STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of: MICHAEL CARUSO, Petitioner, To Review Under Section 101 of the Labor Law: two Orders to Comply with Article 6 of the Labor Law and an Order Under Articles 6 and 19 of the Labor Law, all dated February 11, 2011, - against - THE COMMISSIONER OF LABOR, Respondent.	DOCKET NO. PR 11-040 RESOLUTION OF DECISION

APPEARANCES

Lawler Mahon & Rooney LLP (James J. Mahon of counsel), for petitioner.

Pico Ben-Amotz, General Counsel, NYS Department of Labor (Jeffrey G. Shapiro of counsel), for respondent.

WITNESSES

Michael Caruso, for petitioner.

Joseph Braun, David Strough, Maron Tomasson and Armando Gonzalez, Labor Standards Investigator, for respondent.

WHEREAS:

On March 31, 2011, petitioner Michael Caruso (Caruso or petitioner), filed a *pro se* petition to review three orders issued against him and Country Imported Car Corp. (T/A BMW of the Hamptons) (Country Imported) by the Commissioner of Labor (Commissioner, DOL or respondent), all issued February 11, 2011. Country Imported did not appeal the orders. The first order (wage order) is an order to comply with Article 6 of the New York Labor Law directing petitioner to pay a total of $24,673.27 in wages to four claimants, Joseph Braun, James Castoro, David Strough, and Marion Thomasson; interest calculated to the date of the order in the amount of $3,751.87; liquidated damages in the amount of $6,168.33; and a civil penalty in the amount of $37,009.90 for a total amount due of $71,603.37. The second order (wage supplements order) issued under Article 6 directs petitioner to pay $5,138.14 in unpaid vacation/sick/personal leave to claimants Strough and Thomasson; interest calculated to the date of the order in the amount of $828.93; liquidated damages in the amount of $1,284.54; and a civil penalty in the amount of $7,707.21 for a total amount due of

$14,958.82. The third order (penalty order) issued under Articles 6 and 19 directs petitioner to pay $1,000.00, $2,000.00 and $2,000.00 respectively for failing to: (1) provide written notice of petitioner's hours and/or fringe benefits policy; (2) keep and/or furnish a written commission sales agreement signed by both the employer and the commissioned sales person; and (3) keep and/or furnish true and accurate payroll records, for a total amount due of $5,000.00.

The *pro se* petition challenged the imposition of personal liability; alleged that that petitioner was unable to compute commissions because computers were turned off for non-payment in January 2010 and as a result, the claims were not based on actual sales; that because the company was unable to purchase parts, service and parts sales were "diminished down to zero; and that:

> "employees were notified in December that the Company was in dire economic shape and unable to pay December's commissions. However, we had taken a deposit on the sale of the business, and in the purchase price would be whatever we owed in commissions and vacation pay."

On March 11, 2013, petitioner's counsel filed an amended petition that additionally alleged that a collective bargaining agreement (CBA) with Local 210, Warehouse and Production Employees Union, AFL-CIO (Local 210) governed the terms of employment; that the employees voted to decertify the union on January 8, 2010 resulting in the employees waiving their right to commissions after that date; that after the decertification, Caruso told employees that they would continue to receive their base salary, but that the company could no longer pay commissions; that in February 2010, Castoro, Strough and Tomasson were each paid $800 to cover commissions owed in December and January; and that the claims were inflated because Country Imported made few sales during this time; and requested that the Board vacate the Orders in their entirety or, in the alternative, modify them to accurately reflect commissions owed, if any, and abate all penalties. A July 8, 2013 second amended petition included a copy of Caruso's unaudited NYS tax liabilities based on amounts he reported to state tax authorities, showing a diminution in overall sales. Caruso alleged that sales on which commissions were based were diminished by a similar percentage and demonstrated that the claims were inflated. Caruso also averred that the foreclosure sale resulted in the surrender of all physical assets, including records, to the new owner, making it impossible to comply with the Labor Law's record keeping requirements, and when documents were subpoenaed for the hearing, the new owner claimed to have no knowledge of any such records.

Respondent filed an answer to the pro se petition on May 24, 2011, an answer to the amended petition on May 24, 2013, and denied the allegations of the second amended petition during the August 1, 2013 hearing.

Upon notice to the parties a hearing was held on August 1, 2013, in Hicksville, New York, before Jean Grumet, Esq., then Member of the Board and the designated hearing officer in this matter. Each party was afforded a full opportunity to present documentary evidence, to examine and cross-examine witnesses, make statements relevant to the issues, and make closing arguments. Post-hearing briefs were filed by Petitioner and Respondent on September 24 and September 26, respectively, and Petitioner filed a reply brief on November 8, 2013.

MOTION TO DISMISS

At the conclusion of petitioner's case-in-chief, respondent moved to dismiss the petition on the ground that petitioner failed to establish a prima facie case or meet the burden of proof. The hearing officer reserved judgment on the motion and the respondent proceeded to present his case. We deny the motion because the petitioner raised issues of fact at the hearing, which the Board must resolve in determining whether to affirm, modify or revoke the orders.

