STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of: HOWARD GOLDBERG, Petitioner, To Review Under Section 101 of the Labor Law: An Order to Comply with Article 6, and an Order Under Articles 6 and 19 of the Labor Law, both dated August 24, 2010, - against - THE COMMISSIONER OF LABOR, Respondent.	DOCKET NO. PR 10-331 RESOLUTION OF DECISION

APPEARANCES

Zisholtz & Zisholtz, LLP (Stuart Zisholtz of counsel), for petitioner.

Pico Ben-Amotz, General Counsel, NYS Department of Labor (Benjamin A. Shaw of counsel), for respondent.

WITNESSES

Howard Goldberg, for petitioner.

Sharon Clark, Shelly Wolfson, and Dawn Hughes, Labor Standards Investigator, for respondent.

WHEREAS:

On October 25, 2010, petitioner Howard Goldberg filed a petition with the Industrial Board of Appeals (Board) seeking review of two orders issued by the Commissioner of Labor (Commissioner) against petitioner and former petitioners David Green and David Greene Associates, Inc. on August 24, 2010. The Commissioner filed an answer on July 30, 2012.

David Green and David Green Associates, Inc. filed a petition and amended petition for review but withdrew their appeal on May 30, 2013. The Board adopted an Interim Resolution of Decision approving withdrawal of their amended petition on October 2, 2013.

Upon notice to the parties, hearings were held on October 24, 2013 and January 14, 2014 in New York, New York, before Board member and designated hearing officer J. Christopher Meagher, Esq. Each party was afforded a full opportunity to present documentary evidence, examine and cross-examine witnesses, make statements relevant to the issues, and file post-hearing briefs.

The first order (wage order) demands compliance with Article 6 of the Labor Law and payment of $229,642.59 in unpaid commission wages due and owing to claimant employees Shelly Wolfson and Sharon Clark, interest continuing thereon at the rate of 16% in the amount of $73,454.03, and a civil penalty in the amount of $229,642.59, for a total amount due of $532,739.21.

The second order (penalty order) under Articles 6 and 19 of the Labor Law assesses petitioner a civil penalty of $500 for failure to keep and/or furnish a written sales agreement signed by both the employer and the commissioned salesperson for the period October 16, 2007 through August 29, 2008, and $500 for failure to keep and/or furnish true and accurate payroll records during the period from July 15, 2004 through August 29, 2008, for a total penalty of $1,000.

As clarified at hearing and by petitioner's closing brief, the petition alleges that: (1) the claimants were not employees of petitioner[s]; (2) the commission wages sought are barred by prior settlement agreements between the parties, and; (3) the amounts are exaggerated and inaccurate because claimants failed to establish that commissions listed in the claims for future projects were earned and due and because the commissions were subject to adjustment based on the number of rooms actually utilized.

SUMMARY OF EVIDENCE

Parties and Commission Sales Agreement

Petitioner Howard Goldberg (petitioner) was president and CEO of David Green Associates, Inc. (DGA), a broker company with offices in New York City, Washington, D.C., and Chicago that represented hotels in obtaining corporations and associations to hold meetings at their locations. David Green (David) was chairman of the board of DGA and owned 70% of its shares. Petitioner owned 30%.

Petitioner's responsibility was to supervise the sales end of the business and run the NYC office, while David controlled the financial end in Chicago. Approximately ten sales associates worked in NYC under petitioner's supervision, including claimants Shelly Wolfson (Wolfson) and Sharon Clark (Clark). Wolfson and Clark were interviewed and hired by petitioner in 1986 and were employed in the position of "Vice President of Sales" for over twenty-two years.

Claimants' duties entailed soliciting companies and associations to hold conferences at DGA represented hotels, assisting the client and hotel in negotiation of the contract, and "booking" the meeting for a particular location and date. DGA received a monthly retainer fee from each hotel and a commission payment of 10% of the revenue received by the hotel for each meeting held. There was no written sales agreement with the claimants. Each claimant received a

bi-weekly salary and a percentage commission of the payment received from the hotel. The commission was payable after the meeting was completed ("travelled") and the payment received, with the final payment subject to any adjustment for the number of rooms actually used ("picked up"). Where hotels paid DGA a partial fee before the meeting travelled, claimants were issued their commission percentage of the advance payment.

