STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of:	
PRAKASH HUNDALANI AND SHERRY'S RESTAURANT OF NY INC. (T/A MI NIDITO),	
Petitioners,	
	DOCKET NO. PR 08-124
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 June 10, 2008,	RESOLUTION OF DECISION
- against -	
THE COMMISSIONER OF LABOR,	
Respondent.	

APPEARANCES

Herten, Burstein, Sheridan, Cevasco, Bottinelli, Litt & Harz, LLC, (Daniel C. Ritson of counsel), for Petitioner.

Pico Ben-Amotz, Acting Counsel, NYS Department of Labor, (Jeffrey G. Shapiro of counsel), for Respondent.

WITNESSES

Prakash Hundalani, for Petitioner.

Orlando Nunez, Nilson Nunez, Rafael Munoz, Hector Nunez, Cloty Ortiz, Senior Labor Standards Investigator, for Respondent.

WHEREAS:

The petition for review in the above-captioned case was filed with the Industrial Board of Appeals (Board) on August 4, 2008. An answer was filed on April 22, 2009. A reply to the answer was filed on May 1, 2009. Upon notice to the parties, a hearing was held on June 29, 2010 in New York City before Anne P. Stevason, Esq., Chairperson of the

Board and the designated Hearing Officer in this proceeding. Each party was afforded a full opportunity to present documentary evidence, to examine and cross-examine witnesses, to make statements relevant to the issues, and to file closing briefs.

The Commissioner of Labor (Commissioner, DOL [Department of Labor], or Respondent) issued two Orders against Petitioners Prakash Hundalani and Sherry's Restaurant of NY, Inc. (T/A Mi Nidito) (together, Petitioner) on June 10, 2008. An Order to Comply with Article 19 (Wage Order) directs payment to the Commissioner for wages due and owing to 23 employees in the total amount of $197,541.28, with interest continuing thereon at the rate of 16% calculated to the date of the Wage Order, in the amount of $22,574.10, and assesses a civil penalty in the amount of $395,083.00, for a total amount due of $615,198.38.

The Order under Articles 6 and 19 of the Labor Law (Penalty Order) assesses a civil penalty against the Petitioner in the amount of $9,000.00: $3,000.00 for "failing to keep and/or furnish accurate payroll records for each employee" for the period of October 15, 2007 through October 21, 2007, October 22, 2007 through October 28, 2007 and October 29, 2007 through November 4, 2007; $3,000 for failing "to pay all manual workers within seven days after the end of the week in which the wages were earned" for the same time period; and $3,000.00 for failing to provide each employee with a wage statement with every payment of wages during the same time period.

The petition alleges that the cooks and dishwashers were not underpaid and received salaries that were in excess of minimum wage and 1.5 times minimum wage for all overtime hours. It also challenges the fact that more than half of the wages found due were due to unidentified employees. The petition further alleges that the method of calculating overtime wages was inequitable in that the higher the salary paid to an employee the more would be due in overtime. Finally, it alleges that the penalty of 200% is unreasonable because the violation was not willful or egregious and petitioner had no prior violation.

In response, DOL filed a motion to strike parts of the petition which was denied by the Board without prejudice on February 27, 2009. An answer was then filed denying the material allegations of the petition and alleging that the wait staff at the restaurant was not paid minimum wage and there were no time records for the kitchen staff.

On October 21, 2009, Petitioner filed a motion to prohibit further document production due to DOL's failure to fully comply with a subpoena for records. The motion also requested the Board to strike the Wage Order in relation to the unidentified employees. Petitioner also moved to depose the DOL investigator on the case. The motions were denied without prejudice and both parties were given permission to exchange demands for bills of particular. The Board hereby adopts these previous motion decisions.

At the hearing, Petitioner stipulated that it owes wages to 15 employees listed on the schedule who worked as wait staff at the restaurant (in the amount of $7,614.36) and that it is not contesting the Penalty Order in the amount of $9,000. Petitioner stated that it is only

appealing the back wages found due to the kitchen staff and the 200% civil penalty on the Wage Order.

At the close of Petitioner's case, the Commissioner made a motion for a directed verdict, which was taken under advisement by the hearing officer. The Board is not bound by the CPLR, and in this instance, where there are a number of unidentified employees, and fairness requires consideration of the entire record, the Board denies this motion.

