offered no evidence to challenge Seo's \$800.00 Article 6 wage claim for a fire safety training course that he was required to complete as part of his employment and they, thereby waived their right to challenge it pursuant to Labor Law § 101 (2). Accordingly, the wages as assessed for Seo contained in the wage order are 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 specifically challenge the imposition of interest other than as a function of wages owed. As such, we affirm the interest in the minimum wage and wage orders as modified in accordance with the minimum wage findings.

#### 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.

We find that the inaccurate and insufficient records provided by petitioners were internally inconsistent and do not demonstrate the good faith necessary to avoid liquidated damages. As such, we affirm the liquidated damages in the minimum wage and wage orders, as modified.

#### The Civil Penalty is Affirmed

The minimum wage order and wage order each include a 200% civil penalty. Labor Law § 218 (1) provides that when determining an amount of civil penalty, 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."

The petition in this matter states that petitioners "contest" the civil penalties with no further information about the basis on which petitioners are challenging the civil penalties. There is no affirmative assertion of how the civil penalties should have been calculated based on these statutory factors, nor is there even a general assertion that the civil penalties are excessive or

otherwise unreasonable. Petitioners did not amend the petition at the hearing or offer specific proof regarding the statutory factors considered in determining the civil penalty amount. As 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 affirm the civil penalties in the minimum wage order as a function of the modified minimum wage amount, as well as those in the wage order.

#### Article 19 Penalty Order

Labor Law § 218 (1) provides that where a violation is for a reason other than an employer's failure to pay wages, the order shall direct payment to respondent of a civil penalty in an amount not to exceed \$1,000.00 for a first violation. Here, respondent assessed a \$2,000.00 civil penalty for each of two counts for violating the following provisions of law: Labor Law § 661 and Department of Labor Regulations (12 NYCRR) § 146-2.1 by failing to keep and/or furnish true and accurate payroll records for each employee during the period from on or about February 26, 2012, to February 22, 2015; and, Labor Law § 661 and Department of Labor Regulations (12 NYCRR) § 146-2.3 by failing to furnish to each employee with a statement with every payment of wages listing hours worked, rates, paid, gross wages earned, allowances claimant, deductions and net wages from February 26, 2012, to February 22, 2015. The order also assessed a \$1,000.00 civil penalty for a violation of Labor Law § 661 and Department of Labor Regulations (12 NYCRR) § 146-2.5 by failing to pay employees other than commissioned salespersons an hourly rate of pay from February 26, 2012, to February 22, 2015. The total amount due is \$5,000.00.

As discussed above, petitioners did not offer sufficient evidence that they maintained the required payroll and records of actual hours worked, nor did petitioners have any evidence that it issued wage statements to claimants, other than the wage statements produced by Bang at the hearing. Further, the order to comply referral sheet entered into evidence referenced that petitioners had a prior history of Labor Law violations. Thus, we affirm the two penalties for failure to maintain required records and failure to issue wage statements to claimants. We also affirm the civil penalty for failure to pay employees an hourly rate of pay as the only records offered by petitioners, which, as discussed above, we found to be inaccurate and unreliable, contained no evidence of an hourly rate of pay. As petitioners did not introduce the evidence necessary to challenge the basis for the amount of the civil penalty for these violations, as noted above, the issue is thereby waived pursuant to Labor Law § 101 (2). As such, we affirm the penalty orders.

////////////////////////////////////

////////////////////////////////////

////////////////////////////////////

////////////////////////////////////

//////////

//////////

//////

//


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

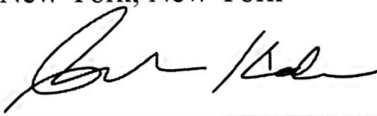
1. The minimum wage order, as modified in the decision above, the wage order and the penalty order are affirmed; and
2. The petition for review be, and the same hereby is, granted in part regarding the minimum wage modifications, but otherwise denied.

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