Claimants' Testimony and DOL's Investigation

Claimants explained that petitioner closely supervised their work and the revenue they generated, meeting with them daily to review leads and meetings they were working on and to resolve any problems. Claimants submitted monthly reports to petitioner and DGA of the dates and locations of the meetings they booked, the company's commission payment, and the percentage sales commission they were to receive. Clark testified that she kept very good records and after every meeting contacted the hotels to find out the number of rooms actually used on a nightly basis. In her reports she calculated DGA's commission payment and her sales commission based on the actual revenue received by the company. Hotels frequently sent the payments to her as the salesperson and she would give petitioner the checks to send to Chicago. Claimants submitted their expense reimbursement requests to petitioner and he signed their salary and expense checks.

Claimants testified that it was customary for DGA to collect its commission check from the hotel within thirty days after each meeting was completed. The check was held for banking purposes for thirty days and their commission checks issued within another thirty days. Accordingly, claimants' sales commissions were customarily paid within ninety days of each meeting. Wolfson's commission ranged between 20% and 33% of the company's payment. Clark's was 32%.

Wolfson testified that as of 2008 she had stopped receiving her earned sales commissions. A large backlog had built up for meetings that had been held and the company had received its payments but had not distributed claimant her earned commissions. Over the next year she made repeated verbal and written requests of petitioner and David asking when she would be paid and submitted lists of her commissions owed. They replied that cash flow was short and they might be able to pay her at a later date, or did not respond. There was never a response denying that the commissions were earned and owed. Wolfson resigned her employment in August of 2008 because the unpaid commissions were substantial and the company was not living up to its agreement to compensate her for her work performed.

Clark also testified that starting in 2008 she stopped receiving her earned commissions. She repeatedly asked petitioner and David when she would be paid and sent them written requests for her wages, together with lists of the commissions owed. They replied that funds were short but "the money is coming." According to Clark, it was never disputed that the bookings were rightfully hers and the commissions due: "What was disputed was that the money was coming in slow and the money was going in other directions, whatever that may be, I was never quite sure, but money would come in on a particular meeting I would book and the commission would go wherever it went [and] not to me, I don't know[1]."

[1] Clark's claim form states that she left her employment at the end of August of 2008 because "the company was not paying."

On March 19 and 23, 2009, Wolfson and Clark filed claims for unpaid wages against DGA with DOL stating that they were owed unpaid sales commissions accrued during the period from February of 2007 through December of 2008. The claims listed David and petitioner as the responsible persons of the firm. Included were copies of email correspondence with petitioner and DGA requesting payment of their commissions, together with detailed lists of all accounts for which commissions were owed.

On May 3, 2009, Clark updated her claim and submitted a "Commission Salesperson Summary Sheet" listing $14,867.03 in commissions owed for eight meetings held between May of 2008 and March of 2009 where the company's payment "had been collected," and $35,422.56 in future commissions payable for an additional nine meetings booked to take place between May of 2009 and June of 2010.

On September 21, 2009, Wolfson updated her claim with a "Commission Salesperson Summary Sheet" listing $123,795 in commissions owed for thirty meetings held between February of 2007 and July of 2009, together with adjustments for payments received in the amount of $37,805. The information reflected her "commissions due to date" for programs "which David Green collected commissions [and] did not pay me." A second Summary Sheet listed $101,415 in future commissions payable for an additional nine meetings booked to take place between July of 2009 and May of 2010, with adjustments for payments received in the amount of $4,399.[2]

The Summaries were based on claimants' records and listed any payments received, the date, location, and amount of the company's commission payment, and the applicable rate, amount, and date that the present and future sales commissions were due.

Testifying in 2014, Wolfson said she knew the company continued to collect payment for all the meetings listed in her Summaries up through 2012, including those listed as future commissions at the time she filed her claim. Asked the basis for her assertion, she replied:

> "I based it on the fact that that was how the business was done. In certain situations, I did inquire with the hotels what the amounts were. The way their business was run was, I would also ask David Green when money was coming in or send memos to Howard, and I would be told that the money would be coming in. Anyway, the way business was run, and the way that the business was done, was that after business happened, they would collect the money. In the hotel industry, this is how it's done. Hotels pay for the service ... And they did in fact collect the money. If they did not collect the money, they would not be in business. They continued to collect the money, and I know that they did."

Claimant added that from 2008 through the present, neither petitioner nor anyone from the company ever identified a booking made by her that had not been paid, or any commission that had not been earned.

