STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of:	:	
ZHEN H. EGLIN A/K/A ZHEN LIN AND MULTI TASTES RESTAURANT INC.,	:	
Petitioners,	:	DOCKET NO. PR 19-055
To Review Under Section 101 of the Labor Law: An Order to Comply with Articles 5 and 19 of the Labor Law dated February 14, 2019,	:	RESOLUTION OF DECISION
- against -	:	
THE COMMISSIONER OF LABOR,	:	
Respondent.	:	

APPEARANCES

Xue & Associates, P.C., Glen Cove (*Benjamin B. Xue),* for petitioners.

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

WITNESSES

Petitioner Zhen Lin, Lin Hong, Wu Ming Lin, for petitioners.

Claimants Silverio Alvarez Alvarado and Gabriel Vargas, and Senior Labor Standards Investigator Julio Rodriguez, for respondent.

WHEREAS:

Petitioners Zhen Lin a/k/a Zhen H. Eglin[2] (hereinafter "Lin") and Multi Tastes Restaurant Inc. (hereinafter "Multi Tastes" or "restaurant") filed a petition with the Industrial Board of Appeals (hereinafter "Board") in this matter on April 16, 2019, pursuant to Labor Law § 101, seeking review of orders 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 the decision.

[2] The petition was filed under the name Zhen H. Eglin a/k/a Zhen Lin. At hearing, petitioner testified that his name is Zhen Lin so the Board will use that name for the individual petitioner throughout this decision.

"Commissioner" or "the Department") on February 14, 2019. Respondent filed an answer to the petition on May 30, 2019.

Upon notice to the parties a hearing was held in this matter on September 12 and 13, 2019 in New York, New York, before Matthew Robinson-Loffler, the Board's Associate Counsel and 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 "order") with Articles 5 and 19 of the Labor Law under review directs compliance and payment to respondent for unpaid minimum wages due to two claimants: (1) Silverio Alvarez Alvarado (hereinafter "Alvarez") for the time period from October 28, 2012 to July 6, 2015 in the amount of $75,207.00; and (2) Gabriel Careo Vargas (hereinafter "Vargas"[3]) for the time period from May 19, 2013 to May 21, 2016 in the amount of $211,501.55; for a total amount of unpaid minimum wages of $286,708.55, interest continuing thereon at the rate of 16% calculated to the date of the order in the amount of $135,939.53, and 100% liquidated damages in the amount of $286,708.55; and assesses a 100% civil penalty in the amount of $286,708.55. The order also imposed penalties under Articles 5 and 19 including an $800.00 civil penalty for violating Labor Law § 161 (1) by failing to provide at least 24 consecutive hours of rest in any calendar week; an $800.00 civil penalty for violating Labor Law § 162 by failing to provide the claimants with at least 30 minutes off for the noon day meal; an $800.00 civil penalty for violating 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; and an $800.00 civil penalty for violating Labor Law § 661 and Department of Labor Regulations (12 NYCRR) § 146-2.3 by failing to provide wage statements to employees. The total amount due in the order is $999,265.18.

The petition alleges that the order is invalid and unreasonable because: (1) petitioner Lin was not the claimants' employer; (2) the Commissioner failed to properly calculate the hourly wage, accurate hours of work and duration of employment, failed to give the employer meal credits and a tip allowance, failed to consider records provided by petitioners, and included substantial periods of time in the order that were outside of the statute of limitations; (3) the interest imposed was unreasonable because it was based on incorrectly calculated wage underpayments; (4) the Commissioner should not have imposed 100% liquidated damages because petitioners had a good faith belief that they were in compliance with the law; (5) a 100% civil penalty is not supported by any aggravating factors; and (6) other "extraordinary circumstances" involving prior settlement attempts warrants consideration. For the reasons discussed below, we find that petitioner Lin is individually liable as the claimants' employer and we affirm the order as modified in the discussion below.

[3] At the hearing, witnesses sometimes also referred to Vargas as "Mario."

SUMMARY OF EVIDENCE

Petitioners' Evidence

Testimony of Zhen Lin

Lin testified that he was the sole owner of Multi Tastes, a restaurant on the Lower East Side of Manhattan that he purchased in 2008. Prior to 2012, Lin worked full time at the restaurant, did the hiring and firing, and established employee work schedules. Between 2012 and December 2016,[4] Lin attended divinity school and worked part time at the restaurant "a couple of hours" each day Monday through Friday. Lin returned to work full-time at the restaurant when he graduated in December 2016.

At the restaurant, Lin usually talked to the customers and sometimes took orders. Lin testified that he "had my older sister [Seang Lin (hereinafter 'Seang')] working there" every day. His other four sisters and sometimes his brother also helped in the restaurant. Besides family members, the restaurant employed the two claimants; a replacement for Vargas for a period of 24 months during 2013 to 2015; a replacement for Alvarez when Alvarez left work for 12 months during 2013 to 2014; and an employee named Jose who worked beginning at 7:00 or 8:00 a.m. when the restaurant opened. According to Lin, the restaurant opened at 7:30 a.m. and closed at 9:00 p.m. seven days per week. Although Lin was not present at the restaurant when it closed during the relevant period, he stated that he did not think any employee stayed beyond 9:00 p.m. to clean up after patrons left.

Lin testified that he "sometimes" supervised his sisters. Seang obtained his approval to make changes to payroll, and he directed her to pay employees overtime. When the minimum wage increased during the relevant period, Lin instructed Seang to raise Alvarez's pay, and when Alvarez complained about his pay, Lin directed her to increase Alvarez's wage. Lin testified that Seang told Lin that she followed his instructions. Lin also testified that Seang hired and paid Alvarez, who was usually supervised by Seang or other family members. Although Lin "sometimes" supervised Alvarez, mainly he did not. According to Lin, Alvarez began working at the restaurant before 2012 when the minimum wage was $6.25 per hour,[5] so Lin advised his sister to pay Alvarez $6.25 per hour plus time and a half if he worked more than 40 hours. He believes Alvarez received a 50¢-per-hour raise every year after 2010. Lin believes that Alvarez was earning $7.25 per hour in 2012, when Lin's sister told Lin that Alvarez wanted a wage increase and "we increased him" to $7.75 per hour. Lin is not sure if Alvarez's pay was ever adjusted after that, but he did not hear of any more complaints.

