STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of:	:	
LINDEN JOSEPH TUDOR AND HQ LOUNGE, INC.,	:	
Petitioners,	:	DOCKET NO. PR 10-050
To Review Under Section 101 of the Labor Law: An Order to Comply with Article 19 and an Order Under Articles 5 and 19 of the Labor Law, both dated December 14, 2009,	:	RESOLUTION OF DECISION
- against -	:	
THE COMMISSIONER OF LABOR,	:	
Respondent.	:	

APPEARANCES

William J. Rita, Esq., for petitioners.

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

WITNESSES

Linden Joseph Tudor, for petitioners.

Itashi Nooks; Xiamara Boyke; Cordie McCann, Labor Standards Investigator; and Vincent R. Hammond, Senior Labor Standards Investigator, for respondent.

WHEREAS:

The amended petition filed with the Industrial Board of Appeals (Board) in this matter seeks review of two orders issued by respondent Commissioner of Labor (Commissioner) against petitioners Linden Joseph Tudor and HQ Lounge, Inc. (together, petitioners) on December 14, 2009.

Upon notice to the parties, a hearing was held on December 7, 2011 in New York, New York before J. Christopher Meagher, Member of 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 that petitioners pay the Commissioner wages owed claimant employees Itashi Nooks and Xiamara Boyke (together, claimants) in the amount of $12,026.75, together with interest continuing thereon at the rate of 16% to the date of the order in the amount of $1,887.38, and a civil penalty of $9,020.06. The total amount due is $22,934.19.

The second order (penalty order) directs that petitioners pay a civil penalty of $750.00 for failure to maintain and/or furnish true and accurate payroll records for each employee; $750.00 for failure to issue wage statements to employees; $250.00 for failure to provide employees at least a thirty minute meal period when working a shift of more than six hours extending over the noon day meal period between 11:00 AM and 2:00 PM; and $250.00 for failure to allow employees at least twenty-four consecutive hours of rest in any calendar week. The total amount due is $2,000.00.

The amended petition claims the orders should be reversed because: (1) the Commissioner incorrectly found that petitioners paid claimants below minimum wage; failed to apply the full tip credit; and failed to consider petitioners' payroll records as sufficient proof of payment of the wages owed; (2) the civil penalty in the wage order exceeds the maximum allowable for liquidated damages under Labor Law § 663; (3) the records penalty is unreasonable because petitioners' payroll records, while not sophisticated, were nonetheless accurate and should have been accepted as evidence of the employees' wages; (4) the meal period penalty is erroneous because petitioners' bar operated from 8:00 PM to 4:00 AM and not during the 11:00 AM to 2:00 PM noon day meal period stated in the Labor Law, and; (5) the day of rest penalty is erroneous because the bar was not open seven days a week and claimants did not work seven consecutive days. Petitioners do not challenge the penalty for failure to issue wage statements.

For the following reasons, we find petitioners failed to meet their burden to establish that the Commissioner's determination of wages owed is invalid or unreasonable and affirm the wage order in all respects. We affirm the records, wage statement[s], and day of rest penalties in the penalty order but find that petitioners did not violate the noon day meal period requirement. We modify the order to revoke the $250.00 penalty assessed for this violation as invalid and unreasonable.

SUMMARY OF EVIDENCE

Petitioner's Evidence

Petitioner Linden Joseph Tudor (petitioner or Tudor) testified that he operates a bar called "HQ Lounge" in Brooklyn, New York and that he employed the claimants as bartenders at the establishment from April to December, 2008. The bar is open from 6:00 PM to 4:00 AM but does not get busy until around 10:00 PM. Claimants and the other bartenders worked on one of two six hour shifts, either 6:00 PM to 12:00 PM or 10:00 PM to 4:00 AM, and were given a one hour meal break in the middle of each shift. According to

petitioner, claimants never worked more than one shift or more than five hours per day throughout the period of the claim. It is undisputed that claimants were paid $30 per day in cash, plus tips, and were not provided wage statements.

Petitioner submitted daily "Sales and Expense Report(s)" for the period April through December, 2008 and testified that they are the daily records of the business from opening to closing that he prepared each night. The reports have entries in various different handwritings and list the names of bartenders who worked the 1st or 2nd shift that night in a column marked for "Shift Personnel". In a separate column for expenses, the reports list lump sum "Dollar Amt[s]" paid to "Barmaids". Petitioner testified that he submitted the reports to the Department of Labor (DOL) during its investigation and they are "... the records of the day's performance. It's the first shift and the second shift. I didn't have the hours that they actually worked on that shift and the days." It is undisputed that the reports do not state the hours worked or the starting, stopping, or break times of employees.

