STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of: HEENAM BAE AND DAEKYUNG BAE AND FANCY LEXINGTON AVE. CLEANERS, INC. (T/A MME LUCILLE CLEANERS), Petitioners, To Review Under Section 101 of the Labor Law: An Order to Comply with Article 19 of the Labor Law and an Order Under Article 19 of the Labor Law, both dated August 27, 2009, - against - THE COMMISSIONER OF LABOR, Respondent.	DOCKET NO. PR 09-298 RESOLUTION OF DECISION **CORRECTED AND REISSUED**

APPEARANCES

Franklin, Gringer & Cohen, P.C., Martin Gringer, of Counsel, for the Petitioners.

Maria L. Colavito, Counsel, NYS Department of Labor, Larissa C. Bates of Counsel, for Respondent.

WITNESSES

Daekyung Bae and Donovan Allen for the Petitioners; Mehmet Aydin and Labor Standards Investigator Dawn Hughes for the Respondent.

WHEREAS:

The petition in this matter was filed with the Industrial Board of Appeals (Board) on October 26, 2009, and seeks review of two orders issued by the Commissioner of Labor (Commissioner or respondent) against the petitioners Heenam Bae and Daekyung Bae and Fancy Lexington Ave. Cleaners, Inc. (T/A Mme Lucille Cleaners) on August 27, 2009. Upon notice to the parties a hearing was held on October 21 and December 2, 2010 in New

York, New York, before Devin A. Rice, Associate Counsel to 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 post-hearing briefs.

The first order is to comply with Article 19 of the Labor Law (wage order). It finds that the petitioners failed to pay minimum wages in the amount of $16,735.87 to claimant Mehmet Aydin from August 13, 2000 to April 9, 2005. The wage order further finds interest due at the rate of 16% calculated to the date of the order, in the amount of $11,745.37, and assesses a civil penalty in the amount of $8,367.93, for a total amount due of $36.849.17.

The second order is under Article 19 of the Labor Law (penalty order). It finds that the petitioners failed to keep and/or furnish true and accurate payroll records for each employee, and failed to give each employee a complete wage statement with every payment of wages from on or about August 13, 2000 through April 9, 2005. The penalty order assesses a $1,000.00 civil penalty for each of the two counts, for a total civil penalty of $2,000.00. The petitioners do not challenge the penalty order.

SUMMARY OF EVIDENCE

Petitioners' evidence

Petitioners Dayekyung Bae a/k/a Damon Bae and Heenam Bae a/k/a Henry Bae own or owned several dry cleaning stores in New York, New York, including Fancy R & S Dry Cleaner, Fancy Lexington Avenue Dry Cleaner, Fancy 21 Dry Cleaner, Fancy 27 Dry Cleaner, Fancy 57 Dry Cleaner, Fancy East Side Dry Cleaner, and Fancy Harlem Dry Cleaner. Each of these was a drop store, meaning that customers could drop off and pick up clothes there; however, only Fancy R & S, Fancy 27, and Fancy Harlem operated plants where the clothes could be dry cleaned. Daekyung Bae testified that Fancy R & S was the plant for Fancy Lexington until R & S closed in late 2003, at which time Fancy 27, which was already the plant for Fancy 21 and Fancy 57, also became the plant for Fancy Lexington. Bae further testified that Fancy 27 closed in late 2004 at which time Fancy Harlem was opened as the plant for the remaining stores – Fancy Lexington, Fancy 21, Fancy 57, and Fancy East Side which opened in the same neighborhood as Fancy R & S sometime after R & S closed. The stores were generally open from 7:00 a.m. to 7:00 p.m., Monday to Friday, and 7:00 a.m. to 6:00 p.m. on Saturdays. Fancy R & S opened a half hour later than the other stores, and Fancy Harlem did not open until 8:00 a.m. on Saturdays.

