STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of: ANTHONY BOUMOUSSA AND BAY PARKWAY SUPER CLEAN CAR WASH, INC., Petitioners, To Review Under Section 101 of the Labor Law: An Order to Comply with Article 19 of the Labor Law dated January 23, 2009, amended and reissued December 18, 2009; and an Order to Comply under Articles 4 and 19 of the Labor Law, dated January 23, 2009, amended and reissued December 18, 2009, - against - THE COMMISSIONER OF LABOR, Respondent.	DOCKET NO. PR 09-058 RESOLUTION OF DECISION

APPEARANCES

Sandback, Birbaum & Michelen, Oscar Michelen of Counsel, for Petitioners.

Maria L. Colavito, Counsel to the NYS Department of Labor, Jeffrey G. Shapiro of Counsel, for Respondent.

WITNESSES

Anthony Boumoussa, Federico Aguilar, Alejandro Corona, and Miguel Hernandez, for Petitioners.

Shaela Montes de Oca, Labor Standards Investigator; Gerard Capdeveille, Senior Labor Standards Investigator; Alejandro Ramos; and Candido Cocsotz, for Respondent.

WHEREAS:

The petition for review in the above-captioned case was filed with the Industrial Board of Appeals (Board) on March 24, 2009. An answer was filed on May 6, 2009. An amended petition was filed on February 16, 2010 in response to amended and reissued

Orders to Comply, dated December 18, 2009. The amended petition was answered on February 18, 2010.

Upon notice to the parties, a hearing was held on May 4, 2010 and continued on June 4, 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 make closing arguments.

The Commissioner of Labor (Commissioner, DOL [Department of Labor], or Respondent) issued Orders against Petitioners Anthony Boumoussa and Bay Parkway Super Clean Car Wash, Inc. (together, Petitioner) on January 23, 2009. An Order to Comply (Wage Order) directs payment to the Commissioner for wages due and owing to one named and twelve unnamed employees in the total amount of $637,223.81, with interest continuing thereon at the rate of 16% calculated to the date of the Wage Order, in the amount of $87,989.22, and assesses a civil penalty in the amount of $637,224.00, for a total amount due of $1,362,437.03. An Amended Wage Order was issued on December 18, 2009 directing payment of wages due and owing to nine named and twelve unnamed employees in the total amount of $637,223.81, with interest continuing thereon at the rate of 16% to the date of the Amended Wage Order in the amount of $192,559.28 and assessing a civil penalty in the amount of $637,224.00, for a total amount due of $1,467.007.09.

The Order under Article 4 and 19 of the Labor Law (Penalty Order) dated January 23, 2009 assesses a civil penalty against the Petitioner in the amount of $250.00 for violating Labor Law § 138 by failing to furnish evidence that one of its employees is over the age for which an employment certificate is required. The Penalty Order also assesses a civil penalty in the amount of $271,000.00 for failing to keep and/or furnish true and accurate payroll records for each employee for the period from March 14, 2002 to March 14, 2008. An Amended Penalty Order was issued on December 18, 2009 raising the penalty for the child labor violation from $250.00 to $750.00. The Amended Wage and Penalty Orders dated December 18, 2009 superseded the January 23, 2009 Orders.

An Interim Resolution of Decision was issued on August 28, 2009 holding that the Board could not issue an order staying entry of judgment pending the appeal because a stay was already in effect by operation of law.

The Amended Petition challenges the Amended Wage Order by alleging that the underlying investigation was improper and/or incomplete in that DOL never determined if the individuals listed on the annexed schedule of minimum wage underpayments (Schedule) were Petitioner's employees or the length of their employment and never sufficiently reviewed Petitioner's records. In addition, it alleges that the individuals on the Schedule were either not Petitioner's employees, were compensated by other entities, or did not work for the length of time indicated; that Petitioner employed only five employees in the job of car dryers; that the other dryers the DOL investigators observed were either customers or family members; and that the employees receipt of tips was not considered in calculating the

underpayment found due. The Petition also attacks the civil penalty in the Wage Order as excessive.

The Amended Petition challenges the Amended Penalty Order by alleging that the $270,000 penalty for failure to maintain records is excessive, not proportionate to any alleged violation and is the result of an incomplete investigation. The Amended Petition also alleges that the $750 penalty for the child labor violation is invalid and/or unreasonable because DOL never determined the minor's age or the length of employment.

