

INDUSTRIAL BOARD OF APPEALS

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In the Matter of the Petition of: :  
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RAM HOTELS, INC. (T/A Rodeway Inn), :  
 :  
Petitioner, :  
 :  
To Review Under Section 101 of the Labor Law: :  
An Order to Comply with Article 19 of the Labor Law :  
and An Order under Articles 6 and 19 of the Labor :  
Law, both dated April 29, 2008, :  
 :  
- against - :  
 :  
THE COMMISSIONER OF LABOR, :  
 :  
Respondent. :  
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DOCKET NO. PR 08-078

RESOLUTION OF DECISION

APPEARANCES

Phelan, Phelan & Danek, LLP (Timothy Brennan of counsel), for petitioner.  
Pico Ben-Amotz, Acting Counsel, NYS Department of Labor (Larissa Bates and Benjamin T. Garry of counsel), for respondent.

WITNESSES

For petitioner: Manish Patel, Darshana Patel, and Hitesh Patel.  
For respondent: Robert Smith and Elizabeth Ares.

WHEREAS:

STATEMENT OF THE CASE

On June 10, 2008, Petitioner's owner Manish Patel, appearing *pro se*, filed with the Industrial Board of Appeals (Board) a petition for review of orders issued by Respondent Commissioner of Labor (Respondent or Commissioner). By letter dated June 13, 2008, enclosing a copy of the Board's Rules of Procedure and Practice (Rules) (12 NYCRR Part 65 et seq.), the Board directed Mr. Patel to file an amended petition and a copy of the orders sought to be reviewed, in accordance with the Rules' requirements, on or before July 14, 2008, or risk dismissal of the appeal.

The Petitioner failed to file either an amended petition or a copy of any order, and accordingly, the Board dismissed the petition by Resolution of Decision (Decision) dated

September 24, 2008. On September 26, 2008, the Board served a certified copy of the Decision on the Petitioner and the Respondent by mail.

Petitioner subsequently commenced an Article 78 proceeding, seeking judicial review of the Board's Decision to dismiss the petition. In addition, through counsel Petitioner filed a motion for reconsideration of the Decision pursuant to Rule 65.41(b). The motion requested reinstatement of and leave to amend the petition and enclosed a copy of two orders sought to be reviewed, both dated April 29, 2008, and a proposed amended petition. The motion was supported by affidavits of Petitioner's attorney and Petitioner's General Manager Kruti Patel, whose affidavit is dated October 24, 2008. Respondent opposed the motion.

By Interim Resolution of Decision dated December 17, 2008, the Board granted the motion for reconsideration, reinstated the petition filed on June 10, 2008, and accepted the amended petition which challenged an order to comply with Labor Law article 19 (wage order) and an order under articles 6 and 19 (penalty order), both issued against Petitioner. By stipulation filed January 23, 2009, the Article 78 proceeding was discontinued.

The wage order finds that the Petitioner paid named employees at "a wage rate below the minimum prescribed in [the] Minimum Wage Order" during various periods from September 2004 through January 23, 2008, and owes wages in the amount of \$78,382.33, interest at 16% in the amount of \$13,720.47, and a civil penalty of \$19,596.00, for a total of \$111,698.80 due and owing.

The penalty order contains three counts. Count I finds that Petitioner violated Labor Law § 661 and 12 NYCRR § 138-3.1, which then governed the hotel industry, "by failing to keep and/or furnish true and accurate payroll records for each employee" for the period from about March 29, 2005 through January 13, 2008. Count II finds a violation of Labor Law § 191 (1) (a) "by failing to pay wages weekly to manual workers not later than seven calendar days after the end of the week in which the wages were earned" during the period from about August 8, 2004, through January 13, 2008. Count III is for a violation of Labor Law § 191 (1) (d) "by failing to pay clerical and other workers in accordance with the agreed terms of employment, but not less frequently than semi-monthly, on pay days designated in advance" during the period from or about March 29, 2005, through January 13, 2008. A civil penalty is assessed in the amount of \$200 for Count I, \$100 for Count II, and \$100 for Count III, for a total of \$400 due.

Petitioner's amended petition challenges the findings in both orders as well as the reasonableness of the interest and penalties assessed. More particularly, Petitioner claims that Respondents' findings regarding employees' job classifications, dates of employment, hours of work, and amount of compensation owed are inaccurate. Respondent filed an answer primarily denying the material allegations of the petition.

A hearing was held on February 11 and June 4, 2010, before Sandra M. Nathan, Esq., the designated hearing officer for this matter. Although correspondence from the Board, including the Notice of Hearing, offered the parties the opportunity to have the Board

arrange for an interpreter at hearing, neither party notified the Board that it would like to have an interpreter at hearing. At the commencement of the hearing, Respondent moved to sequester witnesses. Petitioner did not object, and with the exception of Department of Labor (DOL) Investigator Robert Smith for Respondent and Manish Patel for Petitioner, the witnesses were sequestered. Manish Patel was the first witness to testify.

For clarity, it is noted that Petitioner's General Manager during the time of the events testified to was Kruti Patel (K. Patel) and that she is the daughter of Manish Patel (M. Patel) who is Petitioner's owner; that Petitioner's employees Darshana Patel (D. Patel) and Hitesh Patel (H. Patel) are husband and wife, not related to either K. Patel or M. Patel, and are claimants in this proceeding.

At hearing, Petitioner agreed to Respondent's findings that five of the ten employees listed on the wage order schedule are owed wages. Not in dispute is that the following employees worked for Petitioner during the dates indicated and in the occupational classifications shown and that Petitioner owes each of them the amount shown:

Joseph White (cleaner)	9/27/04 - 10/21/04	\$15.00
Brenda Taylor (cleaner)	2/28/05 - 3/6/05	\$13.00
Zenaida Agrispin (cleaner)	8/21/06 - 8/27/06	\$28.71

As to Mark Cohen and Myron Smith, also listed on the wage order schedule, Petitioner disagreed with Respondent's classification of them as cleaners and contended that they were desk clerks, but otherwise agreed with the findings that Cohen worked August 22, 2005 – August 28, 2005, and is owed \$95.91 in wages and that Myron Smith worked January 10, 2005 – January 23, 2008, and is owed \$56.00 in wages. As it is our understanding that the parties have settled their dispute regarding the amount of wages owed to Mark Cohen and Myron Smith, along with Joseph White, Brenda Taylor and Zenaida Agrispin, the parties did not litigate, and did not intend to litigate, the job classifications of Mark Cohen and Myron Smith. Therefore, we have not relied on either the Respondent's findings or the Petitioner's contentions as to the job classifications of these two employees in reaching our determinations in this matter.

### SUMMARY OF EVIDENCE

At the time of hearing, M. Patel, had been in the hotel business for 25 years and owned only Ram Hotel, Inc., a single hotel with about 54 rooms where he employed three to four people, some part-time. Usually only eight to fifteen rooms were rented each night, and according to M. Patel, employees were responsible for either front desk duties or housekeeping, but not both.

M. Patel testified that there were no problems with the building housing the hotel, but if something went wrong, a plumber or an electrician would be telephoned, and Petitioner had a contract for snowplowing in December, January and February from 2004 to

the date of hearing. According to M. Patel, since 2005, the hotel's hours were from 7 a.m. to 11 p.m.

M. Patel testified that front desk employees, also known as desk clerks, live on the premises in a two-room apartment adjacent to the hotel's lobby. The entrance door to the apartment is immediately behind the front desk. At the time of hearing, D. Patel and H. Patel lived in the apartment with their nine-year-old twin sons; they had lived there and worked for Petitioner since January 1, 2007. Also behind the front desk is a door leading to a two-bedroom apartment upstairs, where M. Patel periodically stayed. Patel testified that his primary residence was in New Paltz, New York; he also testified that in 2007, he considered the hotel to be his primary residence and that he stayed in New Paltz two to three days a week between Monday and Friday.

M. Patel described the work of desk clerks as limited to opening the hotel at 7 a.m., closing it at 11 p.m., and attending to the front desk, that is, checking guests in and out, including having them complete forms, giving them room keys, and coming to an agreement on a rate, which might vary depending upon how slow business was:

“[T]hey [the clerks] make a deal with [the guests] about what rate we charge. Depend upon the situation, like sometimes we are very slow so we will argue with the rate or discount this, discount that and make arrangement, whatever both agree, customer agrees, and then we check them in . . . .”

M. Patel testified that because desk clerks lived in the apartment behind the front desk, they were not required to sit at the desk waiting for guests, but might do whatever they liked in the apartment, and only one person at a time was required to be available to attend to front desk duties. A desk clerk who was in the apartment but also covering the front desk would know when a guest arrived and/or needed help because a doorbell sounded loudly in the apartment when the hotel's front door was opened; the door between the apartment and the front desk was required to be kept open during the daytime; and a second bell was available at the desk for a guest to ring to get service.

According to M. Patel, desk clerks did not have any responsibility to answer the front desk telephone after 11 p.m. when it was shut off. But he also testified that if a guest had a maintenance problem in the middle of the night, for example an overflowing or leaky toilet, the guest would call the desk clerk who would be responsible for moving the guest to a different room. M. Patel both denied that such a thing ever happened and also said “that doesn't happen every night.” M. Patel also testified that desk clerks were additionally responsible for cleaning up spills in and around the front desk, for example when a guest tracked snow in from the outside, but that housecleaners were to clean the area before they left for the day.

In the summer, Petitioner usually employed two housecleaners, but a housecleaner was not always on the premises. According to M. Patel, housecleaners worked from about 10 a.m. to 1 p.m., and their work included cleaning rooms, plunging or flushing out toilets

that did not work, and changing light bulbs. However, they completely cleaned only the hotel rooms that were used the previous night and whose occupants had checked out of the hotel. Where guests remained more than one night, the housecleaners cleaned their rooms every other day during their stay.

### Payroll Records

Petitioner kept records of only the housecleaning staff's daily hours of work. Petitioner did not keep track of the time each desk clerk worked because, as M. Patel stated, "they are living there and they can do anything during that time, as long as the desk is manned." Referring to H. and D. Patel in particular, M. Patel testified that, in effect, Petitioner did not need a record of the hours each worked:

"I hired them to work 40 hours a week, two shifts. Now, which one does when, it doesn't matter, because they live there. Either one, one has to be there. Now, who becomes – say for example somebody work 30 hours and somebody worked say more hours, it's between the two of them, husband and wife. Say husband has gone out to see his father and she covers up for him, it's between the two of them. I'm not involved in that."

In evidence are Petitioner's monthly payroll records for Ranjanben Maisuria and Champaklal Maisuria for their work April through October 2005; Nimishaben Mistry for her work April through July 2006; and D. Patel and H. Patel for their work January through December 2007. The wage order finds underpayments due to the Maisurias for January through October 17, 2005; to Mistry for work from March 28, 2006 to July 30, 2006; and to D. and H. Patel for their work January 1, 2007 to January 13, 2008. M. Patel testified that the Maisurias began their work for Petitioner in April 2005, not January 2005, but there is no dispute that Mistry worked for Petitioner in March 2006 and that D. and H. Patel worked for it in January 2008.

Each monthly payroll record in evidence is on a separate and loose sheet of paper. That is, there is a separate sheet of loose paper for each employee for each month that employee worked, and there is a separate sheet of loose paper for each group of related employees for each month that they worked. There is no evidence whether these separate monthly record sheets were excerpted from a book, log, or larger document.

Each monthly payroll sheet shows the number of dependents claimed; marital status; monthly wage rate; gross monthly wages (usually, but not always, the same amount as the monthly wage rate); various federal and state withholdings; net pay; pay date; and a check number. The payroll sheets do not show the hours or days worked, the hourly rate of pay, social security number, or address of each employee.

The payroll sheets show monthly payment of wages, but not on a consistent date, or even a consistent time each month. However, payment was consistently in the month following the month of work. For example, the payroll sheets for the Maisurias show that for

their work in April 2005, they were paid on May 1, 2005; for their work in May 2005, they were paid on June 15, 2005; for work in June 2005, they were paid on July 16, 2005; their work in July and August 2005 was paid on August 1 and September 1, 2005, respectively; and for their work in September and October 2005, they were paid on October 15 and November 15, 2005, respectively.