The claimant, Mehmet Aydin, worked as a presser for the petitioners from 2000 to 2005, first at Fancy R & S, then at Fancy 27, and finally at Fancy Harlem. His sole job was to press clothes. He did no other work for the petitioners. Bae testified that a garment consists of two pieces and different types of clothes are assigned different numbers of garments or pieces to determine the price to charge the customers. For example, pants are considered half a garment or one piece, a sports jacket or man's jacket is half a garment or one piece, and a blouse is one garment or two pieces. Daekyung Bae testified that the claimant "was a fast presser. He was good." Bae estimated that the claimant pressed 35 to

37 pieces an hour and that an average presser can do 30 to 40 pieces an hour. Bae explained that a presser who presses fewer than 30 pieces an hour is too slow and would not be able to work for the petitioners.

Bae testified that the claimant worked as a presser at Fancy R & S until it closed in late 2003, at which time he moved to Fancy 27 when the pressing operation was consolidated at that location. Bae testified that the claimant's hours of work at R & S and Fancy 27 were from 8:00 or 8:30 a.m. to between 1:00 to 3:00 or 3:30 p.m. on slow days or until 4:00 or 4:30 p.m. on busy days. Bae asserted that the claimant could not have started work before 8:00 or 8:30 a.m. because the boiler, which took 45 minutes to heat up to the temperature needed to press clothes, and which was turned on by another employee known as a spotter, was not ready until then. The claimant was the only presser at Fancy R & S, although seasonal help was hired as needed. At Fancy 27, there were three pressers including the claimant.

Bae further testified that the petitioners paid the claimant $500.00 a week in a combination of check and cash during the time he worked at Fancy R & S and Fancy 27. The check portion of the claimant's wages was originally $210.00 a week which was eventually increased to $240.00 a week. The balance of the claimant's wages was paid in cash. Bae explained that the petitioners paid the claimant a base salary of $210.00 a week for 40 hours, and that the additional cash portion of his wages was "considered overtime, extra work, bonus, whatever you want to call it."

In late 2004, the petitioners closed Fancy 27 and moved their pressing operations to another location, Fancy Harlem. The claimant worked at Fancy Harlem from January to April 2005. There were four or five pressers at Fancy Harlem including the claimant. Bae testified that the petitioners changed the way they paid the claimant at Fancy Harlem from a weekly salary to piece rate wages where the claimant was compensated $.325 for each piece that he pressed. Bae explained that the petitioners still paid the claimant $240.00 a week by check but that at Fancy Harlem the cash portion of his wages correlated to the number of pieces he pressed. The petitioners used a time clock and punch cards at Fancy Harlem to keep track of the pressers' hours and attached colored rings to hangers to track the number of pieces each presser pressed. There was no time clock at Fancy R & S because the claimant was the only presser there. There was a time clock at Fancy 27, but nobody ever used it.

Bae testified that at Fancy Harlem, the claimant arrived each day at 8:00 or 8:30 a.m. and started to work at 8:30 a.m. He went home when the work was finished which was 3:30, 4:00, or 4:30 on busy days, and around 3:30 p.m. on slower days. On Fridays and Saturdays, the claimant finished work at 1:30 or 2:00 p.m. Bae further testified that at some point, the petitioners obtained a wholesale client which caused the plant to run late and the pressers to work longer, which was the reason the claimant's hours increased the last week that he worked for the petitioners.

Bae alleged that the claimant could not have worked the 57 hours per week claimed, because of the work schedule at Fancy R & S and Fancy 27. All work had to be finished by 3:30 to 4:00 p.m. at the latest so that the finished clothes could be delivered by truck to the

drop stores by 5:00 p.m. to be picked up by the customers. Bae testified that the pressers had no work to do after the clothes were packed and sent out for delivery.