DOL's Amended Answer generally denies the Amended Petition's allegations and asserts that the Amended Wage Order is supported by the information obtained during a random inspection conducted at Petitioner's place of business on March 14, 2008, at which time thirteen persons were observed washing and drying cars; Petitioner Boumoussa was interviewed and stated that no records were kept of daily or weekly hours worked; that the business operated from 7:30/8:00 a.m. to 5:30/6:00 p.m.; that the business had only seven employees and that the workers earned primarily tips but that some received tips and an hourly wage; and that DOL used its best evidence, as they must, when an employer fails to keep required records, in determining wages owed.

DOL answers the allegations concerning the Amended Penalty Order by stating that the child labor violation is supported by the fact that the employee in question appeared less than 14 years old, had no identification and the employer could not produce any employment records for this person or an employment certificate as required by Labor Law § 138 for a person apparently under the age of 18.

I. SUMMARY OF EVIDENCE

Testimony of Anthony Boumoussa

Anthony Boumoussa (Boumoussa) is the president and sole shareholder of the Bay Parkway Super Clean Car Wash, Inc. in Brooklyn. He started the car wash in 2003.

The car wash is open seven days per week, weather permitting. On a nice day, the car wash opens around 6:30 a.m. and closes at 6:30 or 7:00 p.m. The workers usually report to work around 7:30 or 8:00 a.m. However, if it is raining the car wash may not open or may close early. The car wash can operate with as few as three people. The workers were paid $7.15 per hour and also received tips. Tips were collected in buckets and distributed among the workers at either the end of the day or the end of the week. The car wash normally had five to six workers on a busy day.

From 2003 to 2008, the car wash used punch cards for the workers to punch in and out to record time; the employees kept notes to track their time; and they were paid once a week. Once the employees were paid, the punch cards and any time records were disposed of.

Boumoussa identified a number of photographs of the car wash and described its operations. The car wash has one entrance and four exits. After a car goes through the washing process, it is directed to one of the four exits where two people dry the outside of the car and the windows, two people vacuum the car, and one person cleans the car mats by removing them from the car and putting them through a mat machine. These five workers act like a pit crew and move together from one exit to another as the cars come out of the wash. At times customers also help to dry their cars.

Investigators from the Department of Labor (DOL) first came to the car wash on a sunny Friday, March 14, 2008, which was several days before Good Friday and close to Passover. In addition, the car wash was running a special promotion. As a result, it was an unusually busy day. At the most the car wash had seven car wash workers that day. On busy days, it was customary for Boumoussa and his children to help out at the car wash, as well as employees of Boumoussa's oil change business which was next door to the car wash.

The DOL representatives were at the car wash for more than one hour. Boumoussa spoke with one of the investigators who asked to see the car wash records. Boumoussa told him that he did not have any records; that they were with his accountant. Boumoussa was also asked about a worker named Juan Canastuch (Juan), whom the investigator stated appeared to be younger than sixteen. Boumoussa testified that Juan had worked at the car wash for about four to five weeks but that he was hired by Alejandro Corona (Corona) and not Boumoussa. Corona is his assistant and helps him communicate with the workers who do not speak English but Corona also does the regular work of the car wash.

Boumoussa stated that he had approximately seven employees working for him on the date of the DOL inspection but could not say for sure and did not know the exact number of employees he had for any typical day from 2003 to 2008. However, there were never more than seven or eight employees at any one time. Employees worked approximately four to five hours per day and would not work the whole time that the car wash was open so that everyone had a chance to work.

Testimony of Federico Aguilar

Federico Aguilar (Aguilar) was called as a witness by Petitioner. He is currently employed by Petitioner and started his employment in 2007. When Aguilar first started working at the car wash, he was paid in cash. Eventually, he began receiving payroll checks. He was paid $7.15 per hour plus between $30 and $60 per week in tips. He usually worked three or four days per week, from 8:00 or 9:00 a.m. to 3:00 p.m. When it was raining he did not work and never worked more than 40 hours per week.

Aguilar testified that he did not go to DOL on April 15, 2009 to speak with investigators nor did he fill out any form or tell DOL that he worked six days per week at the car wash, from 7:30 a.m. to 7:00 p.m. When shown a claim form with his name on it, Aguilar stated that the signature looked like his but was not his, and could be a "forgery."

