STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of:	:	
JOHN E. JEFFERS AND JJ MADDENS, INC. (T/A BUONA SERA),	:	
Petitioners,	:	DOCKET NO. PR 09-187
To Review Under Section 101 of the Labor Law: An Order to Comply with Article 6, and an Order Under Article 6 of the Labor Law, both dated May 12, 2009,	:	RESOLUTION OF DECISION
- against -	:	
THE COMMISSIONER OF LABOR,	:	
Respondent.	:	

APPEARANCES

John E. Jeffers, *pro se* petitioner and on behalf of JJ Maddens, Inc., for petitioners.

Pico Ben-Amotz, Acting Counsel, NYS Department of Labor (Benjamin T. Garry of counsel), for respondent.

WITNESSES

John E. Jeffers, for petitioners. Lori Roberts, Senior Labor Standards Investigator, Andrew DeLuise, and Kayla Peyton for respondent.

WHEREAS:

On July 13, 2009, petitioners John E. Jeffers and JJ Maddens, Inc. (T/A Buona Sera) (together, petitioners) filed a petition with the Industrial Board of Appeals (Board) seeking review of two orders issued by the respondent Commissioner of Labor (Commissioner) against petitioners on May 12, 2009. Upon notice to the parties, a hearing was held on October 22, 2010 in Albany, New York before Sandra M. Nathan, former Deputy Counsel to the Board and the Board's designated Hearing Officer in this proceeding. Each party was afforded a full opportunity to present documentary evidence, examine and cross-examine witnesses, and make statements relevant to the issues.

The first order (wage order) directs petitioners to pay to the Commissioner back wages owed employee Andrew DeLuise (claimant) in the amount of $5,400.00, with interest continuing thereon at the rate of 16% to the date of the order in the amount of $1,017.86, and a civil penalty of $2,700.00, for a total amount due of $9,117.86.

The second order (penalty order) directs petitioners to pay a civil penalty of $250.00 for failure to keep and/or furnish true and accurate payroll records for its employees.

The petition asserts that the orders should be reversed because claimant "was fully compensated for the few hours he chose to spend each week at [petitioner's] business learning from me the operational details of managing a restaurant." Petitioners request that, at a minimum, the penalty imposed should be rescinded because "[t]he business has been closed for some time; all existing relevant records have been provided; there is no history of prior violations; and based on my position that no violation has in fact occurred."

The Commissioner filed an answer denying the material allegations of the petition and asserting that petitioners did not provide credible records regarding the claimant's employment or a separate contract relative to their contention that claimant was learning the business for purposes of purchasing it at a later date. The Commissioner asserts that, in the absence of adequate payroll records, the calculation of wages owed and assessment of penalties were in all respects valid and reasonable.

For the following reasons, we find petitioners did not meet their burden to establish that claimant was not employed and owed the wages calculated by the Commissioner for the period of the claim or that the penalties assessed by the wage order are invalid or unreasonable. We affirm the wage order in all respects. We revoke the penalty order for failure of the Commissioner to adequately explain the basis for her administrative determination.

SUMMARY OF EVIDENCE

Testimony of Petitioner John E. Jeffers

Petitioner John E. Jeffers (petitioner or Jeffers) owned and operated a restaurant called JJ Maddens in Slingerlands, New York until November, 2007. Petitioner testified that he had closed the establishment and was planning on selling and leaving the business when he was approached by claimant Andrew DeLuise (claimant or DeLuise) with a proposal to reopen the restaurant and turn it over to DeLuise. The parties entered a "handshake" agreement whereby petitioner agreed to purchase new equipment and renovate the restaurant in consideration for claimant's promise to repay the renovation costs on a monthly basis and take over the business.