Bae testified that various documents in evidence demonstrated that the claimant could not have worked the number of hours claimed. Bae prepared spreadsheets based on the petitioners' business records to show that the claimant only worked an average 32 hours a week in 2000 pressing for Fancy R & S and Fancy Lexington; 34 hours a week in 2001 pressing for Fancy R & S and Fancy Lexington; 32 hours a week in 2002 pressing for Fancy R & S and Fancy Lexington; 28 hours a week in 2003 pressing for Fancy R & S and Fancy Lexington; 34 hours a week in 2004 pressing for Fancy 27, Fancy 21, Fancy Lexington, Fancy East Side, and Fancy 57; and 25 hours a week in January 2005 pressing for Fancy 27, Fancy 21, Fancy Lexington, Fancy East Side, and Fancy 57. Bae explained that he determined the total number of pieces pressed each month by dividing the dry cleaning revenue from the relevant stores by $5.00 which was the average price per piece: "Most items cost roughly around $5.00 give or take . . . you have some dresses that cost more, jackets cost more, sweaters cost less, skirts cost less. So you average out [to] five . . . it really is very accurate. It really averages about five because you're dealing with so many pieces." He then divided the number of pieces by the industry standard press rate of 35 pieces per hour to determine how many hours were required to press the total number of pieces. This number was then divided by 4.3, the number of weeks per month, to determine the average number of hours worked each week of a given month by the claimant. In some instances, because of the way the petitioners maintained their business records, such as for Fancy Lexington where no breakdown of the revenue existed, the petitioners used an average percentage of the drycleaning revenues versus the total gross revenues of all services and "you just extrapolate." Bae testified that he "took an average and it turned out about 53% of sales. So you take total revenues and then you take 53% of it and you get the dry cleaning revenue." The claimant worked anywhere from 12 hours per week in December 2003 to 41 hours per week in October 2002 according to the spreadsheets provided by the petitioners.

Also in evidence were documents of the actual hours the claimant worked and pieces he pressed at Fancy Harlem from January 31, 2005 to April 9, 2005. Those records showed that the claimant worked from 33.5 hours per week from January 3 to February 5 to 56.5 hours per week from April 4 to April 9 and pressed from 26.2 pieces an hour January 31 to February 5 and 41.87 pieces an hour from March 28 to April 2.

Respondent's evidence

Claimant Mehmet Aydin testified that he worked for the petitioners Monday through Saturday. His hours were 8:00 a.m. to 6:00 p.m. He arrived at work each day at 7:30 or 7:45 a.m. and left at 6:00, 6:05, or 6:10 p.m. When he moved to Fancy Harlem in 2005, he worked fewer hours because the petitioners hired more pressers, so he finished work early. The claimant testified that at Fancy R & S there were two pressers including himself during the off season and an additional presser during the busy season. At Fancy 27 there were three pressers including the claimant. At Fancy Harlem there were five pressers including the claimant.

Aydin testified that he stopped working for the petitioners in April 2005 because they hired more people and put in a time clock. He explained that he was upset that he had worked for so many years without a time clock and finally realized when he started working fewer hours at Fancy Harlem that he should have been paid overtime at the petitioners' other stores. He further clarified that he quit because he was not paid overtime in the previous place. He did not complain to the petitioners because he was afraid he would be fired if he complained, although he believes he asked Heenam Bae about overtime once while employed at Fancy Harlem, but never received a response.

The claimant testified that the boiler took 10 to 15 minutes to get ready and that by 7:45 a.m. the steam was on and there was enough power to start working. The claimant worked Monday to Friday from 8:00 a.m. to 6:00 p.m., and although his claim form states he worked until 6:00 p.m. on Saturdays, he testified that he in fact worked only until 5:00 p.m. on Saturdays. The claimant further testified that the driver left the plant to deliver the finished clothes to the drop off store at 3:00 p.m. to 4:00 p.m. According to the claimant, work was delivered twice a day – once in the morning and once in the afternoon. The work came in a basket in the morning by 8:00 or 9:00 a.m. and then more work was delivered by Noon, 1:00, or 2:00 p.m. The claimant was clear that there were two deliveries of clothes each day. The claimant testified that after 3:00 or 4:00 p.m., "we do the work for the next day . . . if we don't do the work for the next day [sic.] clothes, the day back[s] up, so the work would not go out same day, not even 6:00." The claimant further testified that "it was six, seven stores at least minimum 100 pieces a day. We're talking about 900 pieces a day, so we had a lot of – yes, we need a lot of time to press the clothes."