Petitioner submitted a summary of the hours and wages paid the claimants that he "extracted" from his daily reports around the same time he submitted them to DOL. Petitioner could not recall whether he submitted the summary to DOL. The exhibit states that the 1st shift runs from 8:00 PM to 2:00 AM and the 2nd from 10:00 PM to 4:00 AM. The summary lists claimants' daily hours worked each week at 6 hours per day; total weekly hours to be paid at $4.65 per hour; total wages due; and total wages paid for the weeks ending April 26, 2008 through January 3, 2009. As calculated by petitioner, the total wages paid the claimants each week exceeds the total due. Petitioner testified that minimum wage for bartenders during the time frame was $4.65 per hour and at $30 per day he paid claimants above minimum wage for the period of the claim. Petitioner produced no tip records for his employees. The summary states all tips were undeclared.

Claimants' Testimony

On December 19, 2008, Claimants Itashi Nooks (Nooks) and Xiamara Boyke (Boyke) filed claims against petitioners with DOL for unpaid wages, including overtime wages, accrued during their employment as bartenders by petitioners from March 27, 2008 to December 18, 2008 and April, 2008 to December 18, 2008, respectively.

Nooks' claim stated that she worked 8:00 PM to 4:00 AM each night of the week except Saturday, when she worked 8:00 PM to 6:00 AM. Boyke's claim stated that she worked 8:00 PM to 4:00 AM each night except Wednesday, when she worked 6:00 PM to 4:00 AM. The claims stated that claimants did not have a meal period and that Nooks received an average of $130 in tips per week and Boyke $80.

Nooks testified that bartenders worked one of two eight hour shifts, either 6:00 PM to 2:00 AM or 8:00 PM to 4:00 AM. Nooks always worked the second shift. Two bartenders worked that shift during the week and four or five on weekends when it was busier. Their duties included cleaning the bar, washing dishes, stocking the bar with liquor, and serving drinks and food after customers arrived.

Nooks testified that she and Boyke were petitioner's top bartenders and worked extra shifts and hours each week because the bar was always short staffed. While Nooks was

scheduled for days off, petitioners called her to work the shifts of other bartenders who didn't come in or had quit. She worked six or seven days per week throughout the period of her claim, depending on which bartenders were available each week. Nooks sometimes opened the bar from 6:00 PM to 8:00 PM when a bartender didn't come in and worked extra hours after closing on weekends when petitioner was unavailable to close or the bar was still busy. Nooks testified that she never took a meal break because she had a lot to do after she started her shift. Once the bar got busy, she could not take time out from serving customers to sit down and have a meal.

Boyke testified that she worked six or seven days a week from 8:00 PM to 4:00 AM or 5:00 AM or 6:00 PM to 2:00 AM. She worked past her actual shift approximately three nights a week when there were special events or the bar was crowded.

DOL's Investigation

Labor Standards Investigator Cordie McCann (McCann) and Senior Labor Standards Investigator Vincent R. Hammond (Hammond) testified concerning the investigation that resulted in the orders under review.

McCann made a field visit to the premises on August 21, 2009, and spoke with petitioner by telephone concerning the claims. Petitioner stated he did not keep regular business hours and had no other employees besides himself, his son, and a niece. At a follow up meeting with the investigator on August 27, 2009, petitioner stated the bar was open from 6:00 PM to 4:00 AM, seven days per week, and he had employed the claimants at the rate of $30 to $40 cash per day. Petitioner stated he had no receipts for the payments, did not keep track of how many hours the claimants worked, and had no sign in sheets or punch cards.

McCann issued petitioner a notice of revisit requesting that payroll records be produced on September 11, 2009. The notice demanded that Petitioner produce records of the hours worked and wages paid petitioner's employees from January 1, 2007 to December, 2008, including a sample work schedule.

On September 28, 2009, petitioner submitted a computer generated summary showing each day the claimants worked, the shift time, hourly rate of pay, gross pay, taxes, net pay, tips, and another column setting forth the hourly rate of pay. The summary contains similar data to that in the exhibit submitted by petitioners at hearing, but differs in format. The investigators deemed the record contrived because the daily hours worked, rate of pay, gross wages, taxes, tips, and net pay were the same for each day. Petitioner also failed to submit the requested information for his other employees.