Petitioner testified that he performed the renovations and reopened the restaurant as an Italian steakhouse called "Buona Sera" in February, 2008. The renovations totaled over $60,000. DeLuise ordered equipment, devised the concept[s] and menu, picked the name, and recruited staff. The staff was trained by petitioner. After the restaurant opened in

February, DeLuise worked a few hours a week from February to the middle of March and left in less than a month's time. Petitioner asserted that he considered claimant someone who was going to purchase and take over the business from him, not an employee, and did not schedule or keep records of his hours, give him assignments, or control his employment. Petitioner testified that he was at the restaurant seven days a week from 3:00 to 12:00 PM and knew claimant's hours because he was present when claimant was there. According to petitioner, claimant came "in and out" for short periods of time each day, i.e. from 4:00 to 5:00 PM or 7:00 to 8:00 PM, laid out his recipes for the staff, reviewed receipts with petitioner, and left. Claimant had no control over employees and did not give them assignments. Petitioner showed claimant all aspects of running the business during these visits, including calling in payroll to his payroll service, Paychex. Claimant's employment came to an end in March when he "stopped showing up." He did not pay petitioner any part of the renovation costs.

Petitioner submitted entries from a local restaurant blog and argued they showed claimant's intention to buy into the business. An entry by DeLuise on February 18, 2008 stated, "The menu is meant for everyone! Including me a full time student [.] restaurant owner [.] volunteer to Albany Youth Soccer [.] ..." Petitioner testified that he asked claimant to retract the statement identifying him as an owner because the State Liquor Authority prohibits silent partners who are not registered with the authority and petitioner would be in trouble if it was not corrected. Claimant did so with an entry on February 20, 2008 stating, "Hello to all! It's me again. I am just here to say even though I had an interest in the ownership here at Buona Sera's I am not owner. I am General Manager. I do apologize to all for the misunderstanding. This concept is all my idea as well as all the recipes. However, I will not displace blame on to others for my mishap! Thank you all for your belief in our establishment..."

Petitioner testified that he made two payments to claimant – the first a lump sum personal check for $1,000 and the second a payroll check issued by Paychex for $1,000 – to pay him something for his knowledge, concept[s], recipes, picking the name, and the little time he was there. A payroll time sheet prepared by Paychex lists a $1,000 payment from "employer" JJ Maddens to "employee" Andrew DeLuise on 1/30/08. The wage statement issued with the payroll check lists a payment made by "employer" Buona Sera to the claimant "employee" on 2/22/08 for gross regular earnings of $900, less payroll taxes, for the period 2/11/08 to 2/17/08. A NYS-45 quarterly wage reporting return by "employer" JJ Maddens for January 1 - March 31, 2008 lists claimant as an "employee" paid "gross wages" of $1,000.

Petitioner testified that he did not respond to mailings from the Department of Labor (DOL) concerning its investigation because the business had closed, he was separated and not living at home, and did not receive mail in regular fashion. Petitioner argued that any failure to cooperate with the investigation was not intentional. On March 19, 2009, petitioner submitted a letter to DOL stating that claimant "was considering buying into my restaurant business" and "spent about two hours a day five days a week for about five weeks" receiving training from petitioner in all aspects of running a business. Petitioner enclosed a copy of his quarterly tax return to show that he kept records and never had an

issue about paying his employees. It is undisputed that petitioner had no prior wage violations with DOL. Petitioner testified that he used a time clock to record his employees' hours but had no time or other records to submit because the business had closed.

Testimony of Claimant Andrew DeLuise

On March 9, 2008, claimant Andrew DeLuise filed a claim against JJ Maddens, Inc. (T/A Buona Sera) for $5,400 in wages accrued during the period January 8 to March 8, 2008. Claimant stated that he was employed by Jeffers in the occupation "general management" at the restaurant at the rate of $900 per week, his last day of employment was March 8, 2008, and he was discharged for the reason: "John did not like my management style." The claim stated that it did not include a $900 personal check received by claimant on 2/4/08 and a $900 paycheck received on 2/22/08.