Lin testified that during the relevant period, Alvarez worked a five-day workweek, Monday through Friday from 11:30 a.m. to 9:00 p.m. Although Alvarez was also supposed to work on Sunday, Lin testified that he usually called out from work due to family problems. Alvarez worked "a lot of other time, but not on Sunday." Lin testified that he has personal knowledge that Alvarez began work at 11:30 a.m. because Lin was there in the morning, but not of when Alvarez left work

[4] The relevant period in this matter was October 28, 2012 to May 21, 2016.

[5] The general minimum hourly wage in New York State was $7.15 from January 1, 2007 to July 23, 2009; $7.25 from July 24, 2009 to December 31, 2013; $8.00 in 2014; $8.75 in 2015; and $9.00 in 2016.

at night. Lin's sister was at the restaurant until closing and never told Lin that an employee stayed past 9:00 p.m. Cleaning began before 9:00 p.m. since there were few customers in the evening. Lin is "sure I personally told him" that he had thirty minutes for lunch and thirty minutes for dinner, and that Alvarez could take a one-hour break between 3:00 p.m. and 5:00 p.m., during which he was free to leave the restaurant. The restaurant provided Alvarez with lunch and dinner. Lin testified that employees were not required to work during their lunch and dinner breaks.

Alvarez was mainly a delivery worker and Lin testified that he received tips. Lin testified that Alvarez sometimes helped in other ways, including cleaning the restaurant. He was paid "around $400 sometime[s], it's -- according to his hourly work. So he kept the basis salary, and he got a tip." Alvarez was paid every week.

Lin stated that to the best of his memory, Alvarez quit work in September 2015. During "2013 to 2014, something like that," Alvarez stopped working for the restaurant for approximately one year, returning to work "around the summer." Lin testified that while Alvarez was not working at the restaurant, Vargas brought another delivery person to the restaurant to replace Alvarez.

Lin testified that he hired Vargas when the restaurant opened in 2008. Vargas worked at the restaurant until 2016, mainly as a pizza maker. At the beginning of Vargas's employment, Lin set his pay, required Vargas to sign an agreement indicating that he would earn $9.00 per hour as a pizza maker, scheduled his hours, and supervised his work. Between 2013 and 2016, Lin's sister supervised Vargas's work and calculated his pay. Vargas's hours during the relevant period were 11:30 a.m. to 9:00 p.m. Monday through Friday. Lin testified he is "not too sure" if Vargas worked weekends, but also that "sometimes Saturday he worked for longer than ten hour[s]" and was paid an extra hour of pay. Lin testified that in 2013, Vargas was paid $9.00 per hour, and after 40 hours in a week, he was paid time and a half. In 2014, Vargas was paid $9.25 per hour, and in 2015 and 2016, he was paid $10.00 per hour. Lin was not sure if Vargas received tips.

Lin testified that he determined what rate to pay employees depending on the minimum wage requirement. He did not pay any employee less than minimum wage and does not think the restaurant ever failed to pay anyone overtime pay. According to Lin, Seang kept a book listing each employee's name, number of hours worked, and how much the employee was paid. The employees signed when they received their wages. Lin testified that they could not find the book.

In 2013, Vargas told Lin and his family that he wanted to go back to Mexico, and asked them to find a replacement pizza maker. Vargas returned from Mexico and went back to work at the restaurant ten or twelve months later. From 2014 to 2015, Vargas decided to work at another restaurant and quit his job at petitioners' restaurant; but, he returned ten months later. Considering both breaks in employment, Vargas was not employed by the restaurant for a total of 24 months. Lin testified that he had to hire someone to replace both Vargas and Alvarez for their respective absences. While Lin worked with the employees that were hired during Alvarez's and Vargas's absences, Lin's sister "mainly" directed those employees' work.

Lin testified that a Department of Labor investigator visited the restaurant in 2016 and spoke with him and with Vargas, and asked for Lin's accountant's information, which Lin provided. Lin testified that he provided the investigator with employees' names, addresses,

positions and employment dates. According to Lin, the restaurant was never previously investigated or cited for a labor violation.

On cross-examination, Lin testified that it was true that Alvarez earned $460.00 per week, but Lin denied providing a written statement to Alvarez so indicating. When confronted with a December 16, 2014 letter addressed "To Whom It May Concern" signed by Lin, which stated that Alvarez "earns $460 per week," Lin authenticated his signature on the letter. According to Lin, Alvarez, who was applying for health insurance, requested that Lin write a letter stating how much he earned per week, and Lin wrote the letter stating the $460.00 weekly amount. Lin testified that Alvarez was paid an hourly wage of $7.25 for 40 weekly hours of delivery work, "plus he does the cleaning job, dishwasher, whatever he needs to pay additional to him," resulting in the stated total of $460.00. According to Lin, Alvarez was originally hired for delivery work and later given cleaning and dishwashing tasks, and "whenever he worked more, we paid more," including an overtime premium for work over 40 hours. Lin also testified that Alvarez's wages were not reduced on occasions when he came to work late or left early: "He left earlier, and we paid him the same."

Testimony of Lin Hong

Lin's sister, Lin Hong (hereinafter "Hong") testified that she helped out at the restaurant seven days per week from 2009 to the end of 2014, answering the phone and taking orders. According to Hong, Lin worked at the restaurant two or three hours every morning. Lin calculated the payroll both while Hong was employed at the restaurant and after she stopped working there. Hong sometimes saw Lin pay the restaurant's employees, but because he was not often in the restaurant, she also gave employees their wages. Sometimes Hong's older sister also distributed employees' pay. Hong never saw Lin supervise any employees.

Hong worked with Alvarez between 2012 and 2014. His hours were 11:30 a.m. to 9:00 p.m. Monday through Friday, about the same as Hong's schedule. Alvarez's job was "mainly" to deliver food. She did not keep track of his time. In 2012, Alvarez was paid $7.25 per hour. If he worked more than 40 hours, he was paid time and a half. He was paid once a week. When paid, he signed a paper that listed the date and the number of hours he had worked. According to Hong, when the restaurant closed, these documents were lost. Alvarez's hourly rate was increased to $7.75 in 2013 after he requested a raise. Hong testified that in April 2013, Alvarez "said he wanted to go somewhere" and took a year off of work, and then he returned in April 2014. Hong testified that Alvarez also took one or two days off every month because members of his family were ill.

According to Hong, employees were given 30 minutes off for lunch and 30 minutes off for dinner, and "sometimes" there was another 30 minute break for breakfast. Employees were also given a one-hour break between 3:00 p.m. to 5:00 p.m.