The claimant denied that he pressed 35 pieces an hour. He testified that he could press 60 sweaters an hour, 10-12 shirts an hour, 15-20 pairs of pants an hour, 30 pairs of dress pants an hour, and that a dress takes more time. Indeed, he explained that "different garments take different time, but never 35 pieces an hour can't [sic.] be pressed."

He also disagreed with the piece counts that the petitioners stated he pressed at Fancy Harlem, although he agreed that black rings were used to track his pieces there. He explained that he did not pay attention to the piece count because he was on a weekly salary and was never paid a piece rate. He believed that the rings were used to keep track of the pieces pressed by the new employees at Fancy Harlem.

The claimant agreed that the time cards from Fancy Harlem were accurate. He stated that Fancy Harlem hired an additional presser when the petitioners took on a wholesale client, and that his hours increased his last week because one of the pressers quit.

Labor Standards Investigator (LSI) Dawn Hughes testified that she was assigned to investigate the claimant's claim. The first step in her investigation was to visit one of the petitioners' stores in November 2005. During the field visit, LSI Hughes spoke to a manager but was not able to speak to any employees because they were on break. She hoped to speak to the owner, who had an office at the site, but he never showed up. LSI Hughes, therefore, left a notice of revisit including a request for time and wage records.

The petitioners, by their accountant, eventually provided proof of wages paid to the claimant of $500.00 a week in a combination of check and cash. The accountant told LSI

Hughes that the check portion of the wages represented 40 hours of work at minimum wage. LSI Hughes determined the overtime wages owed to the claimant based on his statement of hours worked because the petitioners did not provide any proof of the hours the claimant worked for the petitioners. However, the petitioners later provided LSI Hughes with time cards for the claimant for the time he worked at Fancy Harlem, but never provided time records for the other periods of his employment with the petitioners. After the petitioners provided Hughes with the time cards from Fancy Harlem, she reduced the wage claim by using the actual hours for the time period the time cards were available, but accepted the time cards as true and accurate only for the time period they covered. LSI Hughes admitted that she had received a letter from the claimant indicating he worked only until 5:00 p.m. on Saturdays (not 6:00 p.m. as claimed in his claim form), but did not credit the petitioners for that hour in her audit.

LSI Hughes testified that "most of the time" DOL uses a claimant's statement of the hours he or she worked when there are no time records. She explained that although she could not think of any instance where her managers had not decided to accept a claimant's statement, she believed that it was possible if interviews or other substantial evidence showed that the claimant could not have worked the hours claimed, that DOL would consider such evidence.

LSI Hughes stated that she never visited Fancy Harlem and did not do a visual inspection of the pressing operations of the two locations that she did visit. She explained that she did not see a presser or pressing station at the stores she visited and assumed they are not in plain view. Hughes was not aware that the petitioners had acquired a wholesale client in 2005, and she did not discuss with the petitioners the reasons that the claimant's hours increased the last week he worked for the petitioners.

Finally, Hughes testified that in order to discredit the claimant, she would have needed to see accurate, contemporaneous records showing when the claimant started work each day and when he left in order to establish the hours he actually worked.

Petitioners' rebuttal evidence

Daekyung Bae testified on rebuttal that the second delivery to the plant was at 6:00 p.m. and that there was no second delivery at 2:00 p.m. He further testified that the first delivery of the day to the plant was at around 9:00 a.m.

Donovan Allen testified that he worked for the petitioners for 20 years as a presser, including at Fancy 27 from the 1990s to the 2000s, and stopped working for the petitioners six or seven years ago. Allen worked at Fancy 27 in 2004 with the claimant. He testified that his hours of work varied and that he was supposed to work from 8:00 a.m. to 3:00 or 4:00 p.m., but "hardly ever worked those hours." Allen testified that he worked the same hours as the claimant. He stated that winter was the slow season and that on a slow day, he left work at 1:00 p.m.

FINDINGS

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

For the following reasons, we modify the wage order in part and otherwise affirm, and find that the petitioners, in the absence of required records of the hours the claimant worked, have failed to meet their burden of proof.