Petitioner did not submit the payroll records requested and the wage calculations were therefore based solely on the written claims filed by the claimants. A computer audit performed by McCann of the wages, hours, and tips stated in the claims found that Nooks was owed $5,105.46 and Boyke $6,921.29 for the period April 05, 2008 to December 18, 2008. By letter dated October 5, 2009, McCann issued Petitioner a notice recapitulating the claims and informing him that DOL had computed a total underpayment of $12,026.75. The notice enclosed a "Recapitulation Sheet" listing the period of underpayment and amount of

wages due and a "Notice of Labor Law Violation" for failure to furnish and/or keep records, issue wage statements, provide a noon day meal period, and afford at least one day of rest in every calendar week. The notice also advised petitioner that failure to remit payment by October 26, 2009 could entail assessment of interest and penalties.

On October 27, 2009, Hammond received a letter from petitioner requesting a district meeting. Hammond responded that a meeting would not be held unless petitioner submitted further documentation that was not available during the investigation. Hammond advised that petitioner should submit such information by November 13, 2009 or the matter would be referred for an Order to Comply.

On November 5, 2009, petitioner met with investigator McCann and presented portions of his daily sales and expense reports for the period May, 2009 to November, 2009 as evidence of the hours worked by the claimants. The investigators deemed the records insufficient because they did not show daily or weekly hours worked, or starting and stopping times. Petitioner stated that he had no other records.

Based on DOL's investigation, the Commissioner issued petitioners the orders under review on December 14, 2009. In support of the 75 % civil penalty assessed in the wage order, Hammond testified that he completed an investigative report titled "Background Information – Imposition of Civil Penalty" that sets forth factors considered in assessment of the penalty. Hammond arrived at the penalty to be recommended by looking at past violations, size of the business, and cooperation of the employer. While petitioner was cooperative with the investigation, a 75 % penalty was recommended because the records he provided did not comply with the Labor Law. The penalty could have been as high as 200 %.

GOVERNING LAW

A. Standard of Review and Burden of Proof

When a petition is filed, 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 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" (12 NYCRR § 65.30). The burden is by a preponderance of evidence (State Administrative Procedure Act § 306[1]).

It is therefore petitioners' burden in this case to prove the allegations in the petition by a preponderance of evidence.

B. Recordkeeping Requirements

Article 19 of the Labor Law, known as the "Minimum Wage Act," defines "[e]mployee," with certain exceptions not relevant to this appeal, as including "any individual employed or permitted to work in any occupation (Labor Law § 651 [5])." Labor Law § 661 requires employers to maintain payroll records for employees covered by the Act and make such records available to the Commissioner:

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

The Commissioner's regulations implementing Article 19 for employers in the Restaurant Industry provide at 12 NYCRR § 137-2.1:

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

C. DOL's Calculation of Wages in the Absence of Adequate Employer Records.

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" (*Angello v Natl. Fin. Corp.*, 1 AD3d 850 [3d Dept 2003]).

In *Anderson v Mt. Clements Pottery Co.*, 328 U.S. 680, 687-688 [1949], superseded on other grounds by statute, the U.S. Supreme Court 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,* 156 AD2d 818, 821 [3d Dept 1989] 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."

FINDINGS

With the modification that follows, we affirm the wage and penalty orders below and find petitioners' evidence submitted at hearing insufficient to meet their burden of proof.

Petitioners Violated Article 19 of the Labor Law by Failing to Pay Wages Due the Claimants

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,* 156 AD2d at 821). In a proceeding challenging such determination, the employer must then "come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employees' evidence" (*Anderson v Mt. Clemens Pottery,* 328 US at 688; *Matter of Mid-Hudson Pam Corp. v Hartnett,* 156 AD2d at 821 [employer burden to negate reasonableness of Commissioner's calculation]).

The Court in *Mt. Clemens Pottery* defined the nature of evidence the employer must produce to establish the "precise" amount of work performed *or* to "negative the reasonableness" of the inference drawn from the employees' evidence. In finding that employees were entitled to compensation for preliminary activities after arriving at their places of work, the Court rejected the trial court's refusal to award such compensation -- not because the activities were not compensable work -- but because the amount of time spent doing these activities had not been proven by the employees with any degree of reliability or

accuracy. The Court held that employees cannot be denied recovery on such basis. "Unless the employer can provide *accurate estimates* [of hours worked], it is the duty of the trier of facts to draw whatever reasonable inferences can be drawn from the employees' evidence as to the amount of time spent in these activities in excess of the productive working time" (*Id.* at 693 [emphasis added]; *Matter of Mohammed Aldeen, et al,* PR 07-093 [2008] [employer burden to provide "accurate estimate" of hours worked], *aff'd. sub nom, Matter of Aldeen v Industrial Board of Appeals*, 82 AD3d 1220 [2d Dept 2011]).