Post hearing briefing was complete on December 23, 2010. Petitioner argues that the Board should strike those portions of the Commissioner's Wage Order that were not based on a specific employee complaint. It argues that in the absence of adequate employer records DOL may only issue orders based on employee complaints. The Board should also strike that portion of the Wage Order pertaining to unidentified employees since there was insufficient evidence of the hours worked or wages paid to these employees. The burden of proof should be on Respondent for all employees who did not file complaints. Labor Law § 196-a only applies to actual complaints filed with DOL. Finally, Petitioner argues that the violations are neither willful or egregious and therefore, the 200% civil penalty is unwarranted.

In its responding brief, DOL argues that where there are inadequate time and payroll records, the burden is on the employer to prove proper payment or sufficient evidence to negate the reasonableness of the audit. Petitioner failed to meet this burden. Petitioner's testimony was imprecise and insufficient and based on an admittedly poor memory. The evidence of the time and wages of the unidentified employees was based on employee statements regarding the number of people that worked at the restaurant during the period in question.

I. SUMMARY OF EVIDENCE

Testimony of Hundalani

Petitioner Hundalani testified that he owned the restaurant Mi Nidito and that it was open 7 days per week. Work was done at the restaurant from 9:00 a.m. until midnight and it was open to the public from 11:00 a.m. until midnight. There were time records for the wait staff, who signed in and out on the computer. However, the cooks and dishwashers did not sign in and out, and some of the employees were not indicated on the payroll records at all if they did not have a social security number. When asked whether he had knowledge of the compensation paid and the hours worked by the kitchen staff, Hundalani replied: "I don't remember." But, he said, that he had some notes written that morning of the six years of hours worked by the cooks and dishwashers. Petitioner introduced 780 pages of payroll records for the period 2005 to 2007 and admitted that there were no records for 2001 to 2004 and some of 2005. The records indicated that the hours worked by the wait staff were recorded but the hours worked by the kitchen staff were not.

Hundalani testified that Luis A. Lopez worked from August 2007 to November 2007 and from 2001 to 2003. Louis Lopez (different from Louis A. Lopez) worked from 2001 to

2007 as a cook and his salary was $500 per week for 45 to 48 hours. The name "Louis Lopez" does not appear anywhere in the payroll records produced by Petitioners. Rafael Munoz worked from 2001 or 2002 to the present. From 2002 to 2003 he made $325 per week; from 2004 to 2005 he made $375 per week; and from 2006 to 2007 Rafael Munoz made $450 per week. The name "Rafael Munoz" does not appear anywhere in Petitioner's payroll records. He worked 45 to 50 hours per week and sometimes 60 hours per week. Hector Munoz worked from 2001 to 2007 for 45 to 50 hours per week, though sometimes when he worked extra days to cover for one of his brothers, who also worked there, he worked 50 to 55 hours and then once or twice a month Hector worked 65 to 66 hours.

Hundalani also testified that Juan Fausto worked off and on for him from 2002 to 2007 for a total of about 1.5 or 2 years but he could not recall exactly. He was paid $350 per week and worked 30 to 40 hours a week, when he worked. From 2001 to 2007, Nilson Nunez, Hector's brother, worked approximately 40 to 45 hours per week. Petitioner's payroll records show Nilson's date of hire as July 1, 2005. Orlando Nunez worked from 2001 to the present averaging 48-50 hours per week. Petitioner's payroll records indicate that Orlando was hired on August 1, 2006.

On rebuttal, Hundalani testified that no one worked seven days per week. He named Hector Nunez, Nilson Nunez, Rafael Munoz, Juan Fausto and Jose Moise Vincente as his dishwashers but when asked if there were any others, he stated that he could not recall. Hundalani also testified that if an employee worked extra hours, he was given a bonus.

Testimony of Orlando Nunez

Orlando Nunez testified that he worked for Mi Nidito from January 2000 to the present. When he first started, he was making $300 per week and working 7 days per week. On Mondays through Saturdays, he worked 3:00 p.m. to 11:30 p.m. and on Sundays, he worked 10:00 a.m. to 11:30 p.m. Then Orlando became a cook and was paid $325 per week for working 7 days per week from 3:00 p.m. to 11:30 p.m. In 2004 or 2005 his salary went up to $400 per week for 6 days. In 2007 Orlando's salary went up to $600 per week. His salary was always paid in cash until 2006. If he missed a day of work, his salary would be reduced. He was given a statement and told to sign it by the employer. However, no one explained it to him. Sometimes, Orlando would make a "commission" of $25 if he worked more hours than he was usually scheduled. No breaks were given during the workday.