Testimony of Alejandro Corona

Corona is currently employed by Petitioner as Boumoussa's assistant and has been working for Petitioner for six or seven years. Prior to 2007, Corona was a regular car wash worker. Most of the workers called in the morning to see if they were needed. Depending on the weather and how busy the car wash was, they were told to come in to work, or not. If the car wash was very busy, the employees from the oil change business would help out.

On average there would be five workers at the car wash in 2007. All of the workers worked approximately the same number of hours. Each worker would keep track of his own hours plus there was a punch card. Corona was in charge of distributing the tips based on the number of hours each employee worked during the week. Corona shared in the tips. On average, Corona made between $70 and $80 in tips weekly.

In 2007, Corona made approximately $7.15 per hour. The car wash is open ten to eleven hours per day, seven days per week, weather permitting. His usual schedule was 9:30 or 10:00 a.m. to 6:00 or 7:00 p.m., six days per week. Sometimes Corona worked more than 40 hours in a week, in which case he would be paid time and one half for the overtime hours. He was paid weekly.

Corona was responsible for distributing the pay checks to the employees. When shown a copy of the DOL list of employees owed wages, Corona did not recognize the following names as people to whom he gave checks: Joel Callel, Edgar Hernandez, Juan Isiah Hernandez, Calito Sotz and Vasquez. But he could remember only the first names of people that worked at the car wash because the time cards were handwritten. Juan Canastuch worked at the car wash but for only a couple of weeks.

On rebuttal, Corona testified that the car wash pays for the supply and maintenance of uniforms for the employees. He also stated that workers were not charged for missing mats.

Testimony of Shaela Montes de Oca

Shaela Montes de Oca (Montes de Oca), a Labor Standards Investigator (LSI) with DOL, conducted a random inspection at the Super Clean Car Wash on March 14, 2008 to see if the workers were being paid according to the law. A worker who appeared to be under the age of fourteen was interviewed and another partial interview was conducted but for the most part the workers did not want to give their names or be interviewed. On April 11, Montes de Oca went to the Petitioner's accountant to review payroll records; however, the accountant did not have any records showing the workers' daily or weekly hours worked or how much they made per hour. He did provide tax and quarterly tax reports that listed the names of the employees and the amounts that they received. Starting in 2006, the quarterly reports listed four or five employees per year.

On April 17, 2008, Montes de Oca made a second field visit to the car wash to conduct employee interviews since DOL had not received proper payroll records. She was

unsuccessful because the employees were again reluctant to answer questions. At that time Boumoussa told her that he did not think his company had done anything wrong. On June 5, 2008, she made a third and final visit to the car wash to deliver an audit sheet to Boumoussa in the amount of $653,806.25 for unpaid wages.

DOL determined that Juan was under a certain age by his appearance, but was never told his actual age. Montes de Oca did not take any contemporaneous notes of her inspection but completed her inspection reports based on memory.

Testimony of Alejandro Ramos

Petitioner employed Alejandro Ramos (Ramos) from July 25, 2004 until March 25, 2009. During that time Petitioner employed between sixteen and seventeen people. All sixteen or seventeen worked on Friday, Saturday and Sundays and eight to nine employees worked the other days. The car wash was busier on the weekends, but even when it was slow the workers were expected to do other things, like sweep. Each employee worked six days per week. On an average day, Ramos worked from 7:15 a.m. to 7:45 p.m. Ramos did not punch a time clock or fill out a time card until January of 2009. Prior to January 2009 he received his wages in cash.

When Ramos started, he received a salary of $220.00 per week, and at the end of his employment he was receiving $300 per week plus tips. Corona was manager of the car wash and would charge Ramos if there was any damage or if floor mats were not replaced in the right car after cleaning. Corona also divided the tips but there were no records kept of the tips.

When LSI Montes de Oca inspected the car wash, Corona told the car wash workers not to speak to her, questioned the workers about what they said to her, and also told them what to say to her. Montes de Oca left her card with the workers after the inspection, and then a group of the workers went to DOL together to file claims.

When Ramos went to DOL to file his complaint against Petitioner, Federico Aguilar went with him and also filed a complaint.