The payroll sheets for Mistry indicate that they cover her work in April 2006 and May, June and July 2005; however, by hand the number "6" is written over the printed "5" in the year 2005, and the sheets were put in evidence as payroll information for 2006. In spite of this, the June payroll sheet shows a pay date of July 1, 2005, although annexed to the June sheet is a copy of what is apparently a check payable to Mistry that is dated July 10, 2006.

There is no evidence that any of the pay reflected on the individual monthly payroll sheets for each employee was actually paid. Only copies of the face of checks payable to Mistry are in evidence, but there is no evidence that these were cashed, or canceled, or even given to her, and even the date on each check is not consistent with the payroll record to which it is attached; the date of the check does not consistently correspond to the pay date recorded on the payroll sheet. So, for example, Mistry's payroll sheets show pay dates of May 1, 2005, June 1, 2006, July 1, 2005, but the copies of the check faces that are annexed to the sheets are dated May 7, 2006; June 7, 2006, and July 10, 2006, respectively.

When asked on cross-examination whether Petitioner had provided any of the monthly payroll sheets to the DOL during its investigation, M. Patel responded that his daughter K. Patel was handling the response to the investigation, and he did not know if she had provided them. The only evidence as to when the monthly payroll sheets were created is M. Patel's testimony that they were created during the periods that the employees were working. However, M. Patel also testified that his son signed all of the pay checks and prepared all of the monthly payroll sheets that Petitioner put in evidence and that he (M. Patel) did not participate in creating the records and only first saw them during DOL's investigation in 2008. M. Patel attributed the numerous errors on the payroll sheets to "clerical error," but did not explain how he knew that. He also stated that the payroll sheets were accurate based on checks that cleared. M. Patel's son did not testify, and as noted above, the record is devoid of evidence of canceled checks. Nonetheless, the gross wages recorded on the monthly payroll sheets are a basis for Respondent's underpayment calculations and findings.

#### Ranjanben Maisuria and Champaklal Maisuria

The wage order finds that both Ranjanben Maisuria (R. Maisuria) and her husband Champaklal Maisuria (C. Maisuria) worked for Petitioner as desk clerks from January 29, 2005-October 17, 2005. The amended petition asserts that R. and C. Maisuria were cleaners who began working for Petitioner in April 2005 and worked 30 hours a week. Neither of the Maisurias testified at hearing.

M. Patel testified that the Maisurias worked as cleaners every day of the week, including the weekends, from April to October 2005 and that their hours were approximately from 10 a.m. to 1 p.m., depending upon the number of rooms to be cleaned, but 1 p.m. was the latest that they would work. He also testified that they took one to two vacations for a couple of days during the period of their employment, but that no money was deducted from their wages for their time away, and that they were not required to make up hours. In October 2005, they worked less than the full month, but M. Patel was not certain whether they worked one, two, or three weeks.

They received free lodging; however, according to M. Patel, the lodging provided was a regular hotel room, not the apartment behind the front desk. It is undisputed that R. and C. Maisuria were paid monthly. M. Patel stated that the Petitioner normally paid wages on the 10<sup>th</sup> of the month, but the Maisurias wanted to be paid on the 15<sup>th</sup> of the month, and that the date did not affect their pay rate.

#### Nimishaben Mistry

It is undisputed that Mistry worked as a desk clerk from March 28, 2006 to July 30, 2006, and lived in the apartment behind the front desk along with her husband, who did not work for Petitioner. They did not pay for housing which came with Mistry's job. The amended petition asserts that Mistry worked 40 hours a week. She did not testify at hearing.

M. Patel testified that Mistry was not responsible for front desk duties during the entire time each day that the hotel was opened, but that he and his son also worked as desk clerks during the period of her employment. M. Patel said that his son "used to relieve me when I had something to do, to go to New Paltz, he would come and relieve me, so he would stay there for me." M. Patel said that he or his son would "come back here" from New Paltz to work at the hotel; they stayed in the upstairs apartment. However, M. Patel also testified that during the period of Mistry's employment, he was at the hotel everyday and his son was there one to two days. M. Patel did not testify that anyone else worked at the desk during the period of Mistry's employment besides Mistry, himself and his son, who did not testify.

During her employment with Petitioner, Mistry did not take any vacation and worked five days a week "on the second shift, like three to eleven," according to M. Patel, although sometimes her shift changed. M. Patel also stated that Mistry worked part time and that she never worked more than eight hours a day. According to M. Patel, when she was not working, Mistry was free to do whatever she pleased, including leave the premises.

#### Hitesh Patel and Darshana Patel

In January 2007, D. and H. Patel moved from New Jersey to take jobs with Petitioner because the jobs allowed them flexible time to care for their children who were in the first grade at the time of their move. D. and H. Patel were paid monthly. Initially, their gross monthly wages were \$1,200 and \$1,720, respectively, but according to Petitioner's payroll sheets, in July 2007 they received raises to \$1,400 and \$1,800, respectively. M. Patel testified that D. and H. Patel were not given more duties or longer hours when their wages

were increased. It is undisputed that D. and H. Patel, with their children, received free lodging in the apartment located behind the front desk, were paid wages on the tenth of each month, and that D. Patel was a desk clerk.

The wage order classifies H. Patel as a maintenance worker. However, M. Patel testified that Petitioner did not employ anyone in a job title of "maintenance worker," that H. Patel, like his wife, was a desk clerk, and that although H. Patel might change a light bulb for a guest, he would not do any major type of maintenance work. M. Patel denied that H. Patel ever shoveled snow and estimated that H. Patel may have spent a few minutes over the course of a year doing light maintenance like changing light bulbs or cleaning up an unexpected mess in the lobby, but that the housekeepers cleaned the lobby, not D. or H. Patel, and that about 99-100% of H. Patel's time was spent as a desk clerk. This percentage was not based on M. Patel's observation of H. Patel, but supposition.

H. Patel testified that he did not do maintenance work and never shoveled snow; he said that there was a contract for someone to plow snow, and in an emergency he might change a light bulb for a guest, which he did a couple of times. D. Patel also denied that her husband did any maintenance work although she agreed that he might change a light bulb for a guest or put batteries in a T.V. remote control device upon a guest's complaint that it wasn't working.

When M. Patel hired H. and D. Patel, he told them that their responsibilities as desk clerks were to open the door, make coffee for the guests, turn the coffee pot off at 10 a.m., check guests in and out and provide related services, give the cleaners a list of hotel rooms to be cleaned, and take their time sheets at the conclusion of their shifts.

D. Patel testified that keeping the lobby clean was among the desk clerk's duties that she and her husband did although no one asked her to do that work; it was not a cleaner's duty. Cleaning the lobby involved mopping and sweeping, dusting furniture, tying up trash bags and taking them out; cleaning the lobby took about a half-hour each day. H. Patel's testimony on cleaning the lobby is consistent with his wife's.

The amended petition alleges that D. and H. Patel each worked 48 hours in a six day work week, and M. Patel and D. and H. Patel each testified that D. and H. Patel each worked 40 hours a week. M. Patel testified that during the entire year 2007 and also January 2008, D. and H. Patel worked Monday through Friday and decided between themselves which of them would be responsible for front desk duties during the course of a day; that it was an informal arrangement that he (M. Patel) did not dictate except to the extent that someone was required to cover the desk duties – whoever was available – and that he communicated these terms to D. and H. Patel. There was no schedule of work that each was required to follow, except that the hotel had to be opened at 7 a.m. and closed at 11 p.m. and someone had to be attending to the desk during those hours, and whoever was not attending to the front desk could leave the premises or attend to personal business or pleasure, including spending time with the children, either on or off the premises. That is, whoever was not covering the front desk was not required to work at all.



D. Patel testified that her husband usually arose early and assumed the morning duties: he opened the hotel doors, made coffee, cleaned the lobby, checked guests in and out, reviewed computer records for the number of guests expected to arrive, confirmed that rooms were cleaned for expected arrivals and, if necessary, telephoned to get additional cleaning staff. While he did these duties, she got their children ready for school and attended to personal needs like doing laundry and preparing lunch and dinner before the children returned from school. Later, on re-direct examination, she testified that she did not keep track of her work hours in a week, "but we work in between six to eleven, half he do, half I do."

D. Patel worked the desk in the afternoon and evening and locked the hotel's doors at night. Her children returned from school at about 3:30 at which time she gave them either a snack or their dinner, and helped them with their homework if needed. She said that she began work at the front desk at 4 p.m. by cleaning the lobby. According to D. Patel, while she worked at the front desk, H. Patel stayed with the children and was in the apartment using the computer or watching T.V. with the children, or he took them out to practice baseball. D. Patel said that she locked up at 11 p.m. turned the lights out and was finished with her job for the day.

When asked on cross-examination if there were times that both she and her husband worked for the hotel at the same time, D. Patel responded that "[i]f it is very busy, he does help me out, but he doesn't have to. . . As a husband, he would do it. As a co-worker he doesn't have to" but that this did not happen often as the hotel's business was slow. Also on cross-examination, D. Patel stated that occasionally she or her husband would have to change a guest's room in the middle of the night. Contradicting his wife, H. Patel testified on cross-examination that a guest never called with an emergency in the middle of the night because once the hotel doors were locked, the telephone was also switched off so that they never received such calls.

H. Patel agreed that the hotel doors were open from 7 a.m. to 11 p.m. and that he decided that he would take the morning shift and his wife the afternoon to evening shift. He testified that he worked Monday through Friday, began at 7 a.m. and finished eight hours later at 3 p.m.; and that when M. Patel hired him and his wife, M. Patel did not say which shift to work only "he says eight hour shift, so you manage whatever you like;" and that either he [H. Patel] or D. Patel were free to leave any time during the day as long as the other covered the desk duties. H. Patel denied that he and his wife ever worked at the same time; he testified that there was no need because the hotel was not that busy.

M. Patel and D. and H. Patel all testified that D. and H. Patel did not work on weekends in 2007 or January 2008 and that on weekends M. Patel stayed in the hotel's upstairs apartment and assumed the desk clerk job. D. Patel said that on the weekends she and H. Patel could go out to eat, for example, "if I request the owners I want to go, they always let me go anytime I want to" and denied that she or her husband worked on the weekend. When asked on cross-examination about whether they had to ask M. Patel's permission to spend the night away from the hotel, the following exchange ensued:

A: "We let him know and he let us go, yes."

Q: "So, did you have to ask for his permission before you left?"

A: "Yes, we do have to let him know, we have to arrange that for us. Yes, we do have to ask him for the day off or for to go out, and he arrange that for us, he said yes, go ahead."

....

Q: "If you wanted to leave the hotel between 11 p.m. and 7 a.m., say to go on like an overnight trip, did you have to ask for permission from Mr. Patel?"

A: "I had to let him know that I am leaving tonight, that's all, and he would not say no at all."

M. Patel denied that D. and H. Patel did food shopping for the hotel; he said that the hotel did not have food. However, he subsequently conceded that when D. or H. Patel did food shopping for themselves, there were times that he asked them to buy food for the hotel and for him as well, explaining "[t]hat's the relationship." This might occur at any time, including weekends, and M. Patel also did personal errands for D. and H. Patel when he (M. Patel) went out. M. Patel also testified that D. and H. Patel deposited money for Petitioner.

D. Patel agreed that she would buy food for Petitioner when she was doing her own shopping on weekends and that this occurred once or twice a month. She said: "if I am going out, I would buy it, but I don't have to especially go and buy." She also testified that M. Patel never asked her to buy anything, "but some jobs I do, like in the morning I make coffee, so I know when I am running out of coffee. So, I use his membership to do my shopping, also, his membership card. So, when I go to Sam's Club, I grab my groceries and I grab his coffee" and also creamers "and like whatever the breakfast they have" at the hotel. D. Patel also agreed that K. Patel, or M. Patel, or his son would get things from the store for her as well. She explained that during 2007, Petitioner served a continental breakfast of doughnuts, muffins, bagels.

M. Patel testified that D. Patel took a paid vacation of three to four weeks to go to India, that H. Patel also went to India, but at another time, and that D. and H. Patel together went on and off to New Jersey to visit family. M. Patel testified that he covered for them when they were away. According to D. Patel, her vacation to India was two to three weeks in duration, but she was paid for her time away at her usual pay rate and that while she was away, K. Patel covered her work at the front desk. H. Patel testified that he along with his wife went to New Jersey to visit family. Without any reduction, they were paid for their time away from work. H. Patel testified that while they were away, M. Patel covered the front desk.