Testimony of Nilson Nunez

Nilson Nunez testified that he started working for Petitioner in January 2000 when he worked 7 days per week from 7:00 a.m. to 4:00 p.m. and was making $300 per week. In 2002 Nilson's salary was raised to $325 per week and he worked 6 days per week and not 7. He worked between 57 and 63 hours per week but his schedule was 9 hours per day. Nilson stopped working for Petitioner in the middle of 2007 when he was making $450 per week.

Testimony of Rafael Munoz

Rafael Munoz started working at Petitioner's restaurant in April 2002. He was hired as a dishwasher and worked from 3:00 p.m. to 3 or 3:30 a.m. 7 days a week at the salary of $350. Rafael started working in the kitchen in 2005 and he worked 6 rather than 7 days per week and his schedule was from 11:00 a.m. to 9:00 p.m. In 2005, Rafael's salary was $375 per week and in 2006 it was raised to $400. Rafael's salary was paid in cash.

Testimony of Hector Nunez

Hector Nunez testified that he started working for Petitioner in September 2001. He left for six or seven months when he worked at another restaurant that was owned by Petitioner but then he returned at the end of 2002. From 2002 to approximately 2007, Hector worked as a cook 7 days per week and received a salary of $350 per week. He worked Tuesday through Sunday from 7:00 a.m. to 4:00 p.m. and on Mondays from 10:00 a.m. to 9:00 p.m. Hector testified that he always received $350 per week in cash unless he was covering another employee's shift in which case he would receive the other worker's salary.

Testimony of Senior Labor Standards Investigator Cloty Ortiz

Senior Labor Standards Investigator (SLSI) Cloty Ortiz (Ortiz) testified that she started her investigation of Petitioner in April of 2007. SLSI Ortiz made an initial visit to Petitioner's restaurant on April 25, 2007 with two other investigators. They interviewed kitchen staff employees and recorded their answers on interview sheets which were then signed. Rafael Munoz, Hector Nunez, and Jose Moises were interviewed in person; Luis A. Lopez, Nilson Nunez and Orlando Nunez were interviewed over the phone by SLSI Ortiz. All of the interview sheets were entered into evidence at the hearing. On June 15, 2007, Hector Nunez filed a complaint with DOL.

At the time of the initial visit, SLSI Ortiz issued a revisit notice for May 8, 2007 to conduct a payroll record examination. On May 8, 2007, Petitioner's accountant provided Ortiz with payroll registers, bank statements and cancelled checks from January 2005 through April 2007. The register contained the hours worked by the food service staff but did not include the hours of the kitchen staff.

SLSI Ortiz testified that she calculated the wages owed to the various kitchen employees by referring to the interview sheets since no time records were provided by the employer for these employees. In computing the amount owed, SLSI Ortiz credited the employer with a meal allowance and computed the regular rate of pay – the derived rate - upon which the overtime wages are based, by dividing the total weekly wages earned by the number of weekly hours worked. For those employees who were at work over 10 hours per day, an hour at minimum wage was added each day representing "spread of hours" pay. In reviewing the audit after hearing the testimony of Nilson Nunez, SLSI Ortiz testified that the audit should be adjusted and $628 deducted from the amount due Nilson Nunez.

Although an audit was done for Juan Fausto (dishwasher), Louis Lopez (cook), and Luis Montero Valdez (cook), the evidence was not clear as to the period of employment of each of these people or that each were owed the entire amount calculated. Therefore, based on information received from Hector and Orlando Nunez that there were always at least 6 cooks and 2 dishwashers on staff at the restaurant and 3 in the kitchen at all times, these named employees were combined with other unidentified employees to account for the wages due these positions for the full time period. Orlando Nunez identified Juan Fausto as a dishwasher, provided the hours that he worked but did not know how much he was paid.

In calculating the wages owed to the unidentified employees, SLSI Ortiz designated the dishwasher salary at $350 per week based on the other evidence she received during her investigation as to what a dishwasher was paid. She used an average workday of 12 hours, 6 days a week then deducted one half-hour per day for a meal break. This was based on information received from Hector and Nilson Nunez that they were working 13 to 14 hours, 7 days per week when they worked as dishwashers.

SLSI Ortiz testified that she completed the background information form for the civil penalty which recommended a 200% civil penalty. Factors that were considered were the lack of cooperation at the initial inspection when employees were sent away; incomplete payroll records; and information that the employees were coached to provide DOL with misleading information.