The wage order

The petitioners' burden of proof in this matter, in the absence of records of the actual hours worked by the claimant, is to submit sufficient proof so as to provide an accurate estimate of the hours the claimant worked (*Matter of Mohammad Aldeen et al.* Docket No. PR 07-093 [March 28, 2008] aff'd sub nom. *Matter of Aldeen v Industrial Appeals Board*, 82 AD3d 1220 [2d Dept 2011]). We do not find that the petitioners' estimate, which is based on averages, provides an accurate estimate of the hours the claimant worked.

The claimant filed a claim with the Department of Labor (DOL) alleging that he worked 57 hours per week as a presser from June 25, 2000 to April 9, 2005, for $210.00 a week from June 25, 2000 to March 15, 2005, and for $240.00 a week from March 17, 2005 to April 9, 2005. DOL subsequently determined that the petitioners paid the claimant an additional $290.00 per week in cash from June 25, 2000 to April 9, 2005 and an additional $260.00 in cash from March 17, 2006 to April 9, 2005, so that his total weekly salary was always $500.00 a week paid partly by check and partly by cash. The petitioners did not provide DOL with records of the hours worked by the claimant for the time period from June 25, 2000 to January 30, 2005, and admitted that none existed. However, they did provide the claimant's time cards for the period January 31, 2005 to April 9, 2005. DOL, therefore, calculated the unpaid overtime wages due to the claimant based on the best available evidence, which was the claimant's statement that he worked 57 hours per week during the claim period (Labor Law § 196-a; *Matter of Mid-Hudson Pam Corp. v Hartnett*, 156 AD2d 818, 821 [3d Dept. 1989]), and modified the wages owed to reflect the actual hours that he worked from January 31, 2005 to April 9, 2005. There is no dispute that the claimant's salary was $500.00 per week from June 25, 2000 to January 30, 2005; however, the petitioners allege that the claimant was paid piece rate from January 31, 2005 to April 9, 2005, which the claimant denies.

At hearing, the claimant testified that he worked 8:00 a.m. to 6:00 p.m. Monday to Friday and 8:00 a.m. to 5:00 p.m. on Saturdays during the time that he worked at Fancy R & S and Fancy 27, and that his salary was $500.00 per week. He admitted that he worked less at Fancy Harlem and that the time cards from Fancy Harlem were accurate. He explained that he worked less at Fancy Harlem because there were more pressers working there. He explained that he quit working for the petitioners without notice because he was upset once he realized that he should have been paid overtime for the extra hours he had worked at Fancy R & S and Fancy Harlem.

Petitioner Daekyung Bae, on the other hand, testified that the claimant's work hours at Fancy R & S and Fancy 27 were from 8:00 or 8:30 a.m. to 1:00 to 3:00 or 3:30 p.m. on

slow days or until 4:00 or 4:30 p.m. on busy days. Bae testified that the claimant could not have worked until 6:00 p.m. as he claimed because all the pressing work had to be finished by 3:30 or 4:00 p.m. at the latest in order to be delivered to the drop stores by 5:00 p.m. The claimant, however, testified that there was a second delivery each day between Noon and 2:00 p.m. and that after 4:00 p.m., he started on the next day's work. The petitioners denied that a second delivery was ever made, but we credit the claimant's specific testimony about what he did after 4:00 p.m., and note that Bae's testimony was vague as to how much time he actually spent at the locations where the claimant was working.

Taking the petitioners' testimony at face value, the claimant at least during busy seasons could have worked from 8:00 a.m. to 4:30 p.m. six days a week which, including a thirty minute lunch break, is 48 hours a week. This testimony is contradicted by the spreadsheets they created based on gross revenues and the pieces the claimant allegedly pressed, which never show the claimant working 48 hours a week. The maximum hours worked by the claimant, according to the spreadsheets, was 41 hours, which occurred only one week for the entire time period from August 2000 to January 2005. Certainly, based on the petitioners' own testimony, we would expect that the claimant would have worked overtime more than 4 weeks in a 54 month period. Furthermore, we find that the petitioners' estimate of the hours worked by the claimant is flawed because it assumed that the claimant's press rate predicts the hours that he worked, which is not supported by the other evidence produced at hearing.