Claimant testified that in November, 2007 he received a phone call from petitioner soliciting his culinary help in opening a new restaurant. DeLuise testified that he was in culinary school and told Jeffers he wished to offer his experience but was more interested in a position at the time than a business relationship. The parties met at the site in late November, went over claimant's suggestions for new equipment and improvements, and agreed that claimant would be employed to create the menu and manage the kitchen when the restaurant opened. According to claimant, the name "Buona Sera" was agreed to by both parties. At the end of December, 2007, petitioner decided the restaurant needed to open soon and agreed to pay claimant a salary of $900 per week for his "management [and] culinary services." Claimant testified that he was given responsibility to recruit staff for petitioner to interview and hire; make sure the staff was trained and had their hours scheduled; and make sure the restaurant had a menu and marketing scheme in place. The restaurant opened in the first or second week of January, 2008.

Claimant testified that once the restaurant opened he was in charge of the menu and food preparation in the kitchen while petitioner, petitioner's wife, and an assistant were in charge of the wait staff in the "front of the house." The restaurant was open 4:00 to 10:00 or 11:00 PM, seven days a week, and was busier on weekends. Claimant testified that Jeffers ran the restaurant and went back and forth between the kitchen and front to insure that the kitchen staff, including claimant, was working productively and food was getting out: "And if food was falling behind in the kitchen, he'd tell me we had a line at the door; we have to get moving." Jeffers told DeLuise what menu items worked or did not work and had claimant submit new menu concepts and specials to him for his review and approval. Petitioner and his wife also sought claimant's advice "if there was something that maybe wasn't working, [they] couldn't figure out up front, I would give advice." Claimant testified that his hours were 8:00 AM to 10:00 or 11:00 PM weekdays and 6:00 AM to 11:00 PM or midnight on weekends. On two days a week he left the restaurant from 10:30 AM to 12:30 PM to attend classes at his school.

Claimant testified that he worked for petitioner from November, 2007 to the second week of March, 2008 when he was discharged by Jeffers after a dispute over the concept for starting a brunch. Claimant testified that he agreed to wait to be paid while petitioner was in

financial straits in November and December but complained about not getting paid once the restaurant opened in January. Claimant received a personal check for $1,000 on February 4, 2008 that was used to pay the graphics company for the menu and a payroll check for $900 on February 22, 2008. According to claimant, the payroll check was compensation for his work on the menu in November and December. DOL advised him to list both payments on the claim form. Claimant testified that he was never paid for any of the weeks of employment listed in the claim, totaling $5,400.

Claimant testified that he had no financial investment in the restaurant. The parties never discussed claimant paying any part of the $60,000 renovation costs. In February, 2008, petitioner asked claimant to help him purchase a dishwasher and DeLuise took out a loan to help Jeffers buy the equipment. Claimant testified that he was never repaid. Claimant explained that the blog statements concerning an ownership interest reflected his long term interest in becoming an owner that he and Jeffers discussed and agreed to look into in the future. Jeffers asked him to correct the blog to clarify to their customer base that his current position was not an owner but a "general manager" and claimant did so. Claimant was asked what opportunity he had for profit in the business and stated, "No profit. The only profit was hourly earnings or stated salary earnings." Claimant was asked whether he ever discussed profit with Jeffers and stated, "[t]he only profit stated ... was that when the business started running better that he would discuss my wage."

Testimony of Kayla Peyton

Kayla Peyton (Peyton) testified that she had dinner with friends at "Buona Sera" on two Friday evenings in February, 2008. She arrived at about 6:00 PM and stayed for 3 to 4 hours on both occasions. On the first visit, Peyton told the waiter she would like to see the chef to complement him on the food and claimant came to the table and thanked her. Peyton testified that DeLuise appeared to be working because he was dressed in a chef's coat and apron that had "sauce and different ingredients all over the apron." Peyton dined at the restaurant the next week and DeLuise appeared in the same working condition.

Testimony of DOL investigator Lori Roberts

Senior Labor Standards Investigator (SLSI) Lori Roberts (Roberts) testified concerning the investigation by the Department of Labor (DOL) that resulted in the Orders under review.

The investigative file revealed that DOL issued Buona Sera collection notices on April 2 and May 27, 2008 advising petitioner that claimant had filed a wage claim against it, the details of the claim, and that if petitioner agreed with the claim it should remit payment to the Commissioner within ten days. The notices further advised that if petitioner disagreed it should respond in writing stating the basis of its dispute and substantiate its reasons with payroll records, contracts, and documentation demonstrating payment of the wages claimed. On May 16, 2008, claimant submitted a copy of the wage statement described above to support his claim.