II. STANDARD OF REVIEW BURDEN OF PROOF

In general, when a petition is filed, the Board reviews whether the Commissioner's order is valid and reasonable. The petition must specify the order "proposed to be reviewed and in what respects it is claimed to be invalid or unreasonable. Any objections . . . not raised in [the petition] shall be deemed waived" (Labor Law § 101). The Board is required to presume that an order of the Commissioner is valid (Labor Law § 103).

Pursuant to the Board Rules of Procedure and Practice (Rules) 65.30 (12 NYCRR 65.30): "The burden of proof of every allegation in a proceeding shall be upon the person asserting it." Therefore, the burden is on the Petitioner to prove that the Orders are not valid or reasonable.

III. FINDINGS AND CONCLUSIONS OF LAW

The Board makes the following findings of fact and law pursuant to the provision of Board Rule 65.39 (12 NYCRR 65.39).

A. <u>The Commissioner is authorized to conduct investigations and issue orders even in the absence of employee complaints.</u>

In *Garcia v. Heady*, 46 AD3d 1088 (3d Dept 2007), the court, on an appeal from the

Board, rejected petitioner's contention that DOL lacked jurisdiction where a proper employee complaint had not been filed, an issue raised by petitioner in this case. The court held that "DOL possesses the inherent authority to investigate Labor Law violations even in the absence of a formal complaint (see Labor Law § 21 [1])." *Id.* at 1090.

Labor Law § 218 provides that: "If the commissioner determines that an employer has violated a provision of article six (payment of wages), article nineteen (minimum wage act) . . . , the commissioner shall issue to the employer an order directing compliance therewith . . . . directing payment of wages, benefits or wage supplements found to be due. . . [and] and additional sum as a civil penalty."

B. Petitioner failed to keep required records.

Labor Law § 661 states in relevant part:

> "Every 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 [her] duly authorized representative a sworn statement of the same. Every employer shall keep such records open to inspection by the commissioner or [her] duly authorized representative at any reasonable time . . . ."

The Minimum Wage Order for the Restaurant Industry[1] specifies the information that employers are required to maintain. Section 137-2.1 of 12 NYCRR provides in relevant part:

> "(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) wage rate;
> (4) the number of hours worked daily and weekly, including the time of arrival and departure for each employee working a split shift or spread of hours exceeding 10;
> (5) the amount of gross wages;
> (6) deductions from gross wages;
> (7) allowances, if any, claimed as part of the minimum wage;
> (8) money paid in cash; and
> (9) student classification."

[1]Since January 2011 the Restaurant Industry is now governed by the Minimum Wage Order for the Hospitality Industry (see 12 NYCRR § 146-3).

Section 137-2.2 further provides:

> "Every employer . . . shall furnish to each employee a statement with every payment of wages, listing hours worked, rates paid, gross wages, allowances, if any, claimed as part of the minimum wage, deductions and net wages."

Therefore, it is an employer's responsibility to keep accurate records of the hours worked by its employees and the amount of wages paid, and to provide its employees with a wage statement every time an employees is paid. This required recordkeeping provides proof to the employer, the employee and the Commissioner that the employee has been properly paid.

In the instant case, the Board finds that Petitioner failed to keep the required payroll records. Records were requested of Petitioner on a number of occasions but the produced records did not include all employees. Notably, several members of the kitchen staff whom Hundalani testified were employed, some for several years, were absent from the records. In addition the records failed to provide the number of hours worked by the kitchen staff.

C. In the absence of employer records DOL may utilize the best available evidence in determining the amount of unpaid wages.

Where an employee files a complaint for unpaid wages with DOL and the employer has failed in its statutory obligation to keep records, the employer bears the burden of proving that the employee was paid. Labor Law § 196-a provides, in relevant part:

> "Failure of an employer to keep adequate records, in addition to exposing such employer to penalties . . . 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, benefits and wage supplements."

In the case of *Angello v Natl. Fin. Corp.*, 1 AD3d 850 (3d Dept 2003), DOL issued an order to an employer to pay wages to a number of employees. The order was based on the employees' sworn claims filed with DOL because the employer had failed to keep required employment records. The employer filed a petition with the Board claiming that the claims and therefore, the order, were overstated. In its decision on the petition, the Board reduced some of the claims. The court, on appeal, held that the Board erred in reducing the wages since the employer failed to submit proof contradicting the claims. Given the burden of proof in Labor Law § 196-a and the burden of proof which falls on the Petitioner in a Board proceeding, 12 NYCRR 65.30, "the burden of disproving the amounts sought in the employee claims fell to [the employer], not the employees, and its failure in providing that information, regardless of the reason therefore, should not shift the burden to the employees." *Id.* at 854.