#### The Department of Labor's investigation.

Robert Smith had been an investigator with DOL for seven and a half years at the time of hearing. His investigative conclusions were derived from information that he

received from employers, employees, and/or personal observations. Smith first went to Petitioner's premises on January 7, 2008, to investigate a claim that an employee (a cleaner) had not been paid wages for her work and asked to see records concerning her. He spoke with D. Patel who gave him the employee's employment application.

While at the hotel, Smith interviewed all of the employees present and requested additional records. Smith's Narrative Report (Report) dated January 7, 2008, is part of DOL's file in evidence and contains the notes that he took while he interviewed people at the hotel. He wrote in the Report what interviewees told him while he talked with them.

Smith testified that he interviewed D. and H. Patel together because D. Patel told him that her husband understands but does not speak English very well. According to Smith, D. Patel told him that she, along with her husband, "worked 24 hours a day, 7 days a week;" that they "weren't allowed to leave the premises and that the only time that they were allowed to leave. . . is when they went to Sam's Club to do shopping for RAM, the hotel . . . and that's when they were able to do their own errands, and that would be . . . on a Sunday." Smith testified that he "absolutely" believed that D. Patel was being truthful with him because when he told her that he thought that both she and her husband would be entitled to back wages, she told him that "she loved her job and she didn't want to . . . go forward with any of this, she wanted to stay. She wanted to not . . . do anything forward after that." The Report shows a January 7, 2008 entry that employees did not want to pursue back wages and that Smith called his supervisor for advice regarding this situation.

Smith discussed D. Patel's duties with her and testified that she told him that they included checking guests in and out and keeping the front area and parking lot clean. Smith understood D. Patel to say that she was responsible for checking in late arriving guests, even when they arrived in the middle of the night. According to Smith, D. Patel also told him that her husband changed locks, fixed the toilets, removed snow, and did personnel work and that when she told Smith this, H. Patel was standing about two feet away and did not dispute anything that she said. Smith added that K. Patel also stated that H. Patel fixed things and removed the snow and that during Smith's exit interview of K. Patel, she described H. Patel's duties which sustained in Smith's mind that H. Patel was a manual employee although Smith testified on cross-examination that he did not recall whether she agreed with him.

The Report indicates that the hotel door is locked at midnight and under the date of "1/7/08," the Report states that "husband is in interview (with us) English is limited." Also recorded in the Report is the information that D. Patel said that the front desk duties include "property management," supervision of maids, and keeping the parking lot clean and Smith's observations that both D. Patel and H. Patel wear uniforms. Other than D. Patel and K. Patel, Smith did not interview any other employees to ascertain H. Patel's duties and testified that he was satisfied with the information that he obtained in this respect from his interview with D. Patel while her husband was present.

During the investigation, Smith was present at the hotel on three days when D. and H. Patel were both wearing uniforms and, according to Smith, were working at the same

time. On one of the days, there had been a snow storm, and at about 8 or 9 a.m. he observed H. Patel shoveling snow while D. Patel was working at the front desk. Smith conceded that he did not observe the scope of H. Patel's shoveling but that later, as Smith audited books at about 11 a.m. or noon, he observed H. Patel cleaning the breakfast area where coffee, cereal, muffins and other "stuff" had been served while D. Patel cleaned the floors, and then they both cleaned the floors together.

The Report also contains Smith's entry that D. and H. Patel's "schedule 24 hours a day 7 days a week – must live here" and "husband is also required to be here. Husband and wife both are not allowed to leave or work anywhere else." On cross-examination, Smith testified that H. Patel did not say anything during the interview and that he (Smith) recalled D. Patel using the words "both are not allowed to leave," but Smith added that she said that she was allowed to leave only on Sunday to go to Sam's Club to buy "provisions" for the hotel. Although interviewees were not required to sign Smith's entries in the Report, Smith did request and obtain the signatures of the cleaners whom he interviewed. D. and H. Patel declined to sign his entries.

A "Record of Incomplete Inspection Time," is another Respondent log in evidence in which Smith entered notes during his investigation. An entry for January 7, 2008 indicates that he called his supervisor because D. Patel did not want to pursue wages to which she and her husband might be entitled. Smith testified that D. Patel informed him of her hours and duties before he advised her that she might be entitled to wages, but that after he advised of the possible payment, she became "very upset" and "teary-eyed." According to Smith, she asked "if I could leave her and her husband out of it, that she was very happy with what she was doing and she didn't want to hurt the employer."

D. Patel testified that she recalled that she and her husband talked to Smith and that when Smith asked if she and her husband could leave the premises, she had answered that they could. She denied telling Smith that she and H. Patel worked 24 hours a day, 7 days a week. On cross-examination, D. Patel agreed that when Smith told her that Petitioner might have underpaid her and owe her money, she responded to Smith that "I get free living and I'm okay with what I have." H. Patel denied ever having met Smith or that his wife had discussed with him her meeting with Smith. H. Patel testified that he wasn't present at the time of their meeting.

*Information recorded on the Computation Sheets.*

DOL computation sheets are used to determine whether employees are due wages. Each sheet in evidence contains information that Smith entered and pertains to a single employee. The information is organized on a weekly basis and includes job classification; the end date for each week worked; the total hours worked; wages received; allowances credited to Petitioner for housing; dollar amount credited to Petitioner, including wages paid and housing allowances; wages required by the state minimum wage order for the hours worked; and any underpayment. The computation sheets for D. and H. Patel, R. and C. Maisuria, and Mistry contain information, in part, from Petitioner's monthly payroll records that K. Patel produced for Smith, who testified that he requested but did not receive any time records, or even work schedules, for these employees.

Smith found that employees who lived in the apartment were paid monthly, but sometimes waited over a month to be paid – up to almost a month and a half and that the cleaners were paid weekly. In the case of employees who were paid monthly, Smith's calculations to determine whether wages are owed were based on a workweek. Smith multiplied each employee's monthly pay, as recorded in Petitioner's monthly payroll records, by 12 to determine annual income, and then divided that product by 52 to determine the employee's weekly pay. This formula, using the applicable monthly pay, is recorded on the computation sheets for H. Patel, R. Maisuria and Mistry.

The computation sheets for D. Patel, R. and C. Maisuria, and Mistry classify them as desk clerks, and the computation sheet for H. Patel classifies him as a handyman or maintenance worker. Smith testified that K. Patel identified the Maisurias as desk clerks. The computation sheets for all of the employees show that the Petitioner was weekly credited with both what it actually paid them and the hourly housing allowance then in effect, that is, either \$.30 or \$.35 an hour multiplied by the hours worked in the week.

The sheets show that each employee worked 91 hours a week. This amount was based on the information that Smith obtained in his interviews of D. Patel and K. Patel and time that was credited to the Petitioner. Smith testified that D. Patel had told him that she and her husband essentially worked around the clock all week. Smith relied on a "wait time" doctrine by which an employee who is required to be available for work 24 hours a day, as for example to provide services to hotel guests, must be paid for the waiting time. Smith credited the Petitioner with giving each employee eight hours of uninterrupted sleep and three one-hour meal periods in a twenty-four hour period, leaving 13 hours each day, or 91 hours of work each week.

Then, based on his discussions with K. Patel, in which Smith described K. Patel as saying that R. and C. Maisuria and Mistry had the same "agreement" with Petitioner that H. and D. Patel had – which Smith understood to mean that they worked the same hours and received the same benefits – Smith calculated underpayments for all five employees based on a 91-hour workweek and also understood that K. Patel confirmed the accuracy of the 91-hour workweek. Written on the computations sheets for R. and C. Maisuria and Mistry is that, according to K. Patel, each of them had the same "agreement" with Petitioner that D. and H. Patel had.

Smith never spoke with, or even attempted to speak with, either R. or C. Maisuria about the terms of their employment with Petitioner, nor did Petitioner have any records of any employee's hours or job description so there were no employer records that, Smith testified, would lead him to conclude that employees did not work 91 hours a week. Smith did not credit Petitioner with giving employees any vacation time and did not ask D. and H. Patel whether or not they took any vacation because he inferred that if they were required to work every day, they were not free to take a vacation and because Petitioner's records did not reflect any vacation time. M. Patel denied that any of his employees worked 91 hours in a single week in 2007 or January 2008. Neither D. nor H. Patel kept records of their time spent working, but at hearing both denied that they ever worked 91 hours a week.

Smith showed all of the computation sheets to K. Patel, discussed them with her, and asked her to sign them. She reviewed all of the sheets and signed the last one that she reviewed which pertained to Mistry. Smith said that it is not a requirement that an employer sign the computation sheets, but he "asked her to review them and sign them to show that they are true and accurate records of what [he had] been provided." Smith never spoke with M. Patel during the investigation.

On cross-examination, Smith testified that he showed the computation sheets to K. Patel, probably after they were completed on January 16, 2008, the date that she signed them, and explained that DOL investigators ask employers to review the computations sheets

"to make sure that they are, basically, reflective of the information, the documentation that they [the employer] provided and the investigation that [DOL] conducted and [ask] them to determine whether that was true and accurate and [ask] them to sign it and [K. Patel] did."

When Smith was asked if he "would have instructed [K. Patel] that if she signed it, she would be agreeing to your calculations," Smith answered "yes." Smith also testified that he would have warned her that "the effect of signing [the computation sheet was] that that would mean that she agreed to it," and "I explained it, yes" that by signing the certification, she signified that she agreed with the computation sheets' contents. The computation sheet that K. Patel signed contained the entry "Desk Clerk Same Agreement as [D. Patel] per Patel Apt. Provided for Family 1200 per wk x 12 ÷ 52 =."

Smith testified that K. Patel may have disagreed with his conclusion that the employees could not leave voluntarily at any time, but he wasn't certain. Smith prepared a "Final Report" dated January 15, 2008, for his supervisors that states that the employer, whom Smith identified as K. Patel, "believes that Clerk(s) misunderstood my questions and stated they are free to leave anytime they do not work during the course of the day." The "Final Report," which is a Petitioner exhibit in evidence over Respondent's objection, also states that the employer, referring to K. Patel, "is an attorney."

Additionally, the "Final Report" states that Smith reviewed "an actual time sheet" that Petitioner kept, showing time of arrival and departure (10 AM-4 PM on 7/31/07) of the cleaner whose claim triggered DOL's investigation. Finally, entered on the "Final Report," is information attributed to D. Patel that she and her husband each work 24 hours a day, seven days a week; are not allowed to leave the hotel except on Sunday when they go to Sam's Club to buy groceries and other supplies for the Motel, at which time she does shopping for her family and runs personal errands; and that the hotel's doors are locked from midnight to 6 a.m. but that she "is still always available for late arrivals and guests who may need something."

*The computation of wages for Ranjanben and Champaklal Maisuria.*

The computation sheets show that Smith determined that during the period from January 29, 2005 to October 17, 2005, R. and C. Maisuria each worked for Petitioner for 27

full weeks and an additional ten days during their last few weeks of employment, and that there were eight weeks within the period – parts of February and April and all of March, 2005 – that they did not work for Petitioner. Smith did not know whether the Maisurias were on vacation during these eight weeks, but his calculation of the wages owed to them did not include the eight weeks.

Smith testified that in 2005, the minimum hourly wage in the hotel industry for the first 44 hours that an employee worked in a week was \$6, and that the hourly premium pay for all hours that an employee worked in excess of 44 hours in a week was \$9. Finding that each of the Maisurias worked 91 hours a week, Smith calculated that each should have been paid \$663.00 for each of their 27 workweeks and \$234 for their last ten days of work, during which each worked 39 hours (39 hours at \$6 per hour).

There is no dispute that R. and C. Maisuria were each paid \$950.00 a month. Smith multiplied the monthly wage of \$950 by 12 months, divided that product by 52 weeks, and found that Petitioner paid each of them \$219.23 weekly until the workweek ending September 26, 2005; paid R. Maisuria \$120.19 for the week ending October 3, 2005 and \$51.51 for her last ten days of employment; and paid C. Maisuria \$212.69 for the week ending October 3, 2005, and \$95.01 for his last ten days of employment.