Based on the accurate records of the hours the claimant worked from January 31, 2005 to April 9, 2005 and the number of pieces he pressed during that time period, we find that not only did the number of pieces the claimant pressed vary from week to week, but that the number he pressed did not correlate to the number of hours he worked. For example, he pressed nearly as many pieces (1056) the week of January 31 in 40.3 hours as he did the following week in just 33.5 hours when he actually pressed 100 more pieces in nearly 7 hours less time. This is consistent with the claimant's testimony that "different garments take different time," and demonstrates that the petitioners' assumptions in their calculations that an average piece costs $5.00 as well as the use of an industry standard average press rate of 35 pieces per hour are flawed. First, the price paid by the customer to clean a garment is not relevant to the amount of time it takes to press a particular garment. The petitioners and the claimant testified that different types of garments take different amounts of time to press. There was also testimony that indicated the number of pieces allotted to a particular garment may have been arbitrary. Second, weekly hours worked is not a function of the number of pieces pressed. Finally, the petitioners' estimates for the time the claimant worked at R & S are clearly inaccurate. The petitioners and the claimant testified that during busy periods, the claimant was not the only presser at Fancy R & S. However, the petitioners' data assumes that the claimant pressed all pieces while he worked at Fancy R & S, and therefore cannot possibly describe with any accuracy the actual hours worked by the claimant.

Furthermore, we find that the manner in which the claimant was paid supports the Commissioner's determination that he worked overtime. The petitioners admitted that they paid the claimant partly by check and partly by cash. It is impossible to ignore that the minimum wage for a 40 hour work week was $206.00 prior to 2005 and that the portion of the claimant's wages paid by check was $210.00 prior to 2005, raised to $240.00 a week in

2005 when the minimum wage was raised to $6.00 an hour or $240.00 for a 40 hour work week. This raises the question of what the cash portion of the claimant's wages represented. We find based on the testimony of LSI Hughes that the petitioners' accountant told her that the check portion of the claimant's wages represented 40 hours of work at minimum wage, and Bae's testimony that the cash payments were "considered overtime, extra work, bonus, whatever you want to call it," that it was not unreasonable for the Commissioner to find that the claimant worked the overtime hours he claimed.

We credit the claimant's testimony that he worked 56 hours a week at Fancy R & S and Fancy 27, that he left work at 6:00 p.m. on weekdays, 5:00 p.m. on Saturdays, that he worked on the next day's pressing after a second delivery of clothes arrived, that he worked fewer hours at Fancy Harlem because there were more pressers working there, and that the petitioners paid him a salary of $500.00 a week. Accordingly, we find that the claimant's regular hourly rate from August 13, 2000 to January 30, 2005 was $8.93 an hour (*see* 12 NYCRR 142-2.16 [regular hourly rate is determined by dividing the total hours worked during the week into the employee's total earnings), and his overtime rate was, therefore, $13.40 an hour for the hours he worked in excess of 40 in a work week (*see* 12 NYCRR 142-2.2). Therefore, under Article 19 of the Labor Law, the claimant is owed $71.60 per week in unpaid overtime ($571.60 earned in regular and overtime wages together less the $500.00 salary actually paid) for the period from August 13, 2000 to January 30, 2005.

DOL's calculation of the overtime wages owed to the claimant for the period from January 31, 2005 to April 9, 2005, was based on the hours actually worked as reflected in the time cards from Fancy Harlem using a salary of $500.00 a week. The claimant acknowledged that the time cards were accurate. The petitioners alleged that the claimant was actually paid piece rate during the time he worked at Fancy Harlem, but the claimant denied this and maintained that he continued to be paid $500.00 a week by check and cash no matter how many hours he worked, and speculated that the petitioners kept track of the pieces pressed there to see how many the new employees pressed. In the absence of any records of the amount actually paid to the claimant during this time period, we find that DOL's determination that the claimant continued to earn $500.00 a week was reasonable (Labor Law § 196-a; *Matter of Mid-Hudson Pam Corp.* 156 AD2d at 821).