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[2] Wolfson's summaries listed additional commissions for meetings payable through 2012. Any commissions payable and due after the date of DOL's order issued on August 24, 2010 are beyond the scope of our review.

Testifying in 2013, Clark also said she believed the company had collected payment for all the meetings she booked from 2008 through 2010. "Yes, absolutely because I have friends in hotels who told me checks were received and exactly how much the check was received [for] and when the check was received and what the number was." Referring to her Summary filed in May of 2009, Clark said she followed up and spoke with "most" of the hotels listed on the Summary, including those listed at the time as future bookings. She was advised that the meetings had taken place and they had paid their commission fee to DGA.

Labor Standards Investigator Dawn Hughes testified concerning DOL's investigation that resulted in the orders under review. Investigator Steve Konsistorum conducted the investigation. On April 24, 2009 and May 14, 2009, DOL issued DGA collection letters advising it of the claims and provided copies of the account information upon which the commissions were based. The company was requested to either remit payment or provide documentation substantiating that the wages were not owed.

While the investigation was ongoing, the DGA entities (DGA, David, and petitioner) and claimants reached agreements wherein the entities would "assign" claimants their commission payment[s] from client hotels for certain future meetings which had been booked but not yet held, rather than having the claimants only receive a percentage portion of those payments. In consideration of the assignments, Wolfson agreed to accept $95,623.52 and Clark $20,000 in settlement of all legal claims and commissions owed.

Petitioner submitted a signed copy of Wolfson's agreement but not Clark's. Wolfson's agreement provided that if she did not receive the agreed amount, then the entities would be "liable for the difference and [Wolfson] reserves the right to reopen or initiate any such claim to secure the outstanding balance for the difference totaling between what is received and the agreed upon [amount]."

Wolfson testified that she received $74,000 from one meeting pursuant to the agreement, and approximately $9,000 to $10,000 from a second, but the company failed to pay the remainder of the monies agreed to. Clark testified that she received no money from the settlement. Petitioner told her that the company had refused to authorize him to sign the assignment. She also checked with the hotel and was informed that DGA had directed it to pay its fee to the company. Claimants advised DOL in July of 2010 that the entities had reneged on their agreements and they wished to reactivate their claims for appropriate action.

By letter of July 12, 2010, Konsistorum advised the new attorney for DGA:

> "It has come to our attention that the law firm of Arnold H. Landis has replaced Drew Levenfeld and associates as attorney for David Green Associates. This matter concerns Sharon Clark and Shelly Wolfson each of whom had filed claims against David Green Associates, for unpaid commissions.
>
> "With Mr. Leven[feld's] intervention and the consents of the claimants, we had temporarily suspended our investigation of [the] claims due to a 'good faith' agreement that was made between the claimants and your client [which] would have permitted them to receive the complete

> booking fee on some of the sales that they made in lieu of the company having to pay the full commissions on all of their sales.
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> "It is my understanding that your clients reneged on their agreement and authorized the clients to pay them directly rather than follow through on the agreement. We have therefore reinstated these claims and updated them to include commissions that are due through July 31, 2010."

The letter further advised that in order to avoid interest and penalties the company should remit payment of $179,353 to Wolfson, and $50,289.59 to Clark, no later than July 26, 2010.

Because the company failed to remit payment or submit sufficient payroll records establishing that the commission wages were not owed, DOL issued the orders under review on August 24, 2010.[3] Wolfson said she believed the final order reflected the payments she had received for the two meetings assigned.

Petitioner's Testimony

Petitioner testified that the company's financial affairs were managed in Chicago and all monies that came into the company went there. Rarely did payments from client hotels came into the New York office. If they did, the checks were forwarded to Chicago.

Petitioner further testified that any information as to whether a particular meeting booked by the claimants had "travelled," and how much money came in as a result, was kept in Chicago. He had no personal knowledge of whether any of the meetings had actually occurred or whether the company had been paid for them.

Petitioner was asked what commissions he believed were still payable to the claimants and replied that he could not provide an answer because all relevant documentation was in Chicago. Petitioner acknowledged that he had not taken any steps to obtain the information. While he did not believe the claimants were owed as much as stated in the order, he could not provide a figure of what they were owed.

GOVERNING LAW

Standard of Review and Burden of Proof

The Labor Law provides that "any person . . . may petition the board for a review of the validity or reasonableness of any . . . order made by the [C]ommissioner under the provisions of this chapter" (Labor Law § 101 [1]). It also provides that a Commissioner's order shall be presumed "valid" (Labor Law § 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 (Labor Law § 101 [3]).