Roberts testified that she left phone messages for Jeffers on May 27 and June 12, 2008 and received a call back from him on June 16, 2008. Petitioner stated that he had just received his mail and would submit evidence that claimant was paid. No records were received. On January 29, 2009, Roberts left another message for petitioner and received a call back on February 2, 2009. Petitioner stated that claimant had worked only a few hours per day, a few days each week, and had been paid $1,000. Petitioner disputed the pay rate listed in the claim and stated that he would submit payroll and time records. On March 19, 2009, petitioner submitted the letter described above, enclosing a copy of the payroll time sheet and quarterly tax return showing wages paid to some 22 employees, including the claimant.

Roberts testified that she recommended issuance of an Order to Comply because the records submitted by both claimant and petitioner demonstrated that claimant was on payroll and had been employed. Petitioner did not submit sufficient payroll records during the course of the investigation to establish that claimant had been paid the wages claimed and wage calculations were therefore based solely on the written claim filed by the claimant.

Based on DOL's investigation, the Commissioner issued petitioners the orders under review on May 12, 2009. In support of the 50% civil penalty assessed in the wage order, Roberts testified that she completed an investigative report titled "Background Information – Imposition of Civil Penalty" that sets forth factors considered in assessment of the penalty. Roberts arrived at the penalty to be recommended by looking at past violations, cooperation of the employer, and whether or not DOL received the records it had requested. A 50 % penalty was recommended because petitioner had failed to submit the records requested. DOL did not submit testimony or documentary evidence explaining the $250 civil penalty assessed in the penalty order.

GOVERNING LAW

A. Standard of Review and Burden of Proof

When a petition is filed with the Board, the Board reviews whether an order issued by the Commissioner of Labor is "valid and reasonable" (Labor Law § 101[1]). Any objections not raised in the petition shall be deemed waived (*Id.* § 101[2]). The Labor Law also provides that an order of the Commissioner shall be presumed "valid" (*Id.* §103 [1]). If the Board finds that the order, or any part thereof, is invalid or unreasonable it shall revoke, amend, or modify the same (*Id.* § 101[3]).

A petition must state "in what respects [the order on review] is claimed to be invalid or unreasonable" (*Id.* § 101[2]). Pursuant to Rule 65.30 of the Board's Rules, "[t]he burden of proof of every allegation in a proceeding shall be upon the person asserting it" (Board's Rules of Procedure and Practice at 12 NYCRR § 65.30).

It is therefore petitioners' burden in this case to prove that the orders issued against them by the Commissioner of Labor on May 12, 2009 are invalid or unreasonable for the reasons stated in the petition.

B. Recordkeeping Requirements and DOL's Calculation of Wages in the Absence of Adequate Employer Records

Labor Law § 195 (4) requires employers to "establish, maintain and preserve for not less than three years payroll records showing the hours worked, gross wages, deductions and net wages for each employee". Labor Law § 31 requires employers to furnish such records to the Commissioner on demand. The Commissioner's regulations at 12 NYCRR § 142-2.6 provides that the following records must be maintained:

> "(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."

An employer's failure to keep adequate records does not bar employees from filing wage complaints. Where employee complaints demonstrate a violation of the Labor Law, DOL must credit the complaint's assertions and relevant employee statements and calculate wages due based on the information the employee has provided. The employer then bears the burden of proving that the disputed wages were paid. Labor Law § 196-a provides that employers who keep inadequate records "shall bear the burden of proving that the complaining employee was paid wages, benefits, and wage supplements" (*See, Angello v Natl. Fin. Corp.*, 1 AD3d 850 [3d Dept 2003]). As the Appellate Division stated in *Matter of Mid-Hudson Pam Corp. v Hartnett*, 156 AD2d 818, 821 [3d Dept 1989], "[w]hen an employer fails to keep accurate records as required by statute, the Commissioner is permitted to calculate back wages due to employees by using the best available evidence and to shift the burden of negating the reasonableness of the Commissioner's calculations to the employer."