Hong worked with Vargas from May 2013 until the end of 2014. Vargas worked from 11:30 a.m. to 9:00 p.m. five days per week and was paid $9.00 per hour. Hong testified that Vargas was paid time and a half for work over 40 hours. Vargas requested overtime on Saturdays and Sundays, and "sometimes" had a regular schedule of more than five days a week, but "[s]ometimes he did not work on Saturdays or Sundays…. Like, every two weeks, he works… seven days a week." On Saturdays and Sundays, Vargas worked from 11:00 a.m. to 9:00 p.m.

Hong testified that in December 2014, Vargas asked for leave to go to Mexico, returning to the restaurant "[a]t least one year" later. Although Hong had left the restaurant when Vargas returned, she worked nearby, would walk by the restaurant and often stopped there so she knew when Vargas returned.

Testimony of Wu Ming Lin

Lin's sister, Wu Ming Lin (hereinafter "Wu Ming") testified that she worked as a waitress and busser at the restaurant seven days a week from 10 a.m. to after 10 p.m. from 2012 to 2017. She neither supervised nor paid the employees. Wu Ming testified that Lin worked at the restaurant for two or three hours every day, sometimes answering the phone and writing down orders.

Wu Ming worked with both claimants. Alvarez was a delivery person and worked from 11:00 a.m. to 9:00 p.m. from Monday to Friday and was off on Saturdays and Sundays. There was a one-hour break between 3:00 p.m. and 5:00 p.m., and meal breaks were 30 minutes each. Wu Ming did not know how Alvarez was paid. According to Wu Ming, Alvarez spent a total of two hours per day talking on the phone; some conversations were over half an hour, and he sometimes went outside to talk on the phone. Alvarez left work 30 minutes early once or twice a week and came to work 30 minutes late once or twice a week. Alvarez took a year off from work from April 2014 to April 2015.

Vargas was the restaurant's pizza maker. He worked from 11:30 a.m. to 9:00 p.m. Monday through Friday and would sometimes ask to work on Saturdays and Sundays. He worked 10:00 a.m. to 9:00 p.m. on those weekend days. Wu Ming testified that Vargas left work early once or twice a week, sometimes half an hour early, and he arrived at the restaurant an average of 30 minutes late once or twice a week. Wu Ming testified that Vargas worked at another restaurant in Queens from December 2012 to January 2014 and he went to Mexico from December 2014 to December 2015. Wu Ming was aware that Vargas was paid $9.00 per hour because "I heard him discuss with the boss about the rate, 9 dollar per hour."

Wu Ming testified that when Alvarez and Vargas came to work late or left early, there were "no deductions. The boss did not deduct anything from their wage." Although Wu Ming did not handle payroll, she testified that she knows this because she asked Alvarez and Vargas if money was deducted and they said no.

Respondent's Evidence

Testimony of Silverio Alvarez Alvarado

Alvarez testified that Lin hired him to work as a dishwasher at the restaurant in February 2011. Alvarez worked there until July 6 or 7, 2015. His work schedule throughout his employment was 11:00 a.m. to 11:00 p.m. six days per week. According to Alvarez, the restaurant opened before 11:00 a.m. and closed at 11:00 p.m., usually. As time went on, Alvarez's duties expanded and he prepared pizza, did deliveries, and as reflected in a schedule he gave the Department of Labor when filing his claim in October 2015, cleaned the restaurant during his final hour of work.

Alvarez testified that when he cleaned up at night, Vargas would clean another part of the restaurant at the same time.

Alvarez testified that Lin was his supervisor and set Alvarez's work hours, which never changed throughout his employment. Alvarez testified that he was paid a weekly salary, not an hourly rate. Initially he was paid $420.00 per week, which was raised to $440.00 a year and a half to two years later, and ultimately to $460.00. Lin never discussed paying Alvarez an hourly wage; Alvarez was told he would be paid by the week when he was hired. When Alvarez was hired, his discussion with Lin was mainly about what Alvarez, who at that point was inexperienced, would have to do as a dishwasher. Alvarez called Lin to tell him he would be late for work or had to miss work, and explained the reason, but Alvarez was paid the same amount each week, regardless. When Alvarez received his weekly wage, which was paid in cash, he signed a notebook which did not list the hours worked, only the date and the amount paid.

Alvarez testified that between 2012 and July 2015, Lin was usually in the restaurant. Lin's sisters also worked there and supervised when Lin was absent. Alvarez testified that the sisters were involved in the entire operation, one at the cash register, others in the kitchen doing "the same work that we used to do." The restaurant had only three non-family employees. When Lin was not present, Alvarez would report to Lin's sister. A "very few times," Lin was away from the restaurant for a couple of days or a couple of hours, and his sisters supervised Alvarez. Lin sometimes had to step out and shop for food and do errands for the restaurant, but for the most part, he was at the restaurant while Alvarez was working. Alvarez denied that Lin was only at the restaurant one or two hours per weekday. Lin supervised Alvarez by indicating that he wanted order, instructing him on the way things needed to be done, saying that it was as important to clean the exterior as it was the interior of the restaurant, and explaining how to treat customers.

Petitioners provided Alvarez with three meals per workday, but he rarely had time to sit down and eat; he had to skip meals because he was sent for deliveries or had to put away groceries. Alvarez occasionally made a long phone call during his break to check on his family, but he denied that he spent over an hour on the phone every day.

Alvarez identified the claim he filed with the Department on October 30, 2015, which he signed after he was asked questions by a Department of Labor investigator, who filled in the form and checked the answers with Alvarez before Alvarez signed. The claim form states that Alvarez worked from 11:00 a.m. to 11:00 p.m. six days per week with Saturdays off doing "dishwasher, cleaning, delivery" work, and that he earned $420.00 per week from October 29, 2012 to December 31, 2012; $440.00 per week from January 1, 2013 to December 31, 2013; and $460.00 per week from January 1, 2015 to July 6, 2015; and that he took two days off in 2013, 2014, and 2015; did not work Christmas and New Year's; and ate three meals provided by petitioners while working. The claim form also states that Alvarez received $100.00 to $120.00 per week in tips.

Most of the time, Alvarez left work at 11:00 p.m. Sometimes on holidays, Lin or his sisters would tell him that they could close up at 9:30 p.m. or 10:00 p.m. Alvarez testified that he took off eight days during his entire four-and-a-half-year employment. He never took time off to go back to his home country, and during his employment, he never worked other than at the restaurant.

Alvarez denied that he was paid $7.25 an hour in 2012. He testified that on several occasions, he asked Lin to raise his pay to "at least the minimum, which at that time was $7.25," but Lin never did. Although when Alvarez asked for a raise from $420.00 per week, Lin raised his salary to $440.00, and when he subsequently requested another raise, Lin raised his salary to $460.00, but when Alvarez requested another raise, Lin refused his request.