In calculating the wages owed to R. and C. Maisuria, Smith credited Petitioner on a weekly basis with the wages that it paid to them along with a weekly housing allowance. Smith found that Petitioner was entitled to a credit for each employee of \$.30 an hour or \$27.30 a week (91 hours at \$.30 an hour) for each of 27 weeks and \$11.70 for the 39 hours that each employee worked during the last ten days of their employment (39 hours at \$.30 an hour). In short, Petitioner received a credit of \$246.52 for each of 26 weeks for each of the Maisurias; for the week ending October 3, 2005, a credit of \$147.49 for R. Maisuria and \$239.99 for C. Maisuria; and for the last ten days of their employment, a credit of \$63.21 for R. Maisuria and \$106.71 for C. Maisuria.

Each weekly total that was credited to Petitioner was subtracted from the \$663.00 that Smith found that each should have been paid each of 27 weeks, and the credits for the last ten days of the Maisurias' employment was subtracted from the \$234 that Smith found that each should have been paid. Smith found a weekly underpayment for \$416.48 for each of them in each of 26 weeks; an underpayment of \$524.51 to R. Maisuria and \$423.01 to C. Maisuria for the week ending October 3, 2005; and an underpayment of \$170.79 to R. Maisuria and \$127.29 to C. Maisuria for their last ten days of work. In total, Respondent found that Petitioner owes each of the Maisurias \$11,378.78.

*The computation of wages for Nimishaben Mistry.*

It is undisputed that Mistry worked for Petitioner from March 28 through July 30, 2006, a total of 18 weeks. According to Smith, in 2006 the minimum hourly wage in effect for the hotel industry for the first 44 hours an employee worked in a week was \$6.75; for hours that an employee worked in excess of 44 hours in a week the premium rate of pay was \$10.125. Finding that Mistry worked 91 hours a week, Smith calculated that she should have been paid \$745.88 a week.

Also undisputed is that Mistry was paid \$1200 a month. Smith multiplied this amount by 12 and divided the product by 52 to find that Petitioner paid Mistry \$276.92 weekly. Smith added the weekly wages that Petitioner paid to Mistry to a housing allowance of \$.35 an hour or \$31.85 a week for a total of \$308.77, which he credited Petitioner with paying Mistry each of her 18 weeks of employment.

The weekly credit of \$308.77 was subtracted from the \$745.88 that Smith found that Mistry should have been paid weekly, resulting in a finding that she was underpaid \$437.11 each week that she worked. The weekly underpayment was multiplied by the 18 weeks that Mistry worked for Petitioner, for a total of \$7,867.98 that Respondent found Petitioner owes to Mistry, which is reflected on the wage order schedule corresponding to Mistry's name.

*The computation of wages for Darshana Patel and Hitesh Patel.*

It is undisputed and Respondent found that D. and H. Patel worked for Petitioner for the entire period from January 1, 2007 through January 13, 2008. According to Smith, in 2007 and 2008, the minimum hourly wage in effect for the hotel industry for the first 44 hours an employee worked in a week was \$7.15; for each hour that an employee worked in excess of 44 hours in a week, the premium rate of pay was \$10.725. Finding that D. Patel and H. Patel each worked 91 hours a week, Respondent calculated that each should have been paid at least \$818.68 a week.

Smith found that D. Patel was paid \$1280 a month from January 2007 through May 2007 and \$1400 a month from June 2007 through December 30, 2007, but not paid at all in January 2008. Smith multiplied the monthly wages by 12 and divided the product by 52 and found that Petitioner paid D. Patel \$295.38 a week until the end of May 2007 and thereafter \$323.08 a week until the end of 2007.

Smith found that H. Patel was paid \$1720 a month from January 2007 through May 2007 and \$1800 a month from June 2007 through December 30, 2007, but not paid at all in January 2008. Using the same formula as applied to the other employees, Smith found that Petitioner paid H. Patel \$396.92 a week until the end of May 2007 and thereafter \$415.38 a week until the end of 2007.

Smith also credited Petitioner with giving D. and H. Patel each a housing allowance of \$.35 an hour or \$31.85 a week for the entire period of January 2007 through January 13, 2008. With respect to D. Patel, Smith credited the Petitioner with \$327.18 a week during the period January 2007 through May 2007 and \$354.93 a week during the period June 2007 through December 30, 2007. With respect to H. Patel, Smith credited the Petitioner with \$428.77 a week during the period January 2007 through May 2007 and \$447.23 a week during the period June 2007 through December 2007.

For each week that Smith found that D. and H. Patel worked, the total that Petitioner was credited with paying each was subtracted from the \$818.68 that Smith determined that each should have been paid. This calculation resulted in a finding that D. Patel was underpaid \$491.50 each week from January 2007 through May 2007 (21 weeks), \$463.75



each week from June 2007 through December 30, 2007 (31 weeks), and \$786.85 for each of two weeks in January 2008, for a total of \$26,271.45 that Petitioner was found to owe her. This calculation applied to H. Patel resulted in Smith finding an underpayment of \$389.91 each week from January 2007 through May 2007 (21 weeks), \$371.45 each week from June 2007 through December 30, 2007 (31 weeks), and \$786.83 for each of two weeks in January 2008, for a total of \$21,276.72.

For the weeks ending January 6 and 13, 2008, the computations sheets for both D. and H. Patel credit Petitioner with only the housing allowance of \$31.85 for each week and state that they were not paid. However, some time after Smith signed the sheets in mid-January 2008, he entered a notation on them to the effect that they were paid for these weeks on February 10, 2008. Nonetheless, he testified that the amount of wages found due in the wage order does not reflect D. and H. Patel's receipt of a February 10, 2008 wage payment because DOL had not received a canceled check from Petitioner or other proof of payment of wages for the weeks ending January 6 and 13, 2008, and since such proof was required, the wage order as issued is correct. Smith did not recall whether he asked Petitioner for proof of payment for these weeks; there was no evidence of such a request in the DOL file; and he was unaware if a supervisor or another DOL staff person asked for proof of payment. No Petitioner payroll records were moved or received into evidence for the weeks ending January 6 and 13, 2008.

*Proceedings at the conclusion of Respondent's investigation; information that Respondent sought from Petitioner before issuing the orders.*

At the time of hearing, Elizabeth Ares had been a Senior Labor Standards Investigator for four years and had previously worked as an investigator for thirteen years. Ares was Smith's supervisor and responsible for reviewing Smith's conclusions in the instant case. She agreed with them, including the conclusion that employees weekly had "91 hours of work or [were] on call to work time, as per the [hotel industry] wage order." On cross-examination, Ares was asked to assume that the desk clerks were allowed to leave the hotel whenever they wanted, so long as someone remained to cover the desk duties, and asked if that were true, whether the calculation of 91 hours of work would be accurate. She responded:

"If the employer had records showing us a daily schedule or assignments that . . . the workers were off – the 91 hours is appropriate, based on lack of evidence telling us what hours they did and did not work. The fact that a desk clerk could leave whenever they wanted to, doesn't tell us that they did leave, and if they were not behind the desk because someone else were behind the desk, it doesn't tell us that they weren't cleaning, painting, doing any number of work-related tasks."

The cross-examination continued, and Ares was asked if the calculations resulting in a 91-hour workweek would change if she assumed that the desk clerks left the premises for personal reasons. She answered:

“If we had some kind of data telling us how many hours per day or per week they could leave, if we had something to work with, where we have, we have a recordkeeping or accounting task to do, we have arithmetic to do here.

....  
“We would need figures or data to use to do the arithmetic.”

Also on cross-examination, Petitioner’s attorney referred to a provision of the hotel industry wage order to the effect that an employer doesn’t have to pay every minute that an employee is on the premises if the employee is free to leave and not performing work at the time, and asked Ares if in light of the provision, D. and H. Patel “were entitled to be paid for 91 hours a week for 52 weeks a year.” She conceded that the provision is applicable to this case, but added that the same wage order provides that an employer pay for an employee’s “on call” status and that “[w]ith the lack of information as to how many minutes per day or hours per day or hours per week each individual was free to leave versus performed work, we utilized the 91 hours.” Ares repeated: “There was a lack of any information – yes, there was a lack of sufficient information to allow us to feel comfortable using any other figure than the 91.”

On re-direct examination, Ares further explained DOL’s process for evaluating information and, in particular, the importance of employer records:

“We rely heavily on the wage and hour records provided by the employer and we like to assume and find evidence that those records are accurate and can be relied on. So, payroll records, wage and hour records, are usually the basis for the work that we do. We verify whether those records are accurate through employee interviews. We ask employees, do you punch in, do you punch out, are the time records accurate, do you take a lunch, do you not take a lunch, are you paid in full for all your hours . . . and if those records seem to be accurate, that’s what we use to determine an underpayment. Where there are no records or the records may not be accurate, doesn’t necessarily mean that the worker was or was not paid properly, but it means that we need to rely on interviews, employee interviews, and when an employer tells us one thing and the workers tell us something different, since the . . . recordkeeping burden is on the employer, and with the lack of records or credible evidence to support the employer’s position, we rely on the testimony of the workers as to what they do and how long it takes them to do it or how many hours they worked.”

The affidavit of K. Patel, in support of Petitioner’s motion to the Board for reconsideration of its initial Decision in this case, is in evidence as a hearing officer exhibit without objection by either party. The affidavit states that K. Patel was present during DOL’s investigation of the Petitioner and that she provided the payroll records to the DOL investigator. She avers that after the investigation was concluded, she advised the

investigator that some of the employees had been misclassified and that minimum wage underpayments had been miscalculated, but does not identify either the asserted misclassified employees or miscalculations. K. Patel's affidavit continues that the investigator told her to request a DOL compliance conference and that although Petitioner's owner requested such a conference (a copy of an unsigned January 17, 2008 letter from M. Patel, making such a request, is attached to K. Patel's affidavit), K. Patel was later informed that DOL no longer uses a compliance conference procedure. The unsigned letter states:

"We recently received an inspection by the Division of Labor Standards. . . After the investigation was conducted, I spoke with the investigator about the items that were claimed as minimum wage underpayments. There were some errors as to the job functions of a few of the employees, specifically Champaklal Patel and Ranjanben Patel, which has led to inaccurate amounts due. As to a few of the other employees, there were errors as to the amounts of time that the employees actually work, specifically Hitesh Patel, Darshana Patel, and Nimishaben Mistry.

"I spoke to Mr. Robert Smith about these concerns we had regarding the findings upon conclusion of his investigation. . . ."

Ares sent K. Patel a letter dated January 29, 2008, confirming that on January 16, 2008 K. Patel had been served with a Recapitulation Sheet showing back wages due to ten employees, that Petitioner's payment was due, and that "[u]nless . . . you provide compelling evidence such as original, contemporaneous time and wage records . . . further legal action will be taken. . . ." According to Ares, in response to a January 21, 2008 letter that she received from M. Patel, she wrote a letter dated January 30, 2008, asking for "[e]vidence of the daily and weekly hours worked by those employees whose underpayment you dispute." Ares testified that Respondent did not receive sufficient evidence to adjust the findings. The orders on review here are dated April 29, 2008. There is no evidence in the record of what, if any, response Petitioner made to Ares' January 29 and 30, 2008 letters.

Ares recommended the civil penalty of 25%, which she testified is on the low end of the percentage that Respondent is authorized to assess, based on the Petitioner's cooperation in that it provided whatever documents and information that existed and a determination that the violations were not willful, but rather based on lack of knowledge of the minimum wage and overtime requirements, and the limited credit available for the housing allowance.

Petitioner did not produce any rebuttal evidence.

## **DISCUSSION and FINDINGS**

H. Patel's facility in English was adequate for meaningful participation as a witness at hearing.

To the degree that a question of H. Patel's understanding of and ability to speak English has been raised, a note is appropriate. Although English is not H. Patel's first language, we find that his facility was adequate to understand the questions posed to him during the course of the hearing and also to answer them. Our finding is supported by the facts that although the parties were offered multiple opportunities to have the Board arrange for an interpreter at hearing, Petitioner (on whose behalf H. Patel testified) did not elect to have one, and H. Patel testified on redirect examination that he had understood all of the questions posed to him. The finding is also supported by Petitioner's evidence that H. Patel worked as a desk clerk who was required to communicate with guests, indeed, at times even negotiate the price of a room and that he also had responsibilities for directing the hotel's cleaning staff.