In *Anderson v Mt. Clements Pottery Co.*, 328 US 680, 687-688 [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."

Citing to *Anderson v Mt. Clemens,* the Appellate Division in *Mid-Hudson Pam Corp. v Hartnett, supra* agreed:

> "The public policy of providing protection to workers is embodied in the statute which is remedial and militates against creating an impossible hurdle for the employee.... Were we to hold otherwise, we would in effect award petitioners a premium for their failure to keep proper records and comply with the statute. That result should not pertain here."

C. Definition of "Employee" Under Article 6 of the Labor Law

Under Article 6 of the Labor Law, "employer" is defined as "any person, corporation, or association employing any individual in any occupation, trade, business or service" (Labor Law § 190[3]). "Employed" is defined as "permitted or suffered to work" (*Id.* § 2[7]). The federal Fair Labor Standards Act (FLSA) also defines "employ" to include "suffer or permit to work" (29 USC § 203[g]). The similarity of language is because Congress adopted the definition of "employ" from state child labor laws to protect employees who might have been otherwise unprotected at common law (*Rutherford Food Corp. v McComb,* 331 US 722, 728 and n.7 [1947]). Because the statutory language is identical, the Labor Law and the FLSA follow the same test to determine the existence of an employment relationship (*Ansoumana v Gristede's Operating Corp.*, 225 F Supp2d 184, 189 [SDNY 2003]).

In determining whether an individual is an employee covered by the Labor Law "the ultimate concern is whether, as a matter of economic reality the workers depend upon someone else's business for the opportunity to render service or are in business for themselves" (*Brock v. Superior Care Inc.*, 840 F2d 1054, 1059 [2nd Cir 1988]). The factors to be considered in assessing such economic reality include: (1) the degree of control exercised by the employer over the workers; (2) the workers' opportunity for profit or loss; (3) the degree of skill and independent initiative required to perform the work; (4) the permanence or duration of the working relationship, and; (5) the extent to which the work is an integral part of the employer's business (*Id.* at 1058-1059). No one factor is dispositive (*Id.* at 1059). In applying these factors, the reviewing court is to be mindful that "the remedial nature of the statute ... warrants an expansive interpretation of its provisions so they will have the widest possible impact in the national economy" (*Herman v RSR Security Services, Ltd.*, 172 F2d 132, 139 [2d Cir 1999]). Indeed, the Supreme Court in discussing the

broad definition of "employ" set forth in the FLSA has observed that "[a] broader or more comprehensive coverage of employees ... would be difficult to frame" (*United States v Rosenwasser*, 323 US 360, 362 [1945]).

FINDINGS

The Board makes the following findings of fact and law pursuant to Board Rule 65.39 (12 NYCRR § 65.39). For the reasons below, we find that petitioners have not met their burden to establish that claimant was not employed and owed the wages calculated by the Commissioner for the period of the claim or that the penalties assessed by the wage order are invalid or unreasonable. We affirm the wage order in all respects. We revoke the penalty order for failure of the Commissioner to adequately explain the basis for her administrative determination.

A. Petitioners Did Not Meet Their Burden to Establish That Claimant Was Not Employed

Petitioner argues that claimant intended to buy into his business and was working for himself, not petitioners, during the period of the claim. We find the record amply demonstrates that claimant was an "employee" of petitioners as a "matter of economic reality" under the applicable five part test.

First, we credit claimant's testimony and find that he was hired by petitioner as a restaurant manager at the rate of $900 per week and worked under Jeffers' direction and control until he was discharged after a dispute over starting a brunch. Claimant credibly testified that petitioner gave him responsibility to recruit staff, assure it was scheduled and trained, and assure that a menu and marketing scheme were in place. Once the restaurant opened, claimant was placed in charge of the menu and food production in the kitchen and performed his work under petitioner's direction and control. Petitioner ran the restaurant; supervised claimant and the kitchen to assure food was efficiently delivered; advised claimant what menu items worked or did not work; and had claimant submit new menu items and specials to him for his review and approval. While claimant no doubt performed much of his work without petitioner's direct supervision, an employer "does not need to look over his workers' shoulders every day to exercise control" (*Brock v Superior Care*, 840 F2d at 1060).