Testimony of Gabriel Vargas

Vargas testified that he worked as the restaurant from its opening in 2008 or 2009, when Lin hired him, until 2016. When Vargas was first hired, Lin initially agreed to pay Vargas $9.00 to $10.00 per hour, but later reneged and decided to pay on a weekly basis. For about five months, Vargas was paid $9.00 or $10.00 per hour but when Lin's sister began working at the restaurant, his wages were switched to a weekly salary. Lin put Vargas in charge of making pizza.

During the relevant period, Vargas was the restaurant's pizza maker, he worked the grill on weekends, and he sometimes worked as a dishwasher. His hours were 10:30 a.m. to 11:00 p.m. Monday through Friday and 8:00 a.m. to 11:00 p.m. on Saturdays and Sundays. Vargas always worked seven days a week. Lin gave Vargas this schedule.

Vargas's first weekly salary was $800.00. Vargas requested a raise, and Lin gave him a $50.00 raise. Lin subsequently gave Vargas a second $50.00 raise. In May 2016, Vargas was paid $900.00 per week. If he was late to work or had to leave early, pay was not deducted, and Vargas received the same amount weekly regardless of the exact number of hours he worked, except for one occasion when Vargas was paid $800.00 for a week when he had missed a day of work.

Vargas testified that he was supervised by Lin or his sister and he was paid by Lin's sister. Lin "made sure that everything was in order, that everything was… according to the way that he liked it, and that the customers were satisfied with the service." Lin spent mornings in the restaurant; ran errands, mainly shopping for the restaurant, in the afternoon; and was rarely there at night.

Vargas testified that he was unable to work at the restaurant for approximately three months in 2015 or 2016 when the restaurant was closed by the "department of hygiene." During those three months, Vargas found another job until a coworker named Jose called him to come back to work for the petitioners. Other than that instance, and four annual holidays, from May 2013 to May 2016 Vargas took less than a week in total off from work. He did not take time off to return to Mexico.

According to Vargas, the restaurant was generally too busy to take a 30-minute meal break and employees would grab a slice of pizza or plate of food twice a day, but typically had no more than 15-20 minutes to eat uninterrupted. Asked how often employees did have 30 minutes to eat, Vargas ultimately testified that it was about every second day.

On cross examination, Vargas was shown his May 2016 Department of Labor interview sheet, which states that Vargas's pay rate was $800.00 per week; that his work schedule was 11:00 a.m. to 10:30 p.m. Monday to Friday and 8:00 a.m. to 10:30 p.m. on weekends; and that Vargas

was "always present but in 2014 – was 1 month out in February 2014." Vargas stated that the interview sheet indicated that he earned $800.00 per week because of the one week he missed a day of work and was paid $800.00 for that week. He testified that while the information he gave the Department of Labor at his interview was correct, he sometimes had to come earlier than 11:00 a.m. and stay until 11:00 p.m. because he was the pizza maker. He denied that he left petitioners' employment to work for someone else in the winter of 2014. Vargas also stated that he does not know why the Department's record of his interview states that he "was always present – but in 2014 was 1 month out in February 2014."

Testimony of Senior Labor Standards Investigator Julio Rodriguez

Senior Labor Standards Investigator Julio Rodriguez (hereinafter "Rodriguez") offered in evidence documents from the Department's investigation, which began when Alvarez filed his complaint on October 30, 2015. The records confirm that Investigator Maria Zalewska, who later retired, visited the premises in May 2016 and subsequently spoke with petitioners' accountant. An Investigation Narrative Report prepared by Zalewska states that during her visit, Vargas "informed that he works 7 days/86.5 hours weekly and receives $800 for last 3 years;" and that because petitioners did not submit requested payroll records, the Department calculated wage underpayment based on Alvarez's and Vargas's statements.[6]

Rodriguez testified that after the parties tried unsuccessfully to stipulate to a settlement, he prepared the order calling for payment of underpaid wages, plus 100% in liquidated damages and a 100% penalty. Rodriguez testified that as a matter of administrative policy, the Department often begins by assessing liquidated damages at 25% of the underpayment and did so in the present case, but that "it's standard for the liquidated damages to be 100 percent when issuing an order to comply." He agreed that no new facts about the case were discovered between the original, 25% assessment and issuance of the order to comply. As to the 100% penalty, Rodriguez testified that the Department can assess penalties up to 200% but 100% "is the standard, and also if I'm not mistaken, the employer doesn't have a record of having a violation in the past." Factors considered in assessing a percentage penalty include: "first to see if the violations are willful. See what kind of behavior…. The resources that they have or do not have." Rodriguez testified that he could not say if the employer's violations were willful but the employer "simply had the – the aid of an attorney who was advising him so…. I don't have enough basis to make that assessment…. It would be an opinion but it wouldn't be based on facts." He agreed that the petitioners are a small employer and that an employer's large size supports a higher penalty. He also agreed that employer cooperation during an investigation is considered when imposing penalties; that "I don't think there was interference" with the Department's investigation; and that petitioners were very upfront in acknowledging their lack of records from the beginning of the investigation

[6] Specifically, the Department of Labor computed a "derived hourly rate" for each claimant and work week by dividing the amount the claimant stated he was paid that week by 40 hours, then calculated what should have been paid that week for the hours the claimant stated he had worked, including an overtime premium for hours over 40, plus an extra hour's pay at the state legal minimum wage for each day in which the claimant worked more than ten hours. Petitioners were credited with $6.00 per work day for two free meals towards what was owed each claimant and the Department assumed that the claimants did not work on four holidays per year, and that Vargas did not work in February 2014.

STANDARD OF REVIEW AND BURDEN OF PROOF

When a petition is filed, the Board reviews whether an order issued by the Commissioner is "valid and reasonable" (Labor Law § 101 [1]). The Board is required to presume that an order of the Commissioner is valid (Labor Law § 103 [1]). A petition must state "in what respects [the order on review] is claimed to be invalid or unreasonable," and any objections not raised shall be deemed waived (*id*. § 101 [2]). Pursuant to the Board's Rules of Procedure and Practice (hereinafter "Board Rules"), the hearing before the Board is *de novo* (Board Rules [12 NYCRR] § 66.1 [c]). The petitioner has the burden to prove by a preponderance of the evidence that the orders are not valid or reasonable (State Administrative Procedure Act § 306 [1]; Labor Law §§ 101 and 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]).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Board makes the following findings of fact and conclusions of law pursuant to the provisions of Board Rules (12 NYCRR) § 65.39.