Testimony of Candido Coc Sotz

Candido Coc Sotz (Sotz) worked for Petitioner from June 13, 2005 to June 13, 2008. Fifteen or sixteen people were employed by the car wash at any one time and everyone worked six days per week, and all employees worked Friday, Saturday and Sunday. Sotz worked from around 7:15 a.m. to 7:50 p.m and never punched a time clock or filled out a time card. Sotz was earning $220 per week when he started working for Petitioner and $260 at the end of his employment. He received about $125 to $150 per week in tips as well.

When the DOL investigators came to the car wash in March 2008, Corona instructed the workers to continue working and not to speak with the investigators.

Sotz came to DOL with about five workers and testified that one of the men's names was Federico.

Testimony of Gerard Capdevielle

Gerard Capdevielle (Capdevielle), a Senior LSI with DOL, led the inspection team on March 14, 2008, and interviewed Boumoussa. Capdevielle took field notes during his investigation but after he wrote his inspection report, he destroyed his notes as was his practice.

His report indicates that Boumoussa told him that there were no time records and was vague about how workers are paid, but stated that some workers receive tips only but others were paid an hourly rate; that at the time of the investigation there were seven employees on payroll; and Boumoussa had no information on Juan. Capdevielle issued a child labor violation to Boumoussa and sent Juan home on March 14.

Capdevielle identified two employee interview sheets summarizing interviews that another investigator had taken while she was at the car wash. One was from Juan and the other was from Juan Hernandez. Capdevielle spoke with Juan, asked him for identification and his date of birth but was not given either. Capdevielle noted that Juan looked very young. Neither Petitioner nor any representative ever provided DOL with information regarding Juan's age.

As part of his job duties, Cadevielle reviewed an audit of wages due, prepared by Montes de Oca and recomputed it. In recomputing the amount owed, Capdevielle used a special formula devised by DOL[1] to calculate the number of days that a car wash is usually open, given the fact that they typically close during inclement weather. The formula assumes that a car wash is open six days a week for twenty-two weeks of the year, five days a week for twenty weeks, and four days a week for ten weeks a year. Based on this formula and the differing minimum wages required for each year of the audit from 2003 to 2008, Capdevielle determined that Petitioner owed $636,465.60 in unpaid wages. An order to comply with Article 19 was issued to Petitioner on January 23, 2009. Attached to the order was a schedule listing Juan and 12 unnamed employees. In computing the amount owed, Capdevielle assumed that the unidentified workers worked from January 1, 2003 to March 16, 2008.

The original Penalty Order against Petitioner provided for a civil penalty of $250.00 for employing a minor and $271,000 for a records violation. The records violation penalty was determined by multiplying a $1000 per week penalty times the 271 weeks which Petitioner failed to produce or maintain required records during the period of March 14, 2002 to March 14, 2008.

On April 7, 2009, Alejandro Ramos visited the DOL office and provided information concerning his employment at Petitioner's car wash. He indicated that he worked at the car

[1] Capdevielle was unable to explain how DOL derived this formula, only that it was used whenever there was an audit of a car wash and there were no records.

wash from July 29, 2004 to March 20, 2009, six days per week, from 7:15 a.m. to 7:45 p.m. with one 15 minute break. He never received a wage statement and was paid in cash until 2009. Ramos stated that there were 16 people employed by Petitioner on March 18, 2008, the date of the DOL inspection, but 3 were off that day and that at the time that he visited the DOL office there were 10 to 11 employees. He confirmed that the young appearing employee encountered on the day of the inspection was 16 years old.

On April 9, 2009 three additional employees went to the DOL office and lodged complaints for unpaid wages: Juan Isiah Hernandez, Mynor Vasquez, and Edgar Fermin Alvarez Hernandez. Capdevielle interviewed the employees with the help of an interpreter. J. Hernandez indicated that he worked from 2/06 to 1/4/09, 6 days per week, from 7:15 a.m. to 7:00 p.m. with a 15 minute lunch, and was paid $280.00 per week, plus tips in the amount of $80 to $200. All of the employees indicated that Corona operated as the manager of the car wash and that if anything was missing from a car, the cost was deducted from an employee's pay. If anything was damaged, an amount was deducted from the employees' tips.

On April 15, 2009, Federico Aguilar, Candido Sotz, Miguel Mateo Taxpuac and Joel Calel, all Petitioner's employees, visited DOL and completed claim forms.