We do not credit petitioner's testimony that claimant's work was limited to presenting menus to the kitchen staff and training with petitioner a few hours a week. Claimant's testimony concerning the nature of his work and the terms and conditions of his hire was specific, credible, and corroborated by other testimony and evidence in the record. Kayla testified that on two Friday evenings in February, 2008 DeLuise appeared at her table as the restaurant's chef wearing a coat and apron with food on it that suggested he was working at the time. Claimant's salary rate of $900 per week was corroborated by petitioner's payroll records. Jeffers did not rebut Kayla's testimony that claimant was working as the chef on busy weekend evenings or contradict his payroll records listing claimant on payroll at a rate of $900 per week. While petitioner may have trained claimant

in various aspects of running the business during the course of his employment, the Board has previously held that time spent in orientation or training at the employer's behest is compensable time under the Labor Law (*Van Patten Enterprises,* PR 08-090 [July 22, 2009]).

Petitioner's supervision over the terms, manner, means, and performance of the work performed by claimant are consistent with his status as an employee (*Brock v Superior Care,* at 1060 [employer setting of wages and review of work performance are indicia of supervision and control consistent with employment

Second, we credit claimant's testimony that he had no investment in the restaurant and no opportunity for profit other than his own wages. The sole source of claimant's income for the culinary services he performed was his agreement with petitioner to be paid at the rate of $900 per week for his labor. He was thereby economically dependent on the agreement and had no opportunity for profit or loss outside his own labor. Such return is properly classified as wages from employment (*Brock v Mr. W. Fireworks, Inc.,* 814 F2d 1042, 1050-51 [5th Cir 1987]).

While petitioner argued that DeLuise was working for himself, a payroll time sheet, payroll check, and quarterly tax statement prepared by petitioner's payroll service list petitioners as "employer" and claimant as an "employee" paid "wages" during the period of the claim. The paycheck shows that claimant was placed on payroll as an "employee" at the rate of $900 per week. Petitioners' own payroll records demonstrate that petitioners treated claimant as an "employee" rather than in business for himself. Petitioner also argued that the blog entries were evidence of a business relationship between the parties rather than an employment relationship. We credit claimant's testimony that the statements reflected his long term interest in becoming an owner that he and Jeffers discussed and agreed to look into in the future. It is undisputed that petitioner asked claimant to correct the blog to clarify to their customers that claimant's current position was not an owner but a "general manager" and claimant did so.

Third, while claimant no doubt has considerable culinary skills, petitioner determined what work was to be performed by claimant and what he would be paid for that work. Claimant helped open the restaurant, prepared the daily menu using petitioner's equipment and supplies, and performed his work under petitioner's overall supervision and control. Such dependence on an employer to provide the opportunities for work does not reflect the skill or independent initiative of a person working for himself *(Brock v Superior Care,* 840 F2d at 1060 [where skilled nurses did not use technical skills in any independent way to obtain work opportunities, but instead depended on employer for job assignments that employer controlled the terms and conditions of, economic reality reflects employment]).

Fourth, claimant was hired by petitioner in late November, 2007 and worked under Jeffers' direction and control until March, 2008. Claimant was discharged after a dispute over starting a brunch. Although the duration of the economic relationship between the

parties was relatively short, petitioner's hiring of claimant on an open-ended basis for a position as a manager is evidence that claimant was an employee.

Finally, petitioners operated an Italian steakhouse called "Buona Sera" that was dependent on the quality of its cuisine to succeed. Claimant was hired to help open the restaurant and then produce its cuisine. It is self evident that claimant's work was essential to petitioners' business.

Based on the totality of circumstances, we find that claimant was as "a matter of economic reality" dependent on the petitioners' business to render service (*Id.*). Accordingly, an employment relationship existed between the parties and petitioners are liable for unpaid wages under the Labor Law.