Petitioner Lin Was An Employer

The threshold issue to be determined is whether Lin was an employer within the meaning of the Labor Law. "Employer" as used in Article 19 of the Labor Law is defined as including "any individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons acting as an employer" (Labor Law § 651 [6]). "Employee" means "any individual employed or permitted to work by an employer." (Labor Law § 651 [5]). Furthermore, to be "employed" means that a person is "permitted or suffered to work" (Labor Law § 2 [7]). Like the New York Labor Law, the federal Fair Labor Standards Act (FLSA) defines "employ" to include "suffer or permit to work" (29 USC § 203 [g]). The test for determining whether an entity or person is an "employer" under the New York Labor Law is the same test used for analyzing employer status under the Fair Labor Standards Act (*Matter of Netram v New York State Industrial Board of Appeals*, 162 AD3d 1362 [3d Dept 2018]; *Cohen v Finz & Finz, P.C.*, 131 AD3d 666, 667 [2d Dept 2015]; *Matter of Yick Wing Chan v New York Indus. Bd. of Appeals*, 120 AD 3d 1120, 1121 [1st Dept 2014]; *Chung v New Silver Palace Rest., Inc.*, 272 FSupp 2d 314, 319 n 6 [SDNY 2003]).

In *Herman v RSR Sec. Servs. Ltd.* (172 F3d 132, 139 [2d Cir 1999]), the Second Circuit Court of Appeals explained the "economic reality test" used for determining employer status:

> "[T]he overarching concern is whether the alleged employer possessed the power to control the workers in question with an eye to the 'economic reality' presented by the facts of each case. Under the 'economic reality' test, the relevant factors include whether the alleged employer (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or

> conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records" (internal quotations and citations omitted).

No one of these factors is dispositive; the purpose of examining them is to determine the economic reality based on a "totality of circumstances" (*id.*). Here, Lin's burden was to prove that he was not, as a matter of economic reality, the claimants' employer (State Administrative Procedure Act § 306 [1]; Labor Law §§ 101 and 103; Board Rules [12 NYCRR] § 65.30; *Matter of Garcia v Heady*, 46 AD3d at 1090 [3d Dept 2007]; *Matter of Angello v National Fin. Corp.*, 1 AD3d at 854; *Matter of Nan N. Oo*, Docket No. PR 18-063, at pp. 6-8 [September 11, 2019]). Under the broad New York and FLSA definitions of "employer," more than one person or entity can be found to be an employee's employer (*Zheng v. Liberty Apparel Co.*, 355 F3d 61, 66-67 [2d Cir 2003]; *Matter of Stephen B. Sacher, Travco, Inc., and Sacher & Co., CPA, P.C.*, Docket No. PR 11-151, at pp. 5-6 [April 10, 2014]; *Matter of Robert Lovinger and Miriam Lovinger and Edge Solutions, Inc.*, Docket No. PR 08-059, at pp. 7-8 [Mar. 24, 2010]).

As to the first factor, power to hire and fire, Lin testified that he hired Vargas prior to the relevant period and during the relevant period, Lin hired replacements for both Alvarez and Vargas, when, according to Lin, they left for a period of time. While Lin testified his sister hired Alvarez, he also testified that he himself did the hiring and firing prior to 2012. Alvarez testified that he was hired by Lin in 2011, a date that petitioners did not dispute. Lin did not claim that his power to hire and fire ever lapsed or changed.

As to the second *Herman* factor, control of work schedules or conditions of employment, Alvarez and Vargas, whose testimony we credit, stated that during the relevant period Lin set their work hours, they called Lin if they were late or absent or needed to leave early, and Lin supervised their work. Lin's own testimony confirms that he satisfied the second *Herman* factor. For example, Lin testified that he "personally told" Alvarez that he had 30 minutes each for two meal breaks, and that he "sometimes" supervised Alvarez.

Lin, the restaurant's owner, testified that he "had my older sister [and other relatives] working there," and that he "sometimes" supervised the employees. According to Lin, he only worked at the restaurant two hours each morning, and his sister Seang, mostly supervised employees, albeit under his direction. Lin did not call Seang to corroborate his testimony, and the two sisters he did call, Hong and Wu Ming, did not specify who supervised the employees during the relevant period. Even assuming *arguendo* that Seang also supervised employees, this does not relieve Lin of individual liability because a worker can have more than one employer (*Ansoumana v Gristede's Operating Corp.*, 255 FSupp 2d 184, 189 [SDNY 2003]). As stated in *Herman*, that control "may be restricted, or exercised only occasionally" does not "diminish the significance of its existence" (172 F3d at 139). An individual may be held liable as an employer if that individual had the power to control employees even if that control is only exercised occasionally (*see Moon v Kwan*, 248 F Supp 2d 201, 237 [SDNY 2002]; *Matter of Christopher Palazzolo*, Docket No. PR 19-083, at p. 7 [August 12, 2020); *Matter of Nan N. Oo*, Docket No. PR 18-063, at p. 7; *Matter of Jagtar Singh*, Docket No. PR 14-245, at p. 8 [May 3, 2017]).

As to the third *Herman* factor, determining pay rates, both Alvarez and Vargas credibly testified that during the relevant period, Lin set their rates and that it was Lin from whom they requested and received raises. Lin testified that he determined pay rates based on the minimum wage; told Seang what rate to pay Alvarez; that his sister obtained his approval to make changes to payroll; that he directed her to pay employees overtime; that he determined what rate to pay employees depending on minimum wage requirements; and told Seang to increase pay when minimum wage rates went up. Lin stated that he knows that his sister followed his instructions. Lin testified that he signed a December 14, 2014 letter in support of Alvarez's application for health insurance stating that Alvarez earned $460.00 per week. Lin explained how he calculated the $460.00 wage. Lin testified that Alvarez's wages were not reduced on occasions when he came to work late or left early.

Lin's sister, Hong, testified that Lin calculated the payroll during the relevant period and that she saw him paying employees after calculating their wages. Wu Ming testified that she heard Vargas discuss a $9.00 wage "with the boss" and that "the boss did not deduct anything from their wage." Lin testified that it was he who required Vargas to sign an agreement that Vargas would earn $9.00 per hour. Such testimony from petitioners' own witnesses confirms that Lin satisfied the third *Herman* factor.