Capdeveille calculated the amounts due the eight individuals who contacted DOL after the Wage Order was issued based on information in their claim forms and interviews including the number of hours worked; the amount paid; the tip allowance; the spread pay, which was due when an employee started and ended his workday more than 10 hours apart; and reimbursements for the purchase of uniforms.

Capdeveille also completed a DOL form regarding the imposition of a civil penalty. He recommended that a 100% civil penalty be imposed based on Petitioner's failure to provide required records Petitioner and a general failure to communicate with DOL, in addition to the size of the business and gravity of the wage violations. A penalty of 100% is a standard civil penalty.

The Amended Wage Order was issued on December 18, 2009 for the same amount of unpaid wages as the original Wage Order but the named workers and the periods of their employment were set off against the amounts due the unidentified car dryers on the Schedule.

Testimony of Miguel Hernandez

Petitioner called Miguel Hernandez (Hernandez) as a rebuttal witness. Hernandez was an employee at the time of the hearing and had started working for Petitioner around November of 2006. He testified that Ramos started working at the car wash in 2008.

II. STANDARD OF REVIEW

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. 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 Miscellaneous Industries specifies the information that employers are required to maintain. Section 142-2.6 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) when a piece-rate method of payment is used, the number of units produced daily and weekly;

(6) the amount of gross wages;
(7) deductions from gross wages;
(8) allowances, if any, claimed as part of the minimum wage;
(9) net wages paid; and
(10) student classification."

Section 142-2.7 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 it produced only tax records. Although Boumoussa testified that time records were kept and then destroyed once the employees were paid, no time records were made available to DOL for any time period, including the period immediately before and after the first inspection. In addition, Capdevielle testified that Boumoussa admitted, at the time of the first inspection, that no time records were kept. In any event, an employer is required to maintain the records for six years (12 NYCRR 142-2.6[a]). Boumoussa also had no record of the days the business was closed; no record of tips; and no record of the alleged minor's employment or age.

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 absence of payroll records, DOL may issue an order to comply based on employee complaints only. 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.

Therefore, DOL properly utilized the best evidence available to determine the amount of unpaid wages and relied on the information concerning time and pay contained in the claim forms filed by the Petitioner's former employees. This information was bolstered by the testimony of Ramos and Sotz at hearing. Petitioner failed to meet its burden to show that the employees were properly paid. Boumoussa was unable to specify the number of employees that he employed at any one time. Petitioner's witness, Aguilar, testified that he worked less than 40 hours a week but denied that he ever visited the DOL office to file a claim even though other witnesses confirmed that he did. The manager of the car wash, Corona, testified that he did not recognize all of the names on the schedule of unpaid wages, and if they worked at the car wash he would, since he was responsible for distributing checks, however, all of the employees (including Aguilar) testified that for a long period of time they were paid in cash. Corona also testified that he only "sometimes" worked overtime, which contradicted his prior testimony that his usual schedule was 9:30 or 10:00 a.m. to 6:00 or 7:00 p.m. six days per week, which is more than 40 hours.

B. Calculation of Wages under the Minimum Wage Act.

The Minimum Wage Order for Miscellaneous Industries, 12 NYCRR 142-2.2, 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 142-2.16:

> "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 work basis, salary, or any other basis other than hourly rate, the regular hourly wage rate shall be determined by dividing the total hours worked during the week into the employee's total earnings."

As the Board has 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 regular number of hours worked per week.

Employers of employees who receive gratuities or tips, as in this case, may take a "tip allowance" against the minimum wage in specified amounts if certain conditions are

met (12 NYCRR 142-2.5). In order to take the tip allowance, the employer must provide "substantial evidence that the employee received in tips at least the amount of the allowance claimed [such as a] statement signed by the employee that he actually received in tips the amount of the allowance claimed" (12 NYCRR 142-2.5 [b] [1] [ii]); and the allowance claimed must be "recorded on a weekly basis as a separate item in the wage record" (12 NYCRR 142-2.5 [b] [1] [iii]).

In this case, there was no record of tips, however, employees did testify that they received tips and testified as to approximate amounts and although the Petition alleges that DOL failed to take into account a "tip allowance," the audit shows that, even though the required records were not kept, in fact DOL did credit a tip allowance in calculating the Amended Wage Order.