Even in the absence of employee claims, the petitioner's burden of proof, in the

absence of records of the actual hours worked and wages paid, is to submit sufficient proof as to provide an accurate estimate of the hours worked and wages paid (*Matter of Mohammed Aldeen,* PR 07-093 [March 28, 2008] *aff'd sub nom. Matter of Aldeen v Industrial Appeals Board,* 82 AD3d 1220 [2d Dept 2011]).

In *Anderson v Mt. Clements Pottery Co.*, 328 U.S. 680, 687-88 (1949), superseded on other grounds by statute, the U.S. Supreme Court long ago discussed the fairness of relying on employee statements where the employer failed to keep adequate records:

> "[W]here the employer's records are inaccurate or inadequate....[t]he solution...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."

Anderson further opined that the court may award damages to an employee, "even though the result be only approximate. . . [and] [t]he employer cannot be heard to complain that the damages lack the exactness and precision of measurement that would be possible had he kept records in accordance with the [recordkeeping] requirements of . . .the Act." *Id.* at 688-89.

As the court stated in *Garcia v Heady,* 46 AD3d at 1090:

> "The record reveals that petitioner failed to maintain records of the hours claimants worked and/or provide them with wage stubs, thus compelling DOL to employe an alternate analysis to ascertain the number of hours that claimants worked and, in turn, imposing upon petitioner the burden of demonstrating the unreasonableness of DOL's calculations."

In the instant case, DOL relied, as well as it could, on Petitioner's records. The only information provided were rates of pay for some of the kitchen staff. Otherwise, employees were interviewed concerning the period of their employment, the number of hours worked, wages paid and the number of employees working in the kitchen and DOL relied on this information in making their calculations.

D. Calculation of Overtime Wages Due is governed by the Minimum Wage Order.

The Minimum Wage Order for Restaurant Industries, 12 NYCRR 137-1.3, requires an employer to pay employees "at a wage rate of 1 ½ times the employee's regular rate" for all hours worked over 40 in a work week. The term "regular rate" is defined at 12 NYCRR 137-3.5:

> "The term *regular rate* shall mean the amount that the employee is regularly paid for each hour of work. When an employee is paid on a piece rate basis, salary or any other basis than hourly rate, the regular hourly rate shall be determined by dividing the total hours worked during the week into the employee's total earnings."

Likewise, the Fair Labor Standards Act of 1938, as amended, (FLSA), 29 U.S.C. § 207(a)(1), requires that covered employees be paid "at a rate not less than one and one-half times the regular rate" for hours over 40 in a week. The FLSA and the New York State Minimum Wage Act are remedial legislation. The general rule in interpreting statutes is that remedial legislation is to be broadly construed. The Acts not only provide for minimum wages for workers but they also set maximum hours.

> "The FLSA embodies a Congressional intent to 'give specific minimum protections to *individual* workers.' Its maximum hours provisions, "like the other portions of the Fair Labor Standards Act, are remedial and humanitarian in purpose. Such a statute must not be interpreted or applied in a narrow, grudging manner" (citations omitted) *Giles v. City of New York,* 41 FSupp2d 308 (SDNY 1999).

The Acts do not forbid work hours of over 40 in a week but they provide that a worker must be compensated at a premium, "stepped-up" rate of one and one-half times the employee's regular rate for these overtime hours. The imposition of this premium is the way in which overtime hours are discouraged.

> "The Supreme Court instructs more generally that courts must construe the FLSA overtime provisions broadly; a finding that a salary included overtime, in the absence of an agreement so stating would be the sort of 'narrow, grudging' FLSA application that the Court rejected soon after enactment. *Tenn. Coal, Iron & R.R. Co. v. Muscoda Local No. 123 et al.,* 321 U.S. 590, 597, 64 S. Ct. 698, 88 L.Ed. 949 (1944)." *Id.* at 317.