The last *Herman* factor is maintenance of records. Lin testified that when the Department of Labor investigator visited the premises, Lin met with her and provided her with employee names, addresses, positions, and dates of employment. According to Lin, the only record that petitioners maintained was the notebook employees signed when they were paid that listed employees' names, the number of hours they worked and how much they were paid, which petitioners testified was lost. Lin testified his sister, Seang, obtained the employee signatures when paying them. Seang was not called as a witness to corroborate this. Lin's sister, Hong, testified that it was Lin who calculated and sometimes personally paid the employees. It is not necessary that all four *Herman* factors be satisfied and, in any event, the evidence that Lin calculated payroll and provided the investigator with employees' names, addresses and dates of employment suggests that to the extent the restaurant had records, he satisfied this factor also.

Based on the totality of circumstances, we find that as a matter of economic reality, Lin was an employer, who hired the claimants, supervised and controlled their schedules, gave them raises, and otherwise determined their method and rate of payment and conditions of employment, and maintained records. We affirm the Commissioner's determination finding that Lin is an employer under the Labor Law.

The Petitioners Failed to Maintain Required Payroll Records

Article 19 of the Labor Law requires that an employer maintain and preserve for six years and furnish to the Department on request weekly payroll records which show for each employee, among other things, the wage rate; number of hours worked daily and weekly, including the time of arrival and departure for each employee working a spread of hours exceeding 10; amount of gross wages; tip credit, if any, claimed as part of minimum wages; meal and lodging credits, if any, claimed as part of wages; and money paid in cash. Employers are required to keep such records open to inspection by the Commissioner at the place of employment (Labor Law § 661;

Department of Labor Regulations [12 NYCRR] § 146-2.1]). Department of Labor Regulations (12 NYCRR) §146-2.2 further provides that every employer furnish to each employee "a statement with every payment of wages, listing hours worked, rates paid, gross wages, allowances, if any, claimed as part of the minimum wage; deductions and net wages." The required recordkeeping provides proof to the employer, the employee, and the Commissioner that the employee has been properly paid.

Although the petition alleged respondent failed to consider petitioners' records, no records which might have refuted the Department's calculations were ever provided, and petitioners stated at the hearing that the notebook which recorded employee pay was lost. Accordingly, it was proper for the Department of Labor to conclude that the employer failed to maintain legally required records.

Burden of Proof in the Absence of Employee Records

In the absence of accurate records required by the Labor Law, an employer bears the burden of proving that the disputed wages were paid (Labor Law § 196-a; *Garcia v Heady*, 46 AD3d at 1090; *Angello v Natl. Fin. Corp.*, 1 AD3d at 851). As the Appellate Division stated in *Matter of Mid Hudson Pam Corp. v Hartnett*, 156 AD2d 818, 821 [3d Dept 1989], "[w]hen an employer fails to keep accurate records as required by statute, the commissioner is permitted to calculate back wages due to employees by using the best available evidence and to shift the burden of negating the reasonableness of the Commissioner's calculation to the employer" (*see also Ramirez v Commissioner of Labor of State of N.Y.*, 110 AD3d 901, 901 [2d Dept 2010]). The petitioners have the burden of proving that the minimum wage order is invalid or unreasonable by a preponderance of the evidence of the specific hours that the employees worked and that they were paid for those hours, or other evidence that shows the Commissioner's findings to be invalid or unreasonable (*Matter of RAM Hotels, Inc. (T/A Rodeway Inn)*, Docket No. PR 08-078, at p. 24 [October 11, 2011]).

In *Anderson v Mt. Clemens Pottery Co.*, 328 US 680, 687-689 [1949], superseded on other grounds by statute, the U.S. Supreme Court opined that a court may award damages to an employee "even though the result be only approximate… [and] [t]he employer cannot be heard to complain that the damages lack the exactness and precision of measurement that would be possible had he kept records in accordance with the requirements." New York courts, following *Mt. Clemens*, have consistently held that when required records are unavailable, the Department is "entitle[d] to make just and reasonable inferences and use other evidence to establish the amount of underpayments, even though the results may be approximate" (*Hy-Tech Coatings v New York State Dept. of Labor*, 226 AD2d 378, 379 [1st Dept 1996], *Mid Hudson Pam Corp.*, 156 AD2d at 818; *see also Matter of Alberto Baudo*, Docket No. PR 15-007, at p. 8 [September 14, 2016], *affd sub nom. Matter of Baudo v New York State Indus. Bd. of Appeals*, 154 AD3d 535, 536 [1st Dept 2017]; *Reich v Southern New England Telecomms Corp.*, 121 F3d 58, 70 n 3 [2d Cir 1997] [damages "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"]). Under these principles, it was clearly proper for the Department to rely on credible evidence from the employees to estimate underpayment.

The Order Is Affirmed As Modified

The petition's claim that the Department failed to properly calculate underpaid wages asserted that the calculation: (a) incorrectly assumed that the claimants were paid on a salary basis and used that assumption to calculate a derived hourly rate, (b) failed to take into account claimants' break times, (c) accepted "grossly exaggerated" estimates of the claimants' hours, (d) failed to give petitioners meal credits and tip credit allowances, and (e) included time periods outside the statute of limitations. None of these assertions has merit.

With respect to the first point, calculation of a derived regular hourly rate was required by the Minimum Wage Order for the Hospitality Industry, which states that "[i]f an employer fails to pay an employee an hourly rate of pay, the employee's regular hourly rate of pay shall be calculated by dividing the employee's total weekly earnings… by the lesser of 40 hours or the actual number of hours worked by that employee during the work week." (Department of Labor Regulations [12 NYCRR] § 146-3.5 [b]). Under Department of Labor Regulations (12 NYCRR) § 146-1.4, the employer owes time and a half of this calculated "regular hourly rate of pay" for weekly work hours over 40; § 146-1.6 also requires that for each day in which the length of the interval between the beginning and end of an employee's work day exceeds ten hours, the employer pay an additional hour of pay "at the basic minimum hourly rate."

The respondent's conclusion that petitioners failed to pay an hourly rate of pay, requiring calculation of a derived rate according to this method, was reasonable and valid. Alvarez and Vargas credibly testified that they were paid a fixed weekly salary, not an hourly rate of pay. Alvarez testified that when Lin hired him, he told him that he would be paid by the week. Vargas testified that after initially paying an hourly wage, Lin switched him to a weekly rate prior to the start of the relevant period. Notably, petitioners' own evidence confirmed that the claimants were paid a salary. Lin and his sister Wu Ming testified that Alvarez and Vargas received the same pay every week, even if they came to work late or left early. Lin agreed that Alvarez was paid $460.00 per week, and his attempt to explain this in terms of a supposed $7.25 hourly wage for delivery work, "plus he does the cleaning job, dishwasher, whatever he needs to pay additional" was not specific, was completely unsupported, and did not clarify the general assertion.