Petitioner failed to keep and/or furnish true and accurate payroll records for each employee from March 29, 2005 through January 13, 2008.

Labor Law § 661 provides in part that

“[e]very employer shall keep true and accurate records of hours worked by each employee covered by an hourly minimum wage rate, the wages paid to all employees, and such other information as the commissioner deems material and necessary, and shall, on demand, furnish to the commissioner or his duly authorized representative a sworn statement of the same.”

Petitioner's employees were covered by the hourly minimum wage rate found in the hotel industry wage order at 12 NYCRR former Part 138.<sup>1</sup> As relevant here, the regulations at 12 NYCRR former § 138-3.1(a) implement Labor Law § 661 by setting out information that the commissioner deems material and necessary:

“(a) Every employer shall establish, maintain and preserve for not less than six years weekly payroll records which shall show for each employee:

- (1) name and address;
- (2) social security number;
- (3) the number of hours worked daily and weekly . . . ;
- (4) the amount of gross wages, job classification and wage rate;
- (5) deductions from gross wages;
- (6) allowances, if any, claimed as part of the minimum wage;
- (7) money paid in cash; and
- (8) student classification.

Referring to the recordkeeping requirements of both New York Labor Law and the federal Fair Labor Standards Act, a federal court stated that they “are not mere

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<sup>1</sup> Regulations governing hotels are now found at 12 NYCRR Part 146 covering the hospitality industry. Part 146 was added December 29, 2010.

technicalities, but substantive obligations that are ‘fundamental underpinnings’ of [the law] and critical to ensuring the statute’s effectiveness, for an employer’s ‘failure to keep accurate records can obscure a multitude of minimum wage and overtime violations [internal quotations marks and citation omitted]’ (*Moon v Kwon*, 248 F. Supp 2d 201, 218 [SDNY 2002]).

M. Patel testified that Petitioner did not keep records of the hours that desk clerks worked. In addition, the documents in evidence show that Petitioner’s payroll records for desk clerks were not accurate and did not include employees’ social security numbers, job classification, and housing allowances that Petitioner claimed as part of the employees’ minimum wage payments. Finally, absent from the record are any kind of payroll records for January 1-13, 2008, a period during which D. and H. Patel worked for Petitioner. It is manifest that Petitioner did not comply with the law’s record-keeping requirements, and we therefore sustain Count I of the penalty order for \$200.

The Petitioner has the burden of proof to show that the orders are unreasonable.

The Board has repeatedly and consistently held that in the appeal of orders of the Commissioner, it is the petitioner who has the burden of proving the orders unreasonable and/or invalid. *See, e.g. Matter of Bernard J. Lombardi et al.*, PR 09-101 (September 9, 2011); *Matter of Heenam Bae et al.*, PR 09-298 (July 26, 2011) (*appeal pending*). Labor Law § 101 (1) and (2) and the Board’s Rules of Procedure and Practice (Rules) together provide that any person in interest may petition the Board for a review of the validity or reasonableness of an order of the Commissioner and that such petition shall state the respects in which the order is claimed to be unreasonable or invalid and be filed in accordance with the Rules. Rule § 65.30 states that the “burden of proof of every allegation . . . shall be upon the person asserting it.”

Petitioner argues that although the Board may find that its payroll records were legally inadequate, the Respondent was not inexorably led to a conclusion that Petitioner underpaid its employees and quotes the Court in *Matter of Mid Hudson Pam Corp. v Commissioner of Labor*, 156 AD2d 818, 821 (3d Dept 1989) that “[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 to shift the burden of negating the reasonableness of the Commissioner’s calculations to the employer.” Then, in its post-hearing reply brief, Petitioner first claims that Respondent failed to rely on the “best available evidence” to reach the findings in the wage order, and therefore on appeal before the Board, the burden of proof to show that the findings are unreasonable or invalid never shifted to Petitioner.

We are troubled that in neither its petition nor its amended petition does Petitioner raise such a claim, and that the claim is only first raised in a post-hearing reply brief – after Petitioner and Respondent have completed presentation of their proof at hearing and have filed briefs – thus litigating this matter as though Petitioner had the burden of proof, depriving Respondent of both notice of the claim and the opportunity to address it, and depriving the Board of the benefit of both parties’ argument on the claim. We find that

Petitioner's failure to raise the claim in its petition or amended petition, very considerable delay in raising the claim, failure to give Respondent notice of the claim, and first assertion of the claim in its post-hearing reply brief establish that the claim is waived (Labor Law § 101 [2] ["any objections to the . . . order not raised in such appeal shall be deemed waived"])).

In any event, we find that Petitioner's claim – that it does not have the burden to prove that the wage order is unreasonable – is not supported by the statutory scheme (see Labor Law § 101 [1] and [2]) or any other authority, including *Mid Hudson Pam Corp.*, and is contrary to longstanding case law. In the absence of adequate employer records, the Commissioner is permitted to make findings based on the "best available evidence" so as not to penalize employees who claim wages are due them. Decisions approving the Commissioner's reliance on the "best available" evidence are rooted in the U.S. Supreme Court's discussion and decision in *Anderson v Mt. Clemens Pottery Co.*, 328 US 680, 687-688 (1946), *superseded by statute on other grounds as stated in Solano v A Navas Party Prod.*, 728 F Supp 2d 1334 (SD Fla 2010):

"The solution [where the employer's records are inaccurate or inadequate]. . . is not to penalize the employee by denying him any recovery on the ground that he is unable to prove the precise extent of uncompensated work. Such a result would place a premium on an employer's failure to keep proper records in conformity with his statutory duty; it would allow the employer to keep the benefits of an employee's labors without paying due compensation as contemplated by the Fair Labor Standards Act. In such a situation we hold that an employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. The burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence. If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result be only approximate."

In New York, the principle that an employee should be not be penalized for an employer's failure to keep adequate payroll records is codified at Labor Law § 196-a, entitled "Complaints by employees to commissioner." It provides, in part, that an employer's failure "to keep adequate records . . . shall not operate as a bar to filing of a complaint by an employee. In such a case the employer in violation shall bear the burden of proving that the complaining employee was paid wages. . . ." Based on the quoted language, federal courts have construed the employer's burden of proof under New York law to be higher than the *Mt. Clemens* burden "to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence." See e.g. *Padilla v Manlapaz* 643 F Supp 2d 302, 307

(EDNY 2009) (The employer must “prove by a preponderance of the evidence that the plaintiff was properly paid for the hours worked. *See* N.Y. Lab. Law § 196-a [2009] [providing that where an employer fails ‘to keeps adequate records the employer in violation shall bear the burden of proving that the complaining employee was paid wages. . .’]”); *Jia v Chen*, 2007 US Dist LEXIS 96480, \*9 (SDNY March 30, 2007) (Quoting *Yang v ACBL Corp.*, 427 F Supp 2d 327, 337 n.15 [SDNY 2005], “the burden shift under New York law places on the employer the ‘burden of showing by a preponderance of the evidence that [the] plaintiff was properly paid for the hours he worked’ [and] if the employer is unable to meet its burden under the FLSA . . . then *a fortiori* [the employer] could not satisfy the more demanding burden’ under New York law”).

The mandate that employers should not profit from their failure to comply with recordkeeping requirements applies even in the absence of employee complaints to the DOL, for the Commissioner is charged with enforcing labor standards (Labor Law § 21 [1]) and empowered to “investigate” and “adjust” disputes concerning wage payments (Labor Law § 196 (1) [a]); *Matter of Mohammed Aldeen and Island Farm Meat Corp. (T/A Al-Noor Live Poultry)*, PR 07-093 (May 20, 2009) *confirmed*, 82 AD3d 1220 (2d Dept 2011); *Matter of Garcia v Heady*, 46 AD3d 1088, 1090 (3d Dept 2007) *appeal denied*, 10 NY3d 705 (2008).

New York courts apply the Labor Law § 196-a standard in review of Board decisions and treat the Commissioner as in the place of employees. At hearing before the Board, the employer in *Matter of Angello v Natl. Fin. Corp.*, 1 AD3d 850 (3d Dept 2003), did not submit proof that contradicted the Commissioner’s findings on the amount of wages owed as set out in the order on review. Nonetheless, the Board modified the Commissioner’s order by reducing the amount of wages on the grounds that her findings “were not supported by ‘credible proof.’” On review, the Appellate Division noted the employer’s failure to submit proof contradicting the Commissioner’s order; the requirement of Labor Law § 196-a “that an employer with inadequate records ‘shall bear the burden of proving that that the complaining employee was paid;’” and Board Rule § 66.30, requiring that “[t]he burden of proof of every allegation . . . shall be upon the person asserting it.” On these bases, the Court concluded that “the burden of disproving the amounts sought in the employee claims fell to [to the employer], not the employees, and its failure in providing that information, regardless of the reason therefor, should not shift the burden to the employees.” *See also Garcia*, 46 AD3d 1088, *supra*; *Matter of Dueck Sun Kim Youn, D/B/A Momo Bespoke Taylor A/K/A Momo Custom Taylor*, PR 08-172 (March 24, 2010).

Finally, and though we have determined that we will not inquire into whether Respondent relied on the “best available evidence,” in issuing the wage order on review, we note that Petitioner appears to have misread the *Mid Hudson Pam Court*’s reference to “best available evidence” as limited to only the best available evidence that the employer proffers. Rather, the Court’s approval of the Commissioner’s use of the “best available evidence” refers to her reliance on a “just and reasonable inference” that “may be based upon the testimony of employees” (156 AD2d at 821). *See Matter of Alphonse Hotel Corp. v Sweeney*, 251 AD2d 169, 169-170 (1<sup>st</sup> Dept 1998) (“where. . . the employer’s records are found to be inadequate or inaccurate, the Department of Labor may use ‘other evidence’ to

calculate the amount of wage underpayment . . . and that such other evidence may include the testimony of employees regarding hours worked and tasks performed”); *Matter of D & D Mason Contractors, Inc. v Smith*, 81 AD3d 943, (2d Dept 2011) (“[i]n view of the petitioners’ failure to produce complete and accurate records, the Department of Labor was entitled to make just and reasonable inferences and use other evidence to establish the amount of underpayments even though the results may be approximate”); *TPK Constr. Co. v Dillon*, 266 AD 2d 82 (1<sup>st</sup> Dept 1999) (“[t]he methodology employed by the investigator, albeit imperfect, was necessitated by the absence of comprehensive payroll records from [the employer]”); *Matter of Hy-Tech Coatings v New York State Dept. of Labor*, 226 AD2d 378, 379 (1<sup>st</sup> Dept 1996) (citing *Mid Hudson Pam Corp.*, “petitioner has not satisfied its burden of establishing that the method utilized to calculate the amount of underpayments was unreasonable. In view of the petitioner’s failure to produce complete records, the DOL was entitled to make just and reasonable inferences and use other evidence to establish the amount of underpayments, even though the results may be approximate”). Here, the record before the Board demonstrates that Respondent’s wage order findings are based on employer statements and records, employees’ statements, and the investigator’s observations.

In conclusion, the *Mid Hudson Pam* Court’s statement that “the Commissioner is permitted to calculate back wages due to employees by using the best available evidence to shift the burden . . . to the employer” does not mean that on an employer’s appeal to the Board, the Commissioner may be required to establish that her findings are supported by the “best available evidence” before the burden shifts to the employer; if the employer has more probative evidence than the Commissioner relied on in issuing an order, then the employer has the burden and opportunity to move that evidence into the record during the Board’s de novo hearing to show the unreasonableness or invalidity of the Commissioner’s order. A claim that the Commissioner failed to use the “best available evidence” does not relieve an employer of its burden of proof on appeal, for that would reward an employer who failed to keep records as required by law.

Accordingly, to prevail before the Board, a petitioning employer must show that the order is not reasonable by a preponderance of the evidence of the specific hours that employees worked and that employees received payment for the time that they worked or other accurate evidence that shows the Commissioner’s findings to be unreasonable. In any event, “the employer cannot be heard to complain that the damages lack the exactness and precision of measurement that would be possible had he kept records” (*Mt. Clemens Pottery Co.*, 328 US at 688; see also *Rivera v Ndola Pharm. Corp.*, 497 F Supp 2d 381, 389 [EDNY 2007]).

The job classifications of Ranjanben Maisuria, Champaklal Maisuria, and Hitesh Patel.