Early on in its interpretation of the FLSA, the United States Supreme Court held that the FLSA was meant to address "the evil of overwork as well as underpay." *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 578 (1942). Discouraging overtime hours by requiring premium pay was viewed as a way of inducing worksharing and relieving unemployment as well as protecting workers from excessive hours. *Id.* at 577-78. In *Missel*, a transportation worker received a set salary each week for hours worked between 65 and 80. The lower court held that as long as the salary met the minimum wage standards and overtime at the minimum wage, then the employer complied with the FLSA. The Supreme Court overturned the lower court ruling and held that the "act was designed to require payment of overtime at time and a half the regular pay, where that pay is above the minimum, as well as where the regular pay is at the minimum." *Id. at* 578. The court went on to explain that where there is a fixed weekly wage for regular contract hours which are the actual hours worked "Wage divided by hours equals regular rate. Time and a half

regular rate for hours employed beyond statutory maximum equals compensation for overtime hours." *Id.* at fn.16. Where there is a fluctuating workweek, the regular rate will vary from week to week since it is determined by dividing the salary by the number of hours worked.

Petitioner argues that it paid its employees correctly since the employees were paid more than the hourly minimum wage and more than time and one half the hourly minimum wage rate that is prescribed by law for overtime hours. However, as stated above, this is not the proper method of calculating premium pay for overtime. As the Board discussed in *Matter of Cayuga Lumber,* PR 05-099 (Decision on Reconsideration, September 26, 2007) the regular rate of pay, which is the basis for determining the premium pay for overtime, is calculated by dividing the employee's weekly salary by the number of hours worked per week. The method Respondent used to determine the overtime wages owed to the kitchen staff is consistent with this formula.

E. Wages due to the named employees.

DOL's audit with regard to the named employees was based on employee interviews and/or claim forms filed with DOL. Given the inconsistencies and lack of specificity in Petitioner's testimony, the Board does not find it credible or sufficient to meet Petitioner's burden of proving that the Wage Order was invalid or unreasonable as far as the named employees (*see, e.g. Matter of the Petition of Angela Jay Masonry & Concrete*, Docket No. PR 06-073 [September 24, 2008]). Therefore, with the exception of the reduction in the amount owed Nilson Nunez of $628, the Wage Order regarding the named employees is affirmed.

F. Wages due to the unidentified employees.

In *Reich v Petroleum Sales, Inc.*, 30 F3d 654 (6th Cir 1994), the court held that it could award damages to unidentified employees under the Fair Labor Standards Act (FLSA) as long as the existence, work hours and wages of these employees is established by a preponderance of the evidence.

> "Such awards benefit the public interest by depriving the employer of any benefits accrued as a result of its illegal pay practices and by protecting those employers who comply with the FLSA from unfair competition with those employers who do not." *Id.* at 657.

In the instant case, the amount of wages due to the unidentified cook and dishwasher for the period of November 2001 to November 2004 is based on a number of factors. First of all, some of the wages are due employees who were identified by Petitioner as being his employees: Juan Fausto, Louis Lopez and Louis Montero Valdez. In addition, Valdez was identified by Petitioner's accountant as a cook and was included in the proffered payroll records. Secondly, it was based on information obtained from employee interviews which indicated the hours worked and the number of people working in the kitchen.

We note that *Reich* holds that damages may be awarded unidentified employees as long as they are established by a preponderance of the evidence. However, under the statute and Board rules, the Petitioner has the initial burden of proving that the order is unreasonable or invalid. Therefore, although we hold that the wages due unidentified employees in this case is supported by a preponderance of the evidence, we also find that

Petitioner had the initial burden of proving that the order concerning the unidentified employees was unreasonable or invalid.

G. Civil Penalties for failure to pay wages are modified to 100%.

The Wage Order additionally assesses a civil penalty in the amount of 200% of the wages due. Factors that were considered were the lack of cooperation of the Petitioner at the initial inspection, where employees were sent away; incomplete payroll records; and information that the employees were coached to provide DOL with misleading information. Labor Law § 218 provides that a 200% penalty is to be assessed where there is a prior violation or the violation is egregious. This issue was raised by Petitioner and Respondent failed to adequately respond. We, therefore, reduce the civil penalty to 100%.

E. Interest is due.

Labor Law § 219(1) provides that when the Commissioner determines that wages are due, then 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." "DOL is obligated to impose interest at the statutory rate." *Garcia v. Heady, 46 AD3d at 1090.*

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NOW, THEREFORE, IT IS HEREBY RESOLVED THAT

1. The Order to Comply with Article 19 (Wage Order) is affirmed after a deduction of $628 and the appropriate interest and penalty are modified accordingly and the civil penalty is further modified to 100% of the wages.

2. The Penalty Order is affirmed in all respects; and

3. The Petition is otherwise denied.

Anne P. Stevason, Chairman

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.