The petitioners produced rebuttal evidence from one former presser, Donovan Allen, who testified that he worked with the claimant at Fancy 27 in 2004. According to Allen's testimony, he was scheduled to work from 8:00 a.m. to 3:00 or 4:00 p.m., he hardly ever worked those hours, that the hours varied, that on slow days in the winter he left work at 1:00 p.m., and that he worked the same hours as the claimant. Allen's testimony was not specific enough with respect to the actual hours he worked to meet the petitioners' burden of providing an accurate estimate of the hours that Allen worked, let alone what the claimant worked.

In addition to the wages found due and owing, the wage order contains a 50% civil penalty. We affirm the civil penalty since the petitioners did not object to it in their petition or at hearing.

Interest

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 section 14-A sets the "maximum rate of interest" at "sixteen percent per centum per annum." Accordingly, we affirm the assessment of interest in the wage order except to the extent that it is suspended for the period from July 27, 2011 to September 9, 2011 due to an error in calculation made by the Board necessitating the issuance of this corrected decision.

The Penalty Order

The penalty order is affirmed in all respects since it was not objected to by the petitioners, and in any event, the evidence at hearing clearly established that the petitioners did not maintain records or provide wage statements with each payment of wages as required by Article 19 of the Labor Law.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The Commissioner will recalculate the overtime wages due and owing based on the findings of the Board herein, pro-rate the civil penalty accordingly, and issue an amended wage order consistent with this decision; and

2. The penalty order is affirmed; and

3. Interest is suspended for the period from July 27, 2011 to September 9, 2011; and

4. This decision corrects and supersedes the decision issued by the Board in this matter on July 27, 2011; and

5. The petition for review be, and the same hereby is, 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
September 9, 2011.

Interest

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 section 14-A sets the "maximum rate of interest" at "sixteen percent per centum per annum." Accordingly, we affirm the assessment of interest in the wage order except to the extent that it is suspended for the period from July 27, 2011 to September 9, 2011 due to an error in calculation made by the Board necessitating the issuance of this corrected decision.

The Penalty Order

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NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The Commissioner will recalculate the overtime wages due and owing based on the findings of the Board herein, pro-rate the civil penalty accordingly, and issue an amended wage order consistent with this decision; and

2. The penalty order is affirmed; and

3. Interest is suspended for the period from July 27, 2011 to September 9, 2011; and

4. This decision corrects and supersedes the decision issued by the Board in this matter on July 27, 2011; and

5. The petition for review be, and the same hereby is, denied.

Anne P. Stevason, Chairperson

J. Christopher Meagher, Member

Jean Grumet, Member

LaMarr J. Jackson, Member

Jeffrey R. Cassidy, Member

Dated and signed by a Member
of the Industrial Board of Appeals
at Rochester, New York, on
September 9, 2011.

Interest

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 section 14-A sets the "maximum rate of interest" at "sixteen percent per centum per annum." Accordingly, we affirm the assessment of interest in the wage order except to the extent that it is suspended for the period from July 27, 2011 to September 9, 2011 due to an error in calculation made by the Board necessitating the issuance of this corrected decision.

The Penalty Order

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NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The Commissioner will recalculate the overtime wages due and owing based on the findings of the Board herein, pro-rate the civil penalty accordingly, and issue an amended wage order consistent with this decision; and

2. The penalty order is affirmed; and

3. Interest is suspended for the period from July 27, 2011 to September 9, 2011; and

4. This decision corrects and supersedes the decision issued by the Board in this matter on July 27, 2011; and

5. The petition for review be, and the same hereby is, denied.

Anne P. Stevason, Chairperson

J. Christopher Meagher, Member

Jean Grumet, Member

LaMarr J. Jackson, Member

Jeffrey R. Cassidy, Member

Dated and signed in the Office
of the Industrial Board of Appeals
at Albany, New York, on
September 9, 2011.