Respondent found that R. and C. Maisuria were desk clerks and that H. Patel was a maintenance worker. Petitioner asserts that Respondent misclassified these employees and that R. and C. Maisuria were cleaners and that H. Patel was a desk clerk.



*Ranjanben and Champaklal Maisuria were desk clerks.*

M. Patel testified that desk clerks lived in the apartment behind the front desk as a benefit of their employment, were paid monthly, and that during the period the orders cover, the cleaning staff recorded their daily hours of work, worked about three hours a day, and were paid weekly. Smith testified that he reviewed a cleaner's time record that showed six hours of work in a day.

R. and C. Maisuria worked for Petitioner in 2005 when M. Patel's primary residence was in New Paltz, New York. They were paid monthly and Petitioner gave them a hotel room as a benefit of their employment. Petitioner's amended petition asserts that each of them worked 30 hours a week, and while M. Patel testified to their working 30 hours a week, he also testified that each worked at the most three hours a day, every day of the week, or 21 hours a week. No time records for the Maisurias are in evidence. Smith testified that he never saw time records for the Maisurias and that K. Patel identified the Maisurias as desk clerks and reviewed the completed DOL computation sheets showing them to be desk clerks without disagreeing with their job classification. Smith understood her to agree that they were correctly classified on the computations sheets as desk clerks.

The affidavit of K. Patel that is in evidence asserts that Respondent misclassified employees but does not identify which employees were allegedly misclassified. As K. Patel's affidavit is not specific and as she did not testify at hearing and was not subject to cross-examination, we do not give her affidavit weight. Nor do we give weight to the January 17, 2008 unsigned letter annexed to her affidavit purporting to be from M. Patel that asserts that "Champaklal Patel and Ranjanben Patel" were misclassified and that he (M. Patel) previously advised Smith of that error. M. Patel had an opportunity at hearing to verify that the letter was his but did not. Further, M. Patel testified that his daughter K. Patel handled the investigation on behalf of the Petitioner, and M. Patel did not testify to any contact with Smith during the investigation and Smith said that he did not have any contact with M. Patel during the investigation. Finally, while the reference to "Champaklal Patel and Ranjanben Patel" might have been intended to be to Champaklal Maisuria and Ranjanben Maisuria, we have no evidence on that point or whether Petitioner responded to Ares' January 30, 2008 letter, which asked for clarification of the names.

Petitioner's evidence of the hours that the Maisurias worked each week is internally inconsistent; that the couple was paid monthly is inconsistent with M. Patel's testimony and Smith's determination that cleaners were paid weekly; that Petitioner has monthly payroll records but not daily time records for the couple is also inconsistent with M. Patel's testimony that Petitioner kept daily time records for cleaners. That the Maisurias received a hotel room as a benefit of their employment supports a conclusion that they worked as desk clerks, along with Smith's testimony that K. Patel identified them as such. K. Patel was not produced to dispute either Smith's testimony that K. Patel told him the Maisurias were desk clerks or his entries in DOL records reflecting that she identified them as desk clerks. In short, Petitioner's inconsistent and imprecise evidence fails to meet the burden to show that the Maisurias were cleaners, and we therefore find that they were employed as desk clerks.

*Hitesh Patel was a desk clerk and was also responsible for maintenance work.*

H. Patel resided in the apartment behind the front desk from January 2007-January 13, 2008, and was paid monthly. D. and H. Patel both testified that H. Patel functioned as a desk clerk. M. Patel testified that 99-100% of H. Patel's time was spent as a desk clerk; however, his testimony in this regard was not based on his observation of H. Patel, but supposition. Further, M. Patel said that he was in New Paltz two to three days a week between Monday and Friday in 2007, and even when he was present at the hotel where he had an apartment upstairs from the lobby, he did not testify as to how he knew what his staff was doing.

M. Patel testified that the hotel did not have many guests, the building did not have problems, and that in any event, a plumber or electrician would be called if something went wrong. However, he and D. and H. Patel all testified that H. Patel did light maintenance work like changing light bulbs or putting batteries in a T.V. remote when requested by a hotel guest.

M. Patel, asserting that the cleaning staff was responsible for maintaining a clean lobby, denied that desk clerks cleaned the lobby. However, D. Patel was very clear that she and her husband each cleaned the lobby during the day and as needed when guests arrived and both she and her husband agreed that cleaning involved moping and sweeping, dusting furniture, tying up trash bags and taking them out. D. Patel said that cleaning the lobby took about a half-hour each day. At times, H. Patel assisted his wife when she cleaned the lobby. While the cleaning staff may have cleaned the lobby, it was necessary to clean it multiple times a day, especially in bad weather when dirt might be tracked in from outside.

Smith testified that D. Patel stated, in H. Patel's presence and without his disagreement, that H. Patel changed locks, fixed the toilets and other things, confirmed that guest room were clean, and did personnel work. The personnel work appeared to involve the cleaning staff; a record of their daily hours were made and kept; he directed which rooms to clean; and at times additional cleaning staff had to be telephoned and/or hired. Smith also testified that K. Patel described manual duties for which she said that H. Patel was responsible.

Smith testified that D. Patel also told him, while H. Patel was standing about two feet away, that H. Patel removed snow. According to Smith, H. Patel did not deny the accuracy of his wife's statement, and Smith himself observed H. Patel removing snow. However, H. Patel denied that he ever shoveled snow, and both he and M. Patel testified that the hotel had a contract for snow removal services during winter months. We observe that the testimony of Smith, M. Patel and H. Patel is not mutually exclusive, particularly in light of a lack of evidence of the scope of the snow removal contract.

We credit Smith's testimony over H. Patel's testimony which we find was not credible, particularly as to whether he ever met Smith. Following D. Patel's testimony, during which she agreed that she met with Smith and that her husband was present at their meeting, H. Patel testified, having previously been sequestered and out of the hearing room. His testimony was not forthcoming and the following exchange during the cross-

examination elicited a caution by the hearing officer, reminding H. Patel "that you swore an oath that you would tell the truth. You are under oath to tell the truth, okay?"

Q: "Do you recognize this man sitting to my right, Mr. Smith?"

A: I don't really remember.

Q: I didn't hear.

HEARING OFFICER: What are you saying? I'm sorry.

A: I really don't remember that.

HEARING OFFICER: You do remember?

A: I don't.

HEARING OFFICER: You don't remember Mr. Smith at all?

A: No.

Q: You don't remember having a conversation with Mr. Smith?

A: No.

Q: Do you remember your wife ever having a conversation with Mr. Smith?

A: I don't know, because I'm not -- I'm not over there. I am not over there right at that time, I think.

Q: You're not?

A: I am not over there that time.

HEARING OFFICER: You were not at the hotel --

A: Right.

HEARING OFFICER: -- at the time your wife had a conversation?

A: I don't know exactly.

Q: You weren't standing behind the desk while your wife was having a conversation with Mr. Smith?

A: No, I am not working at that time.

Q: Okay. Did you wife ever tell you that she had a conversation with Mr. Smith?

A: No.

Q: Do you recall ever having a conversation with anyone from the Department of Labor?

A: No, never.

Q: Do you recall your wife ever telling you that she had a conversation with someone from the Department of Labor?

A: I don't know really.

At this point the hearing officer interjected her caution and then said, "Now, I am going to ask you again, did you ever have a conversation with an investigator from the Department of Labor?"

A: No, because I am not there, like --

HEARING OFFICER: I know you're not there all the time.

A: I don't know, but I swear because I didn't know that the --

HEARING OFFICER: I'm sorry, I didn't hear that.

A: No, I really don't know.

HEARING OFFICER: Okay. You don't recall Mr. Smith, who is sitting here in this room, you don't recall ever having met him before?

A: No.

On redirect examination, H. Patel was again asked several times if he recalled meeting Smith or a DOL investigator and denied that he had. Later, Smith testified with clear recall that he had met with D. and H. Patel together because D. Patel had wanted to assist her husband in answering questions in English.

D. and H. Patel testified that H. Patel worked as a desk clerk and described the details of his duties and the time he spent engaged in that capacity. Throughout the time that they were employed during the period that the wage order covers, H. Patel was paid between \$400 and \$450 more monthly than was D. Patel, whom it is undisputed, was a desk clerk.

We find that Petitioner failed to establish by a preponderance of the evidence that H. Patel did not do maintenance work or that he performed desk clerk work exclusively, but that Petitioner did establish that H. Patel did do work as a desk clerk. In addition to the testimony of all of the witnesses, the consistent wage differential paid to H. Patel above that paid to D. Patel supports our conclusion that he performed both desk clerk duties and maintenance work. *See* Labor Law § 194. Our conclusion is further supported by Petitioner's treatment of R. Masuria and C. Masuria. They were a husband and wife team that was employed to do the same work as each other, and Petitioner paid them the identical monthly salary.

Petitioner failed to meet its burden to show that it paid wages in accordance with the frequency that the Labor Law requires.

Labor Law § 191 governs the frequency of wage payments and provides in relevant part:

"1. Every employer shall pay wages in accordance with the following provisions:

“a. Manual worker. – (i) A manual worker shall be paid weekly and not later than seven calendar days after the end of the week in which the wages are earned;

....

“d. Clerical and other worker. – A clerical and other worker shall be paid the wages earned in accordance with the agreed terms of employment, but not less frequently than semi-monthly, on regular pay days designated in advance by the employer.”

We found above that H. Patel performed both maintenance and desk clerk duties. Accordingly, Petitioner was required to pay H. Patel in his capacity as a manual worker “weekly and not later than seven calendar days after the week in which the wages [were] earned” in order to fully comply with the law. As it is undisputed that H. Patel was paid monthly, we sustain Count II of the penalty order.

Similarly, it is undisputed that desk clerks were paid monthly, and the evidence shows that they were paid erratically and not necessarily on a regular pay day. Accordingly, the desk clerks were neither paid “less frequently than semi-monthly” nor “on regular pay days designated in advance by the employer,” and we sustain Count III of the penalty order.

Petitioner failed to meet its burden to prove that D. and H. Patel did not work 91 hours a week.

It is undisputed that Petitioner had no record of the hours that D. and H. Patel worked, and the evidence that Petitioner adduced as to the time that each employee worked on a weekly basis was internally inconsistent, imprecise, and suggests that the witnesses’ understanding of when they were in work status was more limited than the law contemplates.

The record evidence is that the hotel was open every day of the week from 7 a.m. to 11 p.m. and that someone was responsible for checking guests in or out, along with attendant duties, and otherwise assisting guests during at least this 16 hour period seven days a week. However, there is also evidence that D. Patel may have begun her work day at 6 a.m. and that hotel guests might require the assistance of a desk clerk between 11 p.m. and 7 a.m. Further, Smith’s Narrative Report records that he was told that the hotel’s door was locked at midnight, not 11 p.m.

M. Patel testified that he hired D. and H. Patel “to work 40 hours a week, two shifts,” but then added that they could divide the work day differently so that one worked 30 hours and the other more. As M. Patel stated, “it’s between the two of them. I’m not involved in that.” It appears that M. Patel did not really know how long each of them worked each day or week and was not present at the hotel at least two to three days of the week in 2007. Further, while H. Patel said that he worked from 7 a.m. to 3 p.m., the time when his wife took over, D. Patel inconsistently said that she fed her children a snack or dinner at 3:30 when they returned from school and did not begin work for the hotel until 4 p.m. All three of

Petitioner's witnesses agreed that at least between 7 a.m. and 11 p.m., someone was responsible for the front desk.

Based on her title as General Manager and her status as representative of Petitioner during DOL's investigation, K. Patel, would appear to have been the most knowledgeable about the hotel's day-to-day operations, including the hours that employees worked, but she did not testify. There is also testimony that M. Patel's son was responsible for duties in conjunction with the hotel's operation, including those associated with the front desk. However, as already noted, the son did not testify either. The record is devoid of evidence of the dates and hours that M. Patel, K. Patel, and M. Patel's son may have worked, and contains only the very general testimony of M. Patel that he worked on the weekends and that at times his son relieved him.