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[3] DGA submitted a document to DOL on August 30, 2009 titled "Commission Payment Report" that listed commissions owed the claimants during the period of their claims. Petitioner objected to the document because there was no evidence of who created it. DOL disputed its accuracy because claimants contended that the numbers and accounts were incorrect. As the parties agree that the document is unreliable, we do not consider it.

A petition filed with the Board that challenges the validity or reasonableness of an order issued by the Commissioner shall "state in what respects [the order on review] is claimed to be invalid or unreasonable" (Labor Law § 101 [2]). The Board's Rules provide that "[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]).

Requirements to Pay Commission Salespersons

Labor Law § 191 [1] [c] governs the frequency of payment of wages and commissions to "commission salespersons," requires employers to provide them with a statement of earnings paid or due and unpaid upon written request, and as of October 16, 2007 requires that their agreed terms of employment shall be provided in a written sales agreement:

> "Commission salespersons -- A commission salesperson shall be paid the wages, salary, drawing account, commissions and all other monies earned or payable in accordance with the agreed terms of employment, but not less frequently than once in each month and not later than the last day of the month following the month in which they are earned; provided, however, that if the monthly or more frequent payment of wages, salary, drawing accounts or commissions are substantial, then additional compensation earned, including but not limited to extra or incentive earnings, bonuses and special payments, may be paid less frequently than once in each month, but in no event later than the time provided in the employment agreement or compensation plan. The employer shall furnish a commissioned salesperson, upon written request, a statement of earnings paid or due and unpaid. The agreed terms of employment shall be reduced to writing, signed by the employer and the commissioned salesperson, kept on file by the employer for a period not less than three years and made available to the commissioner upon request. Such writing shall include a description of how wages, salary, drawing account, commissions and all other monies earned and payable shall be calculated. Where the writing provides for a recoverable draw, the frequency of reconciliation shall be included. Such writing shall also provide details pertinent to payment of wages, salary, drawing account, commissions and all other monies earned and payable in the case of termination of employment by either party. The failure of an employer to produce such written terms of employment, upon request of the commissioner, shall give rise to a presumption that the terms of employment that the commissioned salesperson has presented are the agreed terms of employment."

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

Claimants Were "Employees" of the Petitioner Under the Labor Law

Petitioner asserted in his opening statement that claimants worked on a commission basis and DOL had no jurisdiction over them because they were independent contractors, not employees of DGA. As such, petitioner would have no personal responsibility for their wages.

Petitioner failed to submit any evidence of contractor status and acknowledged in his closing brief that claimants were employees of the company. The claim is therefore waived pursuant to Labor Law § 101 [2] ("Any objection to the ... order not raised in such appeal shall be deemed waived").

DOL's Order Is Not Barred by Prior Settlements With the Claimants

Petitioner argues that the claims asserted in this case were settled with the knowledge and approval of DOL and were discontinued with the understanding that they would not be revisited unless there was a breach by DGA in complying with the agreements. If so, claimants would seek only the defaulted sums pursuant to the terms of the settlement.

Petitioner argues that DOL is thereby barred from enforcing its order, or is limited to collecting the defaulted sums, and cites as authority a provision of the Fair Labor Standards Act ("FLSA") permitting individual waivers of the protections of the Act where the Secretary of Labor approves and supervises a wage settlement (29 USC § 216 [c]). Petitioner argues that, contrary to the approved settlement agreements, DOL continues to pursue this matter without any legal basis.

The arguments are unavailing. First, petitioner failed to submit a signed agreement for Clark containing the terms of any waiver. Any claim that she is barred from collecting her full wages or is limited to defaulted sums has insufficient foundation in the record.

Second, this case does not arise under the FLSA but rather the New York Labor Law. The New York Labor Law has no such statutory provision and one may not be imputed.

Third, the Commissioner has broad authority and discretion to investigate and enforce the provisions of the New York Labor Law. Section 191 [1] [c] requires employers to pay commissioned salespersons on time and in full. Section 218 [1] provides that where the Commissioner finds an employer has violated a provision of the wage requirements of Article 6, he shall issue an order directing payment of any wages found due. While Labor Law § 196 [1] [a] authorizes the Commissioner in his discretion to "attempt to adjust equitably controversies between employers and employees," nothing in the statute requires him to do so (*see,* Labor Law § 196 [2]).