Petitioners did not show that the Department's calculation improperly failed to take account of break times. While petitioners claimed employees received two uninterrupted 30-minute daily meal breaks plus an additional one-hour break in the afternoon, there are no records to confirm or support such testimony. Alvarez and Vargas credibly testified that they usually ate while working and were not generally given uninterrupted breaks as would be necessary to treat breaks as unpaid, non-work time. While Vargas's testimony makes clear he sometimes did eat an uninterrupted meal, in the absence of time records showing actual hours worked, occasional uninterrupted breaks do not require a reduction in work time for calculation purposes *(cf. Matter of Wilson Quiceno and Sendexpress Inc. (T/A Send Express)*, Docket No PR 14-287, at p. 8 [July 13, 2016]). General and conclusory testimony concerning work schedules does not "satisfy the high burden of precision required to meet an employer's burden of proof" (*Matter of Young Hee Oh A/K/A Young H. Oh, and Cheong Hae Corp. (T/A Cheong Hae Restaurant)*, Docket No. PR 11-027, at p. 12 [May 22, 2014] [employer cannot shift burden with arguments, conjecture, or incomplete, general and conclusory testimony]; *Matter of Alberto Baudo*, Docket No. PR 15-007,

at p. 8, *affd sub nom. Matter of Baudo v New York State Indus. Bd. of Appeals*, 154 AD3d at 536 [1st Dept 2017]). We also give no credence to what petitioners characterized as Alvarez's excessive time spent on phone calls because Alvarez credibly rebutted it and the allegation was not sufficiently specific.

Despite petitioners' claim that the respondent relied on exaggerated estimates of work hours, in the absence of required records it was reasonable and valid to accept claimants' credible estimates of the hours they worked as the best available evidence. The claimants' testimony about their hours as well as their pay was generally consistent with Alvarez's October 30, 2015 claim and Vargas's May 2016 interview sheet, on which the Department based the order here on review.[7] Lin, for his part, testified that he did not actually know how long the claimants worked at night or on weekends because, according to Lin, he only came to the restaurant on weekday mornings. Although Lin testified that the restaurant was open from 7:30 a.m. to 9:00 p.m. seven days per week, no records or other evidence corroborated a 9:00 p.m. closing, and Lin's sister Wu Ming testified she worked at the restaurant as a waitress seven days a week and "I left after 10:00 p.m." Based on the evidence at the hearing, and in the absence of required payroll and time records, it was reasonable for the Department to accept claimants' statements when calculating underpayments.

While petitioners argued that the respondent failed to give petitioners meal credits, Rodriguez testified and the Department of Labor audit confirms that the respondent credited petitioners with two meal credits per claimant per work day. Both Alvarez and Hong testified that the petitioners provided Alvarez with three meals per day. However, Department of Labor Regulation (12 NYCRR) § 146-1.9 (a) (3) provides that an employer is entitled to an allowance for meals it furnishes to its employees at a certain rate, but that an "allowance for more than two meals shall not be permitted" on any day.

We are likewise not persuaded by the petitioners' allegation that respondent failed to give petitioners tip credits. Department of Labor Regulation (12 NYCRR) § 146-1.3 provides that an employer may take a credit towards the basic minimum hourly wage rate if a service employee "receives enough tips and if the employee has been notified of the tip credit as required in section 146-2.2." Department of Labor Regulation (12 NYCRR) § 146-2.2 requires that employers give each employee prior to the start of employment written notice of among other things, the employee's regular hourly pay rate, overtime hourly pay rate, and the amount of tip credit taken from the basic minimum hourly rate. The petitioners stipulated that they failed to maintain lawfully required payroll records which would indicate whether the claimants received enough tips each week to merit a tip credit. Nor is there evidence that petitioners provided the claimants with written notice of the tip credit. It was reasonable for the Commissioner not to provide the petitioners with a tip credit where there are no records of the amount of tips received by the employees, or that the claimants received notice of the tip credit (*see Bakerman, Inc. v Roberts*, 98 AD2d 965, 966 [4th

[7] The principal difference is that Vargas testified to a higher weekly salary for longer hours. Had the order been based on his testimony rather than his statement, underpayment would have been higher. Based on Vargas's statement that his Monday to Friday and Saturday and Sunday workdays were 11:00 a.m. to 10:30 p.m. and 8:00 a.m. to 10:30 p.m. and he was paid $800.00 per week, the Department calculated a $9.25 hourly rate ($800.00/86.5 hours) implying $645.00 weekly underpayment ($13.87 x 46.5 overtime hours). Vargas's testimony that his Monday to Friday and Saturday and Sunday workdays were 10:30 a.m. to 11:00 p.m. and 8:00 a.m. to 11:00 p.m. and he was paid $900.00 per week would have meant an hourly rate of $9.73 implying weekly underpayment of $766.00.

Dept. 1983]; *Padilla v Manlapaz*, 643 F Supp 2d 302, 310 [EDNY 2009]; *Nick Malegiannakis and NZM Restaurant Corp. (T/A Michael's Diner)*, Docket No. PR 09-254, at p. 9 [May 30, 2012]).

The evidence also does not support petitioners' claim that the order, which includes underpayments dating back to October 28, 2012 for Alvarez and May 19, 2013 for Vargas, included periods outside the statute of limitations. Labor Law § 663 [3] states that an action to enforce a liability under the Labor Law must be commenced within six years, but the "statute of limitations shall be tolled from the date an employee files a complaint with the commissioner or the commissioner commences an investigation, whichever is earlier, until an order to comply issued by the commissioner becomes final." Alvarez complained to the Department on or about October 30, 2015, tolling the limitations period. The order does not relate to any period more than six years earlier.

The petition also asserted that the order failed to recognize that claimants "took many months off from their employment," apparently referring to petitioners' contentions that the claimants left the restaurant to return to their countries and take jobs elsewhere. We reject those contentions because petitioners' only evidence to support them was non-specific testimony that did not establish precise dates that the claimants purportedly left the jobs and the claimants denied those contentions. We do, however, modify the order to reflect Vargas's testimony that for three months in 2015 or 2016 (presumably, after Alvarez's employment ended in early July 2015) he did not work for petitioners because the restaurant was closed by a health department. Based on this evidence, we find that in addition to the month of February 2014 which was already omitted from the order's calculation of wages due to Vargas,[8] three additional months should also be excluded from that calculation. As so modified, we affirm the order's findings concerning underpaid wages.