Petitioner also argued that DOL failed to take the weather into account in computing the number of days worked by the employees. The record shows, however, that DOL has applied a formula that presupposed that the car wash was closed a certain number of days per year during the period in issue and, therefore, has taken into account that a car wash will be open only when weather permits. Although DOL could not explain the basis for the formula, the burden of proof was upon Petitioner to show that the formula was unreasonable or invalid, or to establish a more accurate number of days that the car wash was closed. Petitioner failed to do that.

The Schedule attached to the Amended Wage Order indicates the named and unidentified employees to whom wages are due. The respective periods each worked and the amount due are as follows:

	Name	**Period of Employment**	**Amount Due**
1.	Aguilar, Federico	4/20/07 to 4/15/09	$19,707.56
2.	Calel, Joel Chiualun	8/12/07 to 4/7/09	$26,901.40
3.	Canasatuj, Juan	2/10/08 to 3/16/08	$ 758.21
4.	Hernandez, Edgar Fermin	2/1/05 to 4/5/08	$23,464.75
5.	Hernandez, Juan Isiah Alvarez	2/1/06 to 1/4/09	$32,345.20
6.	Ramos, Alejandro	7/29/04 to 3/20/09	$67,420.24
7.	Sotz, Candido Coc	6/15/05 to 7/13/08	$41,349.08
8.	Taxpuac, Miguel Mateo	4/15/03 to 4/15/09	$43,949.20
9.	Vazquez, Mynor Maximiliano	5/1/07 to 4/9/09	$26,074.35
10.	Employee #001	1/1/03 to 4/19/07	$33,331.24
11.	Employee #002	1/1/03 to 6/14/05	$11,689.72
12.	Employee #003	1/1/03 to 4/14/03	$9,089.60
13.	Employee #004	1/1/03 to 8/11/07	$26,137.40
14.	Employee #005	1/1/03 to 1/13/06	$20,693.60
15.	Employee #006	1/1/03 to 4/30/07	$26,964.54
16.	Employee #007	1/1/03 to 1/31/05	$29,574.05
17.	Employee #008	1/1/03 to 5/9/07	$38,657.36
18.	Employee #009	1/1/03 to 3/16/08	$53,038.80
19.	Employee #010	1/1/03 to 3/16/08	$53,038.80

20.	Employee #011	1/1/03 to 3/16/08	$53,038.80

C. 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. The audit took into consideration that a car wash is not open every day of the year due to weather and also credited Petitioner with a tip allowance. The total due to the named employees is $281,969.99.

Given the inconsistencies and lack of specificity in Petitioner's testimony, the Board does not find it credible or sufficient to disprove the complaints of the employees or to meet Petitioner's burden of proving that the Amended 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]).

D. Wages due to the unidentified employees.

Only one of the employees listed on the Schedule was identified in the first Wage Order. There were twelve unidentified employees whose period of employment was listed as 1/1/03 to 3/16/08. The number was based on the fact that DOL observed 13 workers at the car wash on the date of inspection. The period of employment was based on the time the car wash has been open for business.

The Order was amended when eight employees presented themselves at DOL to file claims and the Schedule was revised to substitute the named Claimants. However, as illustrated above, since only eight claimants were identified, DOL kept a number of unidentified employees on the audit to account for the total number of employees observed at the time of inspection and the complete time period.

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, we find that the preponderance of the evidence establishes that the unidentified workers listed in the schedule worked from July 29, 2004 until the end dates of the schedule.

The record testimony of Ramos, who began employment with the Petitioner on July

29, 2004 was that 15 employees were each employed six days per week for approximately 12 hours. There was no evidence of the situation at the car wash prior to that time. The only evidence concerning that period of time was the testimony of Boumoussa and Corona, who stated that at most there were seven employees and no one worked overtime. There was nothing to counter this evidence. Therefore, each unidentified employee's unpaid wages are reduced by the amount allegedly due from January 1, 2003 to July 29, 2004. We do not rely on the credibility of these witnesses, however, it was unreasonable to credit hours worked by unidentified employees for a period of time during which DOL had no evidence of how the car wash operated.