The Commissioner was not a party to the private settlements agreed to between the DGA entities and claimants in this case. It is well settled that private agreements between employers and employees in no way preclude an administrative agency from enforcing laws in the public interest (*EEOC v Waffle House, Inc.*, 534 US 279 [2002]; *Cuomo v Coventry First, LLC et al.*, 13 NY3d 108 [2009]). While the Commissioner may have suspended his investigation pending settlement negotiations between the parties, once those efforts were deemed unsatisfactory, he was authorized to enforce the Labor Law and collect the wages owed the claimants in full.

Petitioner Failed to Meet His Burden of Proof to Establish That the Wages Were Not Owed

The Labor Law requires employers to maintain payroll records that include, among other things, its employees daily and weekly hours worked, wage rate, and gross and net "wages paid" (Labor Law §§ 195 and 661; 12 NYCRR § 142-2.6). Employers are required to keep such records open to inspection by the Commissioner or a designated representative. The claimants in this case were paid on a salary and commission basis, and sales commissions are considered "wages" (Labor Law § 190 [1]).

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 or other evidence, even though the results may be approximate (*Matter of Mid-Hudson Pam Corp. v Hartnett,* 156 AD2d 818, 820-21 [3d Dept. 1989]; *Ramirez v Commissioner of Labor,* 110 AD3d 901 [2d Dept. 2013]).

In a proceeding challenging such determination, the employer must come forward with evidence of the "precise" amount of work performed or with evidence to negate the reasonableness of the inferences to be drawn from the employees' evidence (*Anderson v Mt. Clemens Pottery Co.,* 328 US 680, 688 [1946]; *Mid-Hudson Pam Corp.*, 156 AD2d at 821). Given the interrelatedness of wages and hours, the same burden shifting applies to wages and requires the employer to prove the "precise wages" paid or to negate the inferences drawn from the employee's statements (*Doo Nam Yang v ACBL Corp.,* 427 FSupp2d 327, 332 [SDNY 2005]; *Matter of Gattegno,* PR 09-032 [December 15, 2010]). Labor Law § 196-a provides that where an employer fails "to keep adequate records ... the employer in violation shall bear the burden of proving that the complaining employee was paid wages, benefits and wage supplements."

Petitioner testified at hearing that he could not provide a specific amount of commissions payable to the claimants because all relevant documentation was in Chicago.[4] He did not take any steps to obtain the information. While he did not believe the claimants were owed as much as stated in the order, he could not provide a specific figure of what they were owed. The Board has repeatedly held that general testimony and bare assertions that employees are not due wages are insufficient to establish the "precise wages" paid (*see e.g., Matter of Young Hee Oh,* PR 11-017 at p. 12 [May 22, 2014] [citing prior Board decisions]).

Petitioner may not avoid his burden to establish the precise wages paid because relevant financial information was maintained in Chicago. As president and CEO of the company he could have supplied the information or obtained it by subpoena. No effort was made to do so. Even in situations where a third party has taken possession of a company's payroll records, the Board has found that the employer is not absolved of its responsibility to maintain and produce records (*Matter of David Schlockman and/or Mitchell Zimmerman and/or D.A.M. Clothing, Inc.,* PR 07-047 [June 25, 2008] [employer put into foreclosure by its financing factor may subpoena records]; *Matter of Mark Hochlerin*, PR 08-055 [March 25, 2009] [same for employer put into foreclosure by financier]). The Appellate Division, in *Angello v National Finance Corp.*, 1 AD3d 850, 854 [3d Dept 2003], stated that if the employer does not provide the records required under

[4] Petitioner did not dispute that he is an individual "employer" under the Labor Law personally responsible for payment of claimants' wages.

the Labor Law, "regardless of the reason therefor," the presumption favoring the Commissioner's determination based on the employees' statements applies (*see, Andrew Andruszko and Peter Kay Auto Sales,* PR 10-189 [October 2, 2013]). We likewise find that petitioner has failed to meet his burden of proof.

Petitioner argued in closing that the amounts set forth in the order are exaggerated and inaccurate because many of the claims were for "future projects" and no proof was submitted that the meetings took place and the commissions were earned and due. Furthermore, payments for many of the meetings may have been reduced based on the actual rooms utilized at the conference.