Liquidated Damages

The petition claims liquidated damages should not have been awarded, asserting that liquidated damages "may only be assessed if the violation was found to be willful" and that petitioners believed in good faith that they were complying with the law by paying agreed-on hourly rates higher than minimum wage. Contrary to petitioner's assertion, the Labor Law does not require a finding of willfulness for the imposition of liquidated damages. Labor Law § 218 provides that whenever the Commissioner brings administrative action to collect a wage less than employees are entitled to under Article 19, 100% liquidated damages must be awarded "unless the employer proves a good faith basis to believe that its underpayment was in compliance with the law."

There is no evidence that claimants' weekly salaries were, as the petition asserted, "understood to cover their hourly wages and any overtime wages." Indeed, Labor Law §195 (1) and Department of Labor Regulations (12 NYCCR) § 146-2.2 require written notice when there is any change to an employee's hourly rate of pay, including the employee's regular hourly pay rate, overtime hourly payrate, and the amount of tip credit. Petitioners never provided the required notice to the claimants even though it is undisputed that the claimants received raises during the

[8] Vargas testified he did not know why the Department's record of his interview states that he "was always present but in 2014 was 1 month out in February 2014."

relevant period. We have credited the claimants' testimony, which was confirmed by the petitioners, that throughout the relevant period, they were paid a weekly salary, not an hourly wage. We give no credence to petitioners' assertion, contradicted by their own evidence, that they believed in good faith that they were paying an agreed-on hourly as opposed to weekly rate.

We also reject petitioners' argument that only the 25% liquidated damages proposed by respondent prior to the issuance of the order be imposed because once the order was issued, Labor Law§ 218 required the respondent to assess 100% liquidated damages. Further, the assertion in the petition regarding petitioners' attempts to settle the matter prior to the issuance of an order is not proof of a good faith belief of compliance with the law at the time the underpayment accrued.

The 100% Civil Penalty Is Revoked

Labor Law § 218 (1) states that an order to comply finding a violation of Article 19 (or certain other Labor Law sections) shall direct payment of "the appropriate civil penalty," and that in assessing the penalty's amount, the Commissioner "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… violations, the failure to comply with recordkeeping or other non-wage requirements." For a "willful or egregious" violation, the penalty can be up to 200%.

Rodriguez, who prepared the order in this case, testified that factors considered in assessing a penalty include "first to see if the violations are willful," the employer's resources, and the employer's cooperation during the investigation. He also testified that he did not have enough basis to assess whether petitioners' violations were willful, that the petitioners are a small employer, that there was no interference with the Department's investigation, and that petitioners were "very upfront" in acknowledging their lack of records. It is undisputed that there was no history of previous violations. The Board has frequently revoked penalties whose basis the Department did not explain (*see e.g. Matter of Charles Allen and Charosa Foundation Corporation*, Docket No. PR 15-063, at p. 10 [September 14, 2016]; *Matter of Ammar A. Zabarah (T/A Guy R. Deli)*, Docket No. PR 14-062, at p. 13 [April 29, 2015]). In the present case, some statutory factors – notably, lack of a good faith basis for the employer to believe its conduct was in compliance with law, the gravity of the violation, and the failure to comply with recordkeeping requirements – may have supported a penalty, but the only factors there is evidence the Department actually considered clearly did not. The 100% penalty imposed in the order is therefore revoked.

The Penalties for Violations Other Than Underpayment of Wages Are Affirmed

Labor Law § 218 (1) states that an order finding a violation "for a reason other than the employer's failure to pay wages, benefits or wage supplements found to be due… shall direct payment to the commissioner of a civil penalty in an amount not to exceed one thousand dollars for a first violation." The order imposed penalties under Articles 5 and 19 totaling $3,200.00, for four distinct violations, including an $800.00 civil penalty for violating Labor Law § 161 (1) by failing to provide at least 24 consecutive hours of rest in any calendar week; an $800.00 civil penalty for violating Labor Law § 162 by failing to provide the claimants with at least 30 minutes off for the noon day meal; an $800.00 civil penalty for violating 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; and an $800.00 civil penalty for violating Labor Law § 661 and Department of Labor Regulations (12 NYCRR) § 146-2.3 by failing to provide wage statements to employees. As discussed below, we affirm each of the four $800.00 penalties.

Labor Law § 161 (1) requires in relevant part that an employer provide a restaurant employee at least 24 consecutive hours of rest in any calendar week. Vargas credibly testified that his regular schedule included seven work days a week and petitioners' evidence confirmed this: Hong testified that Vargas "sometimes" had a regular schedule of more than five days and "[l]ike, every two weeks, he works… seven days a week." The $800.00 penalty for violating § 161 (1) is affirmed.

Labor Law § 162 (2) requires that every employee who works a shift of more than six hours extending over the period from 11 a.m. to 2 p.m. "be allowed at least thirty minutes for the noon day meal." The evidence established that both Alvarez and Vargas worked such a shift and we have found, as discussed above, that they were not provided with an uninterrupted meal period. The $800.00 penalty for violating § 161 (2) is affirmed.

Labor Law § 661 and Department of Labor Regulations (12 NYCRR) § 146-2.1 require, as previously discussed, that an employer in the hospitality industry keep and furnish to the Commissioner on request true and accurate payroll records. Petitioners stipulated at the hearing that they did not maintain legally required payroll records. We affirm the $800.00 penalty for violating this requirement.

Labor Law § 661 and Department of Labor Regulations (12 NYCRR) § 146-2.3 require that employers in the hospitality industry provide each employee with "a statement, commonly referred to as a pay stub, with every payment of wages. The pay stub must list hours worked, rates paid, gross wages, credits claimed (for tips, meals and lodging) if any, deductions and net wages." Petitioners stipulated at the hearing that they did not maintain legally required payroll records. We affirm the $800.00 penalty for violating this requirement.

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NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The wage order is modified to reduce by three months the underpayment found due to Vargas with liquidated damages and interest reduced proportionally; and

2. The 100% liquidated damages are affirmed as modified by the reduced wages; and

3. The 100% civil penalty is revoked; and

4. The penalties for violations other than underpayment of wages are affirmed; and

5. The Commissioner is directed to issue an amended wage order consistent with this decision and so modified, the order is affirmed; and

6. The petition for review is otherwise denied.

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

Molly Doherty, Chairperson
New York, New York

Michael A. Arcuri, Member
Utica, New York

Gloribelle J. Perez, Member
New York, New York

Patricia Kakalec, Member
Brooklyn, New York

Najah Farley, Member
Brooklyn, New York