We, therefore, reduce the amount owed to the eleven unidentified employees by $10,294.41 each, which represents wages owed for the time period of January 1, 2003 to July 29, 2004. The wages now due the unidentified employee are as follows:

	Unidentified Employee Number	**Period of claim**	**Wages due**
1.	Employee #001	7/29/04 to 4/19/07	$23,036.83
2.	Employee #002	7/29/04 to 6/14/05	$ 1,395.31
3.	Employee #003	Prior to 7/29/04	- 0 -
4.	Employee #004	7/29/04 to 8/11/907	$15,842.99
5	Employee #005	7/29/04 to 4/9/09	$10,399.19
6.	Employee #006	7/29/04 to 4/30/07	$16,670.13
7.	Employee #007	7/29/04 to 1/31/05	$19,279.64
8,	Employee #008	7/29/04 to 5/9/07	$28,362.95
9.	Employee #009	7/29/04 to 3/16/08	$42,744.39
10.	Employee #010	7/29/04 to 3/16/08	$42,744.39
11.	Employee #011	7/29/04 to 3/16/08	$42,744.39

E. Civil Penalties for failure to pay wages are affirmed.

The Amended Wage Order additionally assessed a civil penalty in the amount of 100% of the wages due. The Board finds that the considerations and computations that the Commissioner was required to make in connection with the imposition of the civil penalty amount is reasonable in all respects. Petitioner has been in business for over 10 years; had no time records or wage statements; provided inconsistent information to DOL; and pressured its employees not to cooperate with DOL's investigation.

F. The Civil Penalty for the child labor violation is affirmed.

The Amended Penalty Order cites Petitioner for $750.00 for a violation of "Section 138 of Article 4 of the New York State Labor Law by failing to furnish evidence that Juan Canastuj is over the age for which an employment certificate is required."

Labor Law §135, requiring that the employer of any minor have an employment certificate on file at the minor's place of employment, provides:

> "If any person apparently under eighteen years of age is employed without a certificate on file as required by law, in or in connection with any employment to which the provisions of this article apply, the commissioner may require the employer to cease employing the person . . . ."

Labor Law § 141 provides, in relevant part, that "if the commissioner finds that an employer has violated any provision of this article . . . the commissioner may by an order . . . assess the employer a civil penalty of not more than one thousand dollars for the first such violation."

Petitioner argued that this penalty should be revoked since there was no proof that Juan was a minor. However, the Labor Law puts that burden on the employer. If an employee appears to be a minor, then the employer must produce an employment certificate or other proof showing that the minor is properly employed. Petitioner failed to do that in this case. Therefore the child labor violation is affirmed.

G. The Civil Penalties for failure to have records.

The Amended Penalty Order also cites Petitioner for "failing to keep and/or furnish true and accurate payroll records for each employee as required by Labor Law § 661 as supplemented by the Minimum Wage Order for Miscellaneous Industries § 2.6 (12 NYCRR 142-2.6) said employer was duly requested to provide payroll records for the period from on or about March 14, 2002 through March 14, 2008" and imposes a penalty of $271,000.

The Commissioner alleges, in the Amended Answer, that she:

> "Respondent issued to the Petitioners an Order Under Articles 4 and 19 of the New York State Labor Law finding the Petitioners in violation of Labor Law § 661 and 12 NYCRR § 142-2.6 and setting a civil penalty of $125.00 per day for each day of such violations between March 14, 2002 and March 14, 2008 for a total due and owing for such violations of $271,000.00. . . ."

DOL Senior LSI Capdeveille testified that the records violation penalty of $271,000 was "a thousand dollars per week." Indeed, in its closing Respondent states: "Assessing a $271,000 penalty for each week in which the records - - which the employer failed to keep records was valid and reasonable."

Petitioner urged that this penalty is excessive. Respondent has offered two different and inconsistent explanations as to how the penalty was calculated and failed to establish the factors were taken into account in deciding the amount of penalty. We find that this civil penalty is unreasonable and revoke it.

H. 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." We therefore affirm the rate of interest imposed in the Amended Wage Order but find that the amount of interest assessed must be modified based on the reduction in the amount of wages found due.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT

1. The Amended Order to Comply with Article 19 (Amended Wage Order) is modified to hold that wages in the amount of $525,190.20 are due and the interest and civil penalty due are to be modified based on that amount; and

2. The Penalty Order is modified to eliminate the civil penalty of $271,000 but is affirmed in all other 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 New York, New York, on
February 7, 2011.

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