Claimants' "Commission Salesperson Summary Sheets" were filed with DOL in 2009 and listed various future commissions due for meetings scheduled to take place over the course of the next year through May and June of 2010. By the date of DOL's order issued on August 24, 2010, however, these commissions were no longer for "future projects" but for bookings that were payable and due.

Clark testified in October of 2013 and Wolfson in January of 2014, some four years after the bookings were completed. Claimants testified that it was customary for the company to collect its payment within thirty days of each booking and to pay their sales commissions within ninety days (*see, Pachter v Bernard Hodes Group, Inc.,* 10 NY3d 609, 618 [2008] [evidence of extensive course of dealings over many years supports implied contract between the parties]). Clark testified that she contacted most of the hotels listed on her Summary and was informed that the meetings had occurred and the company had received its payments. Wolfson testified that she knew the company continued to collect its payments for all her bookings up through 2012 because it was customary in the hotel industry for the hotels to pay, and for the company to collect its payment for the service. In some situations she inquired of the hotels what the amounts were. Throughout the dispute neither petitioner nor anyone from the company ever identified a booking made by her that had not been paid, or a commission that had not been earned. Petitioner did not rebut the claimants' testimony. Petitioner ran the sales end of the business, closely supervised the claimants' work and the revenues they generated, and assured them during the dispute that money was "coming in" from their bookings. We give no credence to his testimony that he lacked knowledge of whether any of their meetings occurred or whether the company had ever received its commission payment.

We find this evidence supports a reasonable inference that all of the commissions covered by DOL's order were "earned" and "payable" in accordance with the agreed terms of employment (Labor Law § 191 [1] [c]). It was petitioner's burden to provide accurate payroll records establishing the precise commission wages paid the claimants, not the claimants. In the absence of such records, the Commissioner may rely on the best available evidence and make an approximation of wages owed based on reasonable inferences drawn from the claimants' statements (*Mid-Hudson Pam Corp.,* 156 AD2d at 820-21). Petitioner failed to submit credible evidence negating the reasonableness of those inferences. While some of the commissions may have been subject to adjustment based on the actual rooms utilized, DOL's order may not be faulted for its imprecision where petitioner fails to produce accurate records (*Mt. Clements* Pottery, 328 US at 687-88 ["The employer cannot be heard to complain that the damages lack the exactness and precision of measurement that would be possible had he kept records in accordance with the [recordkeeping] requirements of ... the Act"]; *Reich v Southern New*

England Telecommunications Corp., 121 F3d 58, 67 [2d Cir 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"]).

For the foregoing reasons we affirm the Commissioner's wage order as reasonable and valid, but modify it as to the amount of wages owed. DOL did not submit an audit demonstrating how the wages in the order were calculated aside from the claimants' Summaries. Wolfson's state that she was owed commissions of $225,210 for all meetings from February of 2007 through May of 2010, minus payments received of $42,204, for a total amount of $183,006. The $84,000 she received for the two meetings assigned is not reflected in any of the adjustments. Subtracting $84,000 from $183,006, she is owed $99,006.

Wolfson's underpayment is $99,006 and we modify the order accordingly.

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 interest assessed in this case and the issue is thereby waived pursuant to Labor Law § 101 [2]. We find that the computations made by the Commissioner in assessing interest in the wage order are valid and reasonable in all respects. The order is modified as to the total amount of wages owed claimant Wolfson and the interest shall be reduced proportionally.

Civil Penalties

The petition did not challenge the civil penalties assessed in the wage and penalty orders and the issue is thereby waived pursuant to Labor Law § 101 [2]. We find that the considerations and computations the Commissioner was required to make in connection with the imposition of the penalties assessed in the orders are valid and reasonable in all respects. The wage order is modified as to the total amount of wages owed claimant Wolfson and the civil penalty shall be reduced proportionally.

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NOW, THEREFORE IT IS HEREBY RESOLVED THAT:

1. The wage order is affirmed as to claimant Clark, but modified as to claimant Wolfson to direct payment to her of $99,006, for a total amount due and owing of $149,295.59, with the interest and civil penalty in the order to be reduced proportionally; and

2. The penalty order is affirmed; and

3. The petition for review be, and the same hereby is otherwise dismissed.

Vilda Vera Mayuga, Chairperson

J. Christopher Meagher, Member

LaMarr J. Jackson, Member

Michael A. Arcuri, Member

Frances P. Abriola, Member

Date and signed in the Office
of the Industrial Board of Appeals
at New York, New York on
September 24, 2014.