It was petitioner's burden in this case to establish an "accurate estimate" of the hours worked by the claimants for the specific period of the Commissioner's audit. Unless the petitioners do so, they have not negated the approximation of those hours drawn by the Commissioner from the employees' statements. Petitioners' evidence submitted at hearing failed to meet this burden.

Petitioner testified in general terms that claimants never worked more than one six hour shift or more than five hours per day. General testimony of shift times and hours is insufficient to establish an accurate estimate of hours worked by employees (*Matter of Mohammed Aldeen et al, supra* [general testimony of work hours insufficient to establish accurate estimate of hours and wages]; *Matter of Michael Fischer*, PR 06-099 [testimony of general hours at worksite insufficient]).

Petitioner submitted daily sales and expense reports listing the shifts worked by claimants and a computer summary of daily hours and wages paid that he "extracted" from the reports during the investigation. Petitioner argued that these records, while not sophisticated, nonetheless establish that at $30 per day he paid claimants above minimum wage. However, the daily reports do not state claimants' starting, stopping, and break times each day, or even their total hours, and do not cover the entire period of the claim. The summary does not show the actual starting, stopping, or break time of employees; lists the same hours worked by the employees every day; and states times for the first and second shifts at variance with those testified to by petitioner. Petitioner admitted to the investigator that he had no sign in sheets or punch cards and never kept track of how many hours the claimants worked. The summary is not a contemporaneous payroll record and is not reliable or probative evidence of the actual hours worked by the claimants.

In the absence of contemporaneous payroll records for its employees, it was petitioners' burden to submit sufficient affirmative evidence to negate the Commissioner's determination of wages owed. Petitioner's testimony was simply too general and his records too unreliable to make an accurate estimate of the actual hours worked and wages paid to overcome the presumption favoring the Commissioner's calculation. In the absence of such proof, the Commissioner's determination based on "the best available evidence", in this case DOL's audit approximations based on the claims of the employees, is deemed valid and reasonable *(Mid- Hudson Pam Corp. v Hartnett,* 156 AD2d at 821*)*.

Petitioners argued in closing that the Commissioner's calculation is flawed because claimants did not work seven days every single week during the period of the claim. However, it was petitioners' burden to establish the "precise" hours worked by the claimants in this case, not the respondent Commissioner (*Anderson v Mt. Clemens Pottery,* 328 US at 688). Where the employer fails to keep accurate records, the Commissioner may calculate

wages due "even though the result be only approximate" (*Reich v Southern New England Telecommunications Corp.*, 121 F.3d 58, 67 [2d CA 1997] [finding no error in damages that "might have been somewhat generous" but were reasonable in light of the evidence and "the difficulty of precisely determining damages when the employer has failed to keep adequate records"]). Claimants credibly testified that that they worked six or seven days per week and extra hours beyond their shifts each week throughout the period of their claims. We find the claim forms were a reasonable approximation of the hours worked by the claimants and it was reasonable for the Commissioner to rely on that approximation to calculate back wages, even if possibly over-inclusive. To fault the order for its possible imprecision, even when caused by petitioners' failure to keep records, would reward the employer for its unlawful conduct.

Finally, the petition asserted that it was error for the Commissioner not to afford petitioners the full tip credit applied to food service workers during the time frame of the claim (Labor Law § 661 [4] and 12 NYCRR § 137–1.5 [2005]). Those provisions permitted a "food service worker" to be paid a minimum wage of at least $4.60 per hour, provided that her tips, when added to the cash wage, were equal to or exceeded $7.15 per hour. However, the regulations also required petitioners to maintain weekly payroll records of the gross wages, net wages, and "allowances" claimed as part of the minimum wage (12 NYCRR §§ 137-2.1) and that "[t]he employer shall have the burden of proof that an employee receives sufficient tips to entitle him to classify such employee as a food service worker" (*Id.* §137-3.4 [c]).

It is undisputed that petitioners did not keep tip records. We find it was reasonable for the Commissioner not to afford petitioners the lower restaurant service wage where there were no records of the actual tips received (*Bakerman, Inc. v Roberts,* 98 AD2d 965 [4th Dept 1983] [offset denied where "no proof" presented of actual tips received]; *Padilla v Manlapaz,* 643 F Supp 2d 302, 310 [EDNY 2009] [credit denied where employer fails to maintain records of tip "allowances" claimed as part of minimum wage]). The Commissioner afforded petitioners a tip credit based on the "average" weekly tips stated by claimants on their claim forms. We find the calculation valid and reasonable in all respects.