B. Petitioners Violated Article 6 of the Labor Law by Failing to Pay Wages Due the Claimant

In the absence of accurate records required by the Labor Law, the Commissioner may draw reasonable inferences and calculate unpaid wages based on the "best available evidence" drawn from employee statements (*Matter of Mid-Hudson Pam Corp. v Hartnett,* at 821). In the absence of records of the actual hours worked and wages paid the claimant during the period of the claim, it is petitioners' burden in this case 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]).

Petitioner testified in general fashion that claimant worked a few hours a day, a few days a week, and left in less than a month's time. Petitioner submitted no payroll records or other credible proof to establish an accurate estimate of claimant's hours and wages, save a payroll time sheet and quarterly tax return showing a payment to claimant for $1,000. A payroll check showing claimant was paid $900 was submitted by the Commissioner. Both payments were excluded from the calculation of wages owed. We find petitioners failed to meet their burden of proof. The general and conclusory testimony of petitioner is insufficient to establish an "accurate estimate" of the hours claimant worked during the period of the claim and the wages he was paid for those hours *(Matter of Mohammed Aldeen et al,* [general and conclusory testimony insufficient to establish accurate estimate of hours and wages]; *Matter of Michael Fischer*, PR 06-099 [April 23, 2008] [testimony of general hours at worksite insufficient]).

We therefore affirm the Commissioner's wage order directing payment of wages to the claimant.

C. Civil Penalties

Labor Law § 218 provides that once the Commissioner determines that an employer has violated Article 6 of the Labor Law governing payment of wages, she shall issue to the employer an order directing compliance therewith, which shall describe with particularity

the nature of the violation. The statute also provides:

> "In addition to directing payment of wages, benefits or wage supplements found to be due, such order, if issued to an employer who previously has been found in violation of those provisions [of the Labor Law], rules or regulations, or to an employer whose violation is willful or egregious, shall direct payment to the commissioner of an additional sum as a civil penalty in an amount equal to double the total amount found to be due. In no case shall the order direct payment of an amount less than the total wages, benefits or wage supplements found by the commissioner to be due, plus the appropriate civil penalty. Where the violation is for a reason other than the employer's failure to pay wages, benefits or wage supplements found to be due, the order shall direct payment to the commissioner of a civil penalty in an amount not to exceed one thousand dollars for a first violation, two thousand dollars for a second violation or three thousand dollars for a third or subsequent violation. In assessing the amount of the penalty, the commissioner shall give due consideration to the size of the employer's business, the good faith of the employer, the gravity of the violation, the history of previous violations and, in the case of wages, benefits or supplements violations, the failure to comply with recordkeeping or other non-wage requirements."

In assessing the civil penalties in this case, the Commissioner was required to give "due consideration" to the size of petitioners' business, their good faith, the gravity of the violation, the history of prior violations, and in the case of petitioners' wage violation, their failure to comply with recordkeeping requirements. Petitioner argued that the civil penalties in both orders should be rescinded because he had no prior violations, his business had closed, and any failure to cooperate with DOL's investigation was not intentional. Roberts testified that the relevant statutory factors were considered in assessing the civil penalty in the wage order. A 50% penalty was recommended because petitioners had not submitted the payroll records requested. DOL did not submit any testimony or documentary evidence explaining the $250 civil penalty assessed in the penalty order.

The Board finds that the considerations and computations the Commissioner was required to make in connection with the imposition of the civil penalty in the wage order are valid and reasonable in all respects. In the absence of any explanation for the $250 penalty assessed in the penalty order, the Commissioner's determination is arbitrary for failure to adequately explain the basis for her administrative determination and the order is vacated accordingly.

D. Interest

Labor Law § 219(1) provides that when the Commissioner determines 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."

Petitioner did not challenge the assessment of interest made by the wage order. The Board finds that the considerations and computations required to be made by the Commissioner in connection with the interest set forth in the order are valid and reasonable in all respects.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The wage order is affirmed;

2. The penalty order is revoked; and

3. The petition for review be, and the same hereby is, 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 New York, New York, on
March 29, 2012.