Both D. and H. Patel testified that H. Patel worked only in the first part of the day and that D. Patel worked only in the afternoons and evenings and that they did not work at the same time. However, D. Patel also testified inconsistently that "some jobs I do, like in the morning I make coffee, so I know when I am running out of coffee [and] when I go to Sam's Club, I . . . grab . . . coffee" and also creamers "and . . . whatever the breakfast they have" at the hotel. In addition, Smith observed them both attired in the hotel's uniform working in the morning at the same time. Smith testified that while H. Patel shoveled snow, D. Patel worked at the front desk. Then later in the same morning he saw H. Patel clean the area in the lobby where breakfast was available to guests while D. Patel cleaned the floor, and then they both cleaned the floor together.

D. Patel, explaining on cross-examination why she and H. Patel might be working at the same time, testified that her husband helped her when the hotel was busy because he is her husband, not because he was a co-worker. She said that in his capacity as a co-worker he was not required to help her and that the hotel was usually not busy so she usually did not require his help.

Other of Petitioner's evidence also establishes that D. and H. Patel each worked more hours than just eight hours a day, Monday through Friday, and also worked on the weekends. M. Patel testified that he would ask D. and H. Patel to deposit money and though he at first testified that the hotel did not serve food, he later conceded that he did ask D. and H. Patel to buy food for the hotel as well as for his himself and explained that that was the nature of their relationship and that he did favors for them as well. He said that D. and H. Patel might do shopping at any time, including weekends. D. Patel denied that M. Patel asked her to buy food for the hotel, but she also testified "I always do that [shop for food] for him from the beginning" and that she usually shopped for the hotel on Sundays, about twice a month.

The testimony of Petitioner's witnesses implying that some of the services that D. and H. Patel performed were not part of the employment relationship but simply favors attributed to friendship or a special relationship outside of employment is not supported by the facts or the law.

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The testimony of Petitioner's witnesses implying that some of the services that D. and H. Patel performed were not part of the employment relationship but simply favors attributed to friendship or a special relationship outside of employment is not supported by the facts or the law.



Petitioner was the overarching beneficiary of D. and H. Patel's purchases of food and coffee, deposit of money, work in cleaning the lobby, and other tasks that one did in assisting her/his spouse. There is no evidence that D. and H. Patel would have engaged in the tasks at all but for their employment by the Petitioner. Clearly these activities took the couple's time and effort. M. Patel admits that he asked that they do shopping and deposit money, and all of the tasks were integral to Petitioner's ability to function and to attract and serve guests. *See Holzapfel v Town of Newburgh*, 145 F3d 516, 522 (2d Cir) writ of certiorari denied, 525 US 1055 (1998).

There is no evidence that M. Patel, on the one hand, and D. and H. Patel, on the other, knew each other at all before their employment relationship. Nor does it appear that they shared a friendship. When M. Patel was asked on redirect examination "[a]re you friends with the Patels, are you friendly with them?" M. Patel responded, "Friends? I know them well. I am not, what you call it, friend-friend or however you say it." In response to his attorney's follow-up question, "Maybe an acquaintance?" M. Patel agreed, "[a]n acquaintance you can say."

While D. Patel did describe M. Patel as a friend, we find, based on both Smith's testimony describing his interview of her as well as her own testimony, that she was influenced by a fear that her employment, that allowed her flexibility to work while simultaneously being at home for her primary school-age children and for which she was so grateful, might be adversely affected by Respondent's findings and our decision. Smith testified that before he advised D. Patel that she might be entitled to additional wages, she told him that she and her husband worked around the clock and could not leave the hotel. After learning that her employer might be "hurt," Smith testified that she did not want anything to do with the investigation. Her testimony before the Board was "I get free living and I'm okay with what I have." She would apparently forego wages that might be due her in order to maintain her situation. However, the public policy underlying the requirement that employers pay the appropriate minimum wage is in force whether an individual employee seeks additional wages and is happy with the law's effect or not. The Labor Law, including minimum wage orders, is intended to protect not only individual employees, but also the standard of living of all workers, and enforcement of the law's provisions prevents employers from having unfair advantage over their competitors and promotes a thriving state economy. The Legislature expressed these policies in enacting Labor Law § 196-a (L 1997, ch 605):

"§ 1. Legislative intent. The legislature declares that the working people of the state of New York are the key to our maintenance of a strong economy. The legislature finds, however, that too often the working people of our state do not receive the full wages they have earned, and that some workers are never paid at all for their labor. Underpaid and unpaid workers are found in all areas of commerce and industry, but are concentrated in low-wage areas such as . . . the service industry. Exploitation of these most vulnerable workers drives down wages for all working people. Low-wage workers who are unpaid or underpaid cannot support themselves and their

families, and may be forced to rely on scarce public resources. Honest employers, who constitute the vast majority of those doing business in our state, suffer from unfair competition when others cut costs by underpaying their workers. Finally, the state loses precious tax revenue when employers avoid payment of wages. Especially as more and more New Yorkers are called upon to earn their living through work, we must ensure that working people are paid what they earn.

“If our economy is to thrive, the state must pursue enforcement of the wage provisions of the labor law with vigor and fairness. That enforcement is the mandate of the department of labor. The purpose of this legislation, therefore, is to provide the department of labor and working people with stronger and more varied tools with which to collect unpaid wages. The legislature also seeks to ensure that the most vulnerable workers have access to the department's enforcement mechanisms, in an effort to prevent the generalized devaluation of wages for all workers.

“§ 2. This act shall be known and may be cited as the ‘unpaid wages prohibition act’.”

Labor Law § 2 (7) defines “employed” as including “permitted or suffered to work,” and the minimum wage order applicable to New York’s hotel industry at the time relevant here and set out at 12 NYCRR former Part 138 defined “working time” as “actual service or time of permitted attendance at the establishment” (12 NYCRR former § 138-2.4 [a] [1]). The time that Petitioner’s witnesses describe as spent in doing favors or tasks motivated by personal relationship fall squarely into “actual service” for the Petitioner and employment for which D. and H. Patel were “permitted or suffered to work.” In short, to the extent that D. and H. Patel spent time doing tasks as described above, they were spending time at work for which the law requires that Petitioner compensate them.

Further, at the time at issue in this matter, the hotel industry minimum wage order at 12 NYCRR former § 138-2.4 (a) (2) governed payment to employees for “waiting time” at “all-year hotels” and provided:

“Waiting time . . . during which an employee is required or permitted to wait during the workday while no work is provided by the employer, shall be counted as working time. Such waiting time shall be paid for at not less than the minimum rate . . . after taking into account . . . the total number of hours of working time for that week.”

We sustain Respondent’s determination that D. and H. Patel were required “to wait” 13 hours a day, Monday through Friday, were at least permitted “to wait” all day (13 hours) on Saturdays and Sundays as well, and that the time that they spent waiting constituted

working time for which they should have been paid (*see e.g., Moon v Kwon*, 248 F. Supp 2d 201, 228-230 [SDNY 2002]). Petitioner does not contest that D. Patel or H. Patel was engaged in waiting time as defined in the hotel wage order during part of each day, Monday through Friday. What it does contest is Respondent's finding that they were engaged in waiting time virtually all day, every day, except for eight hours a day of sleep time (12 NYCRR former § 138-2.4 [c] [1]) and three hours a day for meals.

Petitioner has adduced evidence that during the day D. and H. Patel, or one of them, attended to their personal business including their children and therefore could not have worked the entire day. The problem is that Petitioner has failed to provide reliable, not inconsistent, and precise evidence of the number of hours that D. and H. Patel worked each week, which is Petitioner's burden to establish (*Mt. Clemens Pottery*, 328 US 680, *supra*; Labor Law § 196-a). Petitioner relies on a provision of the hotel wage order that states that "[a] residential employee shall not be deemed to be permitted to work or required to be available for work . . . at any other time when such employee is free to leave the place of employment" and then contends that Petitioner has proven that D. and H. Patel were "free to leave" the hotel during the week because there is testimony to that effect. The mere assertion that an employee was free to leave does not meet Petitioner's burden; Petitioner must prove with greater precision than this record presents the number of hours each employee actually worked (*Matter of Mohammed Aldeen and Island Farm Meat Corp. (T/A Al-Noor Live Poultry)*, PR 07-093 (May 20, 2009) *confirmed*, 82 AD3d 1220, *supra*). As Senior Investigator Elizabeth Ares clearly explained in her testimony, in the absence of such information, it is impossible to calculate with any reasonable accuracy the amount of wages due.

As we have already discussed, the evidence shows that both D. and H. Patel at times worked at the same time; that each of them was responsible for more than merely the desk clerk duties; that they also did work on the weekends, and Petitioner's evidence of their time worked is internally inconsistent. Without probative evidence of more exact hours worked, or even of hours scheduled to be worked or worked as a matter of routine, we are unable to determine the number of hours that Petitioner's employees worked, and Petitioner has failed to meet its burden. *See Matter of Dueck Sun Kim Youn, D/B/A Momo Bespoke Taylor A/K/A Momo Custom Taylor*, PR 08-172 at 8 (March 24, 2010) (Petitioner did not meet its burden when its "proof is general and inadequate. It does not account for employees on an individual basis: the specific dates each worked . . . ; the hours each worked on a daily basis; or the rate of pay for each hour worked"). Further, Petitioner has not adduced any evidence that it did not desire the overtime work that D. and H. Patel performed, or that it attempted to prevent its performance; rather, the evidence shows that M. Patel asked that the work be done. *See Chao v Gotham Registry*, 514 F3d 280, 288 (2d Cir 2008). In light of the Petitioner's failure to meet its burden, we conclude that D. and H. Patel each worked 91 hours a week and that Petitioner may not complain about any uncertainty as to this number which is attributed to its own failure to keep the proper records. *Mt. Clemens*, 328 US at 688, *supra*.

The decision of the Second Circuit in *Reich v Southern New Eng. Telcoms. Corp.*, 121 F3d 58, 70 (2d Cir 1997) is instructive here. The Court found that an employer's

evidence of employees who were due wages was under-inclusive and the U.S. Secretary of Labor's evidence was over-inclusive. The Court nonetheless affirmed the lower court's decision to adopt the Secretary's version of the evidence because "consistent with the lesson of *Mt. Clemens* [the District Court] placed the burden of inadequate record keeping on the employer." The Circuit Court rejected the employer's contention that its evidence was "sufficient under the *Mt. Clemens* framework to 'negative the reasonableness of the employee's evidence'" (121 F3d at 70) (citation omitted) and stated that "the evidence does not affect the reasonableness of the award. It simply points out the difficulty of precisely determining damages when the employer has failed to keep adequate records" (*id.* at n.2).

Smith recorded on the computation sheets for D. Patel, H. Patel, R. Maisuria, C. Maisuria, and Mistry that each worked 91 hours a week and that Petitioner had the "same agreement" with each of them. Petitioner challenges Respondent's reliance on K. Patel's certification of employee computation sheets because Smith also recorded in the Final Report what the Petitioner characterizes as an inconsistent statement: "ER [K. Patel] believes the Clerk(s) [desk clerks] misunderstood my questions and stated they are free to leave anytime they do not work during the course of the day." Based on this entry, Petitioner asserts that K. Patel did not agree that the desk clerks' agreement with Petitioner included a 91-hour workweek and criticizes Respondent for issuing the orders at issue without consideration of what K. Patel viewed that agreement to be.

The statement that Petitioner relies on is ambiguous, and we do not know what K. Patel meant because she did not testify although Petitioner had the opportunity to produce her. The only evidence of her position on employees' hours and agreements with Petitioner is her certification and the statements that Smith attributed to her. That a witness might have been expected to testify in support of Petitioner to clarify apparent investigative ambiguity did not testify does not support Petitioner's challenge and does not help Petitioner to meet its burden of proof.

On the other hand, Smith's testimony establishes that he reviewed with both D. and H. Patel as well as K. Patel the terms that constituted D. and H. Patel's employment agreement before entering the information in the computations sheets. We are also satisfied that Smith's recording of the information – that the terms applicable to H. and D. Patel's employment also applied to those who previously served as desk clerks – must have come from K. Patel. It is undisputed that K. Patel represented Petitioner in DOL's investigation, and there is no evidence that anyone beside K. Patel represented Petitioner during DOL's investigation. Also, Smith did not interview any of the former desk clerks. Therefore, she was the only source for information on the employment terms – the agreement – that applied to desk clerks whom Petitioner employed before employing H. and D. Patel. We find that Smith was credible and forthcoming in testifying about the investigation; he admitted mistakes that he made in recordkeeping and was resolute when challenged about information that he clearly remembered hearing from those he interviewed. On cross-examination, when Smith was asked how the entry in the Final Report could be reconciled with K. Patel's certification, he opined that even if H. and D. Patel were free to leave, they did not; they worked and therefore were entitled to be paid.