Subject to the Modification Below, the Civil Penalties Assessed in the Wage and Penalty Orders are Otherwise Valid and Reasonable

Petitioners claim the civil penalty assessed by the wage order is in error because it exceeds that allowed for liquidated damages by Labor Law § 663. The argument is misplaced. That statute permitted the Commissioner to collect an amount as liquidated damages equal to 25 % of the underpayment found to be due in a civil action brought on behalf of the employee (*Id.* § 663 [2]).[1] The civil penalty in the wage order below, however, was assessed not by a civil action but pursuant to a compliance order issued pursuant to Labor Law § 218. That statute authorizes the Commissioner to assess penalties up to 200 % of the wages found owing upon giving "due consideration" to the factors listed in the statute (*Id.*). Petitioners did not otherwise challenge the penalty.

[1] Labor Law § 663(2) was amended in 2011 to authorize the Commissioner to collect liquidated damages equal to no more than 100% of the underpayment found to be due "by any legal action necessary, including administrative action".

Petitioners assert that the $750.00 records penalty is unreasonable because petitioners' payroll records, while not sophisticated, were nonetheless accurate and should have been accepted as evidence of payment of the wages owed. However, petitioners failed to furnish the payroll records requested by the Commissioner during the investigation and the records produced do not contain certain data required by 12 NYCRR § 137-2.1, including employee addresses, daily and weekly hours, deductions from gross wages, and allowances claimed as part of the minimum wage.

The petition claims that the $250.00 penalty for failure to allow employees at least twenty-four consecutive hours of rest in any calendar week is erroneous because the business was not open seven days a week and claimants did not work seven consecutive days. The record establishes that petitioners' business was open seven days a week, however, and we credit claimant's testimony they worked seven consecutive days during the period of their claims.

Petitioners did not challenge the penalty assessed for failure to issue wage statements.

Subject to the modification below, we find the considerations and computations the Commissioner was required to make in connection with the imposition of the civil penalties assessed in the wage and penalty orders valid and reasonable in all respects.

Petitioners Did Not Violate the Noon Day Meal Period Requirement

Labor Law § 218 [1] provides that if the Commissioner determines an employer has violated various wage and other provisions of the Labor Law, including Labor Law § 162, then he "shall issue to the employer an order directing compliance therewith, which shall describe particularly the nature of the alleged violation."

Labor Law § 162 requires meal periods to be provided employees, and sets forth different requirements depending on their shifts or working hours. Subdivision two provides that an "employee who works a shift of more than six hours which extends over the noon day meal period" is entitled to at least a thirty minute break within that time frame for the meal period. The "noon day meal period" is defined as "extending from eleven o'clock in the morning to two o'clock in the afternoon". In contrast, subdivision four provides that an employee working a later shift "of more than six hours starting between the hours of one o'clock in the afternoon and six o'clock in the morning" shall be allowed at least a sixty minute meal period when employed in a factory, and forty-five minutes when employed in any other establishment, at a time "midway between the beginning and end of such employment".

The record establishes that petitioners' business was open at night from 6:00 PM to 4:00 AM, and sometimes later, but claimants did not work shifts extending over the noon day meal period. We find petitioners did not violate the noon day meal requirement in this case and the penalty imposed must be vacated as invalid and unreasonable. The Commissioner did not amend the penalty order prior to hearing to charge petitioners with violation of the requirements of subdivision four of the statute, rather than the noon day meal requirement of subdivision two (*Matter of David Savaterri and NYC Photobooth, Inc.,*

PR 10-297 [June 7, 2011] [once order is appealed pursuant to Labor Law § 101, Commissioner must obtain Board approval to withdraw or amend the order by motion or stipulation of the parties]). As the statute authorizing the Commissioner to impose a civil penalty provides that the order "shall describe particularly the nature of the alleged violation", the discrepancy is not merely technical but a violation of the notice requirements of the statute.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. Subject to the modification set forth in this decision, the Order to Comply with Article 19 and the Order Under Articles 5 and 19 of the Labor Law, both dated December 14, 2009, are otherwise affirmed; and

2. The Commissioner is directed to amend the civil penalties in the Order Under Articles 5 and 19 of the Labor Law and issue an amended Order consistent with this decision; and

3. The Petition for review be, and the same hereby is, otherwise denied.

Absent
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
December 14, 2012.