K. Patel's position on the 91-hour work week is further clouded by her January 16, 2008 certification of the computation sheet of desk clerk Mistry and same-day review of all computations sheets pertaining to desk clerks, all of which show that they worked 91 hours a week. Finally, we note that Petitioner moved the Final Report in evidence. The Final Report states that K. Patel is an attorney, and on that basis we reasonably infer that she understood the effect of signing under the following statement on the computation sheet:

"I hereby certify that the above is a true and accurate transcript of the payroll of the above named establishment for the employees listed *and is a true and accurate record of the hours worked* and the wages paid for the employees listed." [Emphasis added.]

Whether or to what extent K. Patel disagreed with Smith's understanding of the agreement we do not know. She did not testify although she was the general manager, the Petitioner's representative who spoke with Smith, and is the daughter of M. Patel, Petitioner's owner.

Wage calculations and amounts due Ranjanben and Champaklal Maisuria, Nimishaben Mistry, and Darshana and Hitesh Patel.

We find that Respondent's method of calculating back wages owed to Petitioner's employees is reasonable and the minimum wage amounts and the housing credits used to calculate underpayments are consistent with the law in effect in the relevant year.

*Ranjanben and Champaklal Maisuria.*

We find that R. and C. Maisuria worked for Petitioner from late January through mid-October 2005, but not continuously. We find that the computation sheets, whose information concerning dates of employment Smith testified he obtained from Petitioner's records and K. Patel, are more accurate than the testimony of M. Patel, who did not testify how frequently he was at the hotel in 2005 and did not author Petitioner's payroll records or even see them until 2008 during the investigation. Further, that Petitioner moved payroll records for the Maisurias into evidence for the period only from April through October 2005 does not establish that these employees did not work during a longer period, especially as the records in evidence consist of individual sheets of paper, and there is no evidence about where they came from, or whether they were excerpts from a larger and more complete document. In any event, Smith did not find that Petitioner owed wages for an eight-week period from late January to mid-April so that the number of weeks that Respondent found that the Maisurias worked for Petitioner is comparable to the time period that M. Patel testified that they worked.

Smith was correct that the 2005 minimum wage in the hotel industry, applicable to residential employees like R. and C. Maisuria at all-year hotels, was \$6 an hour for the first 44 hours worked in a week and \$9 an hour for all hours that exceeded 44 in a work week and was also correct that Petitioner was entitled to a housing credit of \$.30 an hour for each hour worked (12 NYCRR former § 138-2.1 [a] [2], 2.2 and 2.7 [b]). Using these figures, we find mathematical errors that result in wage underpayments that exceed those set out in the

wage order schedule for R. and C. Maisuria; however, because the wage order, and therefore notice to Petitioner, was based on the erroneous calculations, we do not increase the amount due in the wage order.

In addition, we find that because M. Patel testified that R. and C. Maisuria each took one to two vacations for a couple of days each time, and there is no evidence that Smith inquired about whether the Maisurias took vacation days and calculated underpayments without regard to vacation days, we reduce the amount of the wages due to each of the Maisurias from \$11,378.78 to \$10,910.78. We arrive at the reduced amount by crediting the Petitioner with 52 hours (two-13 hour days in each of two different work weeks) at \$9 an hour, or \$468 for each employee's vacation, or a total of \$936 to be subtracted from the wage order.

*Nimishaben Mistry.*

There is no dispute that Mistry worked for Petitioner for 18 weeks in 2006. Smith correctly calculated that Petitioner paid Mistry \$276.92 weekly and also correctly determined that the minimum and premium wages in effect in residential hotels in 2006 were \$6.75 and \$10.125, respectively, and that the housing allowance was \$.35 an hour (12 NYCRR former § 138-2.1 [a] [3], 2.2 and 2.7 [b]). However, as with the Maisurias, we find mathematical errors here that result in higher underpayments than Smith found. Nonetheless, because the wage order, and therefore notice to Petitioner, was based on the erroneous calculations, we do not increase the amount due in the wage order.

*Darshana and Hitesh Patel.*

It is undisputed that D. and H. Patel worked for the Petitioner from January 1, 2007, to January 13, 2008; however, Petitioner disputes Respondent's finding that they were not paid for the period January 1-13, 2008. Petitioner's payroll records in evidence, which indicate the date each month that each employee was paid, cover D. and H. Patel's work from January-December 2007, but there are no records for their work in January 2008. In the absence of payroll records, cancelled checks, or any other evidence in the hearing record showing payment for these two weeks, we find that Petitioner has failed to meet its burden to prove that D. and H. Patel were paid wages for their work from January 1, 2008 to January 13, 2008. *See Tho Dinh Tran v Alphonse Hotel Corp.*, 281 F3d 23, 34 (2d Cir 2002).

As reflected in the figures on the computation sheets for D. Patel, Smith calculated underpayments due to her based on a pay rate of \$1280 monthly from January through May 2007, and \$1400 monthly from June 2007 through January 13, 2008; however, Petitioner's payroll records show that D. Patel did not receive a raise to \$1400 a month until July 2007. Similarly, the figures on the computation sheets for H. Patel were based on a pay rate of \$1720 a month from January through May 2007, and \$1800 from June 2007 to January 13, 2008, while Petitioner's payroll records show that H. Patel did not receive a raise to \$1800 a month until July 2007. Because Smith testified that monthly pay rates from Petitioner's payroll records were the bases for the figures entered on the computations sheets, we find that the payroll records are more accurate as to when D. and H. Patel's raises commenced and that neither of them received a raise until July 2007.

During the period that D. Patel was paid \$1280 a month, Smith correctly calculated that Petitioner paid her \$295.38 weekly; during the period that she was paid \$1400 a month, he correctly calculated that she was paid \$323.08 weekly. Similarly, during the period that H. Patel was paid \$1720 a month, Smith correctly calculated that Petitioner paid him \$396.92 weekly; during the period that H. Patel was paid \$1800 a month, Smith correctly calculated a weekly pay of \$415.38.

Smith also correctly determined that the minimum and premium wages in effect in residential hotels in 2007 and 2008 were \$7.15 and \$10.725, respectively, and that the housing allowance for the entire period at issue was \$.35 an hour (12 NYCRR former §§ 138-2.1 [a] [3], 2.2 and 2.7 [b]). However, we find that the sum of the weekly wages paid D. Patel until July 2007 (\$295.38) and the weekly housing allowance that is credited to the Petitioner (\$31.85) is \$327.23, not \$327.18 as Smith calculated. Smith did correctly compute that the sum of the weekly wage rate for D. Patel beginning July 2007 through December 2007 (\$323.08), and the weekly housing allowance (\$31.85) is \$354.93; the credit due to Petitioner for each of two weeks that D. Patel worked in January 2008 is \$31.85; the sum of the weekly wage rate for H. Patel from January through June 2007 (\$396.92) and the weekly housing allowance (\$31.85) is \$428.77; the sum of weekly wage rate for H. Patel from July 2007 through December 2007 (\$415.38) and the weekly housing allowance (\$31.85) is \$447.23; and the credit due to Petitioner for each of two weeks that H. Patel worked in January 2008 is \$31.85.

Accordingly, we find that the weekly underpayment to D. Patel from January through June 2007 is \$491.45; the weekly underpayment to D. Patel from July through December 2007 is \$463.75; the weekly underpayment to D. Patel for each of the two pay periods in 2008 is \$786.83; the weekly underpayment to H. Patel from January through June 2007 is \$389.91; the weekly underpayment to H. Patel from July 2007 through December 2007 is \$371.45; and the weekly underpayment to H. Patel for each of the two pay periods in 2008 is \$786. 83.

Smith did not inquire about whether D. and H. Patel took vacations and, in fact, assumed that they did not. However, M. Patel testified that D. Patel took a vacation of three to four weeks to India without her husband; H. Patel went to India another time; and that the two of them also periodically went to New Jersey together, D. Patel testified that she took a vacation to India for two to three weeks without her husband, and H. Patel testified that he and D. Patel went to New Jersey multiple times for a few days during the workweek; however, he was specific as to only two vacations which he testified were three days each in February and August 2007.

We find that D. Patel took a vacation of three weeks as both she and M. Patel testified to three weeks. Further, as testimony about specific times is more reliable than testimony that estimates time, we find that D. and H. Patel each took three days vacation in February and in August 2007. Petitioner must be credited with the time that D. and H. Patel were on vacation, and the wage order should be reduced by the dollar amount that Respondent assessed for that time.

Unfortunately, there is no testimony as to whether D. Patel's three-week vacation was taken before or after her pay was increased in July 2007. Having considered a number of alternatives for crediting the Petitioner, we find that the most reasonable is to compute the credit based on a three-week vacation during the period after the wage increase was effected because it is more likely that such an extended vacation would have been taken later rather than earlier in D. Patel's employment and because a larger part of the time period covered by the order is after the raise became effective. As Respondent assessed an underpayment of \$463.75 for each week after D. Patel's raise, we find that Petitioner should be credited for three weeks multiplied by \$463.75, or \$1391.25, and that the amount of underpayment due D. Patel should be reduced by that amount.

Regarding the three days vacation that D. and H. Patel each took within single weeks in February and August 2007, we credit the Petitioner with three-13 hours days at the premium wage rate of \$10.725 an hour in each of 2 weeks for D. Patel and for H. Patel, or \$836.55 for each of the employees. Accordingly, the amount of underpayment to D. Patel should be reduced by the sum of the dollar value of all of vacation time that she took (\$1391.25 + \$836.55), or \$2,227.80; the amount of the underpayment to H. Patel should be reduced by the dollar value of his vacation time, or \$836.55; and the wage order should be reduced by the sum of the dollar value of the vacation time for both D. and H. Patel, or \$3,063.35.

Respondent's assessment of a 25% civil penalty is reasonable.

Petitioner challenges Respondent's assessment of a civil penalty of \$19,596 in the wage order. Ares' testified that the penalty, which is 25% percent of the amount of wages found due, was considered a relatively light penalty and was based on her determination that Petitioner was cooperative in DOL's investigation and that its violations of the Labor Law were a consequence of ignorance rather than intention.

We find that Respondent's assessment of a 25% penalty is reasonable, but that the dollar amount in the order should be reduced in light of the credits against wages that we find that Petitioner is due.

Respondent's assessment of interest at 16% is reasonable.


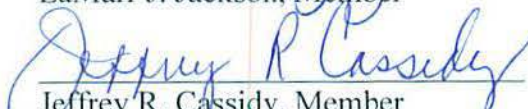
Labor Law § 219 (1) provides that upon Respondent's determination that wages are due, the order directing payment shall include "interest at the rate of interest then in effect as prescribed by the superintendent of banks pursuant to section fourteen-a of the banking law per annum from the date of the underpayment to the date of payment."

Banking Law § 14-A sets the "maximum rate of interest" at "sixteen percent per centum per annum." We therefore affirm the rate of interest assessed in the wage order, but find that the dollar amount of interest should be reduced in light of the credits against wages that we find the Petitioner is due.



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

1. The Order under Labor Law articles 6 and 19, dated April 29, 2008, issued against Petitioner Ram Hotels Inc. (T/A Rodeway Inn), and assessing a civil penalty totaling \$400 for Counts I, II and III of Labor Law violations is affirmed in its entirety; and
2. The Order to Comply with Labor Law article 19, dated April 29, 2008, issued against Petitioner Ram Hotels Inc. (T/A Rodeway Inn), is modified by reducing the amount of wages due and owing from \$78,382.33 to \$74,382.98; and
3. The Commissioner of Labor is directly to re-compute the amount of interest and civil penalty due and owing in light of the modification of the wage order; and
4. The petition and amended petition are otherwise denied.

  
Anne P. Stevason, Chairperson  
J. Christopher Meagher, Member  
Jean Grumet, Member  
LaMarr J. Jackson, Member  
Jeffrey R. Cassidy, Member

Dated and signed in the Office  
of the Industrial Board of Appeals  
at Albany, New York, on  
October 11, 2011.