SUMMARY OF EVIDENCE

Testimony of Petitioner Michael Caruso and Documents from the Country Imported Bankruptcy Proceeding

Caruso was vice president and general manager of Country Imported, a Southampton, New York auto dealership franchised by BMW North America, Inc. (BMW). Caruso and an uncle each owned 25% and his father owned the other half. Capital One provided Country Imported with financing for the dealership and its mortgage. In the beginning of 2009, Capital One revoked Country Imported's revolving line of credit (also known as a "floor plan") and informed Caruso that they would no longer allow deliveries of new or used cars without the bank's prior approval of such deliveries. This violated BMW's franchise agreement, which required an unrestricted line of credit. Caruso testified that as 2009 progressed without credit, "we couldn't have inventory...to the point where we weren't getting any more cars from BMW in somewhere around, I believe, October or November of 2009." However, according to a June 1, 2010 "Statement of Debtor in Support of the Motion for Bankruptcy," which petitioner entered into the record at the hearing, Capital One ceased financing Country Imported's purchase of vehicles in June 2008, and in a letter dated September 16, 2009, BMW provided notice to the petitioner of its intent to terminate the franchise.

On November 3, 2009, Country Imported reached an asset purchase agreement (APA) with Madison Acquisition Group (Madison) a company owned by Jon Sobel, an investment banker, who, according to Caruso, "wanted to know every aspect of the dealership" including "pay plans to every employee, our benefit packages, the expenses.... [H]undreds of e-mails were going back and forth." A condition of the APA was that Caruso remain as general manager because BMW required an experienced owner operator and would not approve Sobel who had no previous auto industry experience. Another provision of the APA, according to Caruso, was "to stay open and maintain standards, which means all the employees that I had." Caruso expected it could take 90 days for BMW to approve the APA.

In December 2009, Country Imported's computers were turned off because the dealership had not paid its bill, and thereafter, Jennifer Rogers, the controller, maintained sales and payroll records by hand. By February 2010, Caruso could not make payroll, and a bankruptcy lawyer confirmed that the APA required Caruso to retain all of the employees and maintain standards. Sobel refused to provide additional financing on terms Caruso could meet, so Caruso cancelled the APA, borrowed money needed to meet payroll and entered into a different APA with a group that owned other dealerships. Sobel "sued me and the other party" alleging interference with contract. BMW notified Caruso that it would "pull my franchise." On March 17, 2010, the date this was to happen, Caruso had Country Imported file a bankruptcy petition in an effort to protect the franchise.

While the bankruptcy proceeding was pending, an entity owned by Sobel became "debtor in possession" and Caruso signed personal notes to obtain Sobel's financing for dealership expenses including payroll, payroll taxes, and electric and insurance bills. Jennifer Rogers, Country Imported's controller, continued keeping records and gave Caruso necessary records to forward to Sobel by fax or e-mail. After the other potential purchaser withdrew, Sobel compelled Caruso to sell him Country Imported's assets, and the bankruptcy proceeding was dismissed. The Settlement Agreement transferred Country Imported's assets to Sobel's new dealership, BMW of Southampton, for an amount from which previous loans to fund payroll and other operating expenses were deducted, and stated that "Country Imported shall discharge all of its liabilities and obligations that exist as of the Dealerships Closing Date." Caruso's employment agreement with Sobel was terminated.

On June 10, 2010, Caruso was told to leave the building, while the new dealership retained records, tools, equipment and other assets. Jennifer Rogers became controller of BMW of Southampton, and Country Imported's sales and payroll records are still in her computer at her office. Caruso continues to have access to the emails he sent or received from Sobel during this period on his AOL account, but lost access to any records maintained at the dealership when he was told to leave the premises.

As evidence that sales had diminished and "business was nowhere near anything of previous months," Caruso entered into evidence unaudited New York State tax records based on returns he filed indicating that Country Imported's tax liabilities for the quarters ending, respectively, 5/31/09, 8/31/09, 11/30/09 and 2/28/10 were $557,078, $430,172; $125,044 and $43,357. Caruso testified that these numbers were derived from records of "new car sales, used car sales, taxable service events and parts sales," all of which were automatically logged in the Country Imported computer system when invoices were generated or, were hand-recorded by controller Jennifer Rogers after the computers were turned off in December 2009. Caruso testified that there is no way to separate out taxes on parts and services and on car sales, but the latter were larger: tax is on a percentage basis and a "service bill can be one hundred dollars" while "[a] car can be twenty thousand."

Caruso testified that the four claimants' compensation was governed by a CBA with Local 210. Service advisors Braun and Strough were "[c]ompletely covered" by the CBA. While Caruso directly negotiated wages with parts manager Castoro and service shop foreman Thomasson, managers received benefits as stated in the CBA, "which basically was our handbook." Caruso entered into evidence a CBA for the term November 1, 2005 to October 31, 2008 (which he obtained from Local 210 in response to a subpoena), stating that employees are entitled to paid vacation and sick or personal days. The section of the CBA entitled "Pay Program," which covered service writers and parts counter personnel working on commission reads, in its entirety, "No increase at this time will reopen for wages June 1st 2006." Caruso stated that this CBA, might not be complete. Asked what commission rates were in December 2009, he testified: "I have no idea." Braun and Strough were paid "a salary and a piece – and I don't remember the percentages – of what [they] personally wrote, the customers [they] handled." Castoro had "a base salary and then there was a percentage of – I can't remember if it was profit or sales from the parts department. It's been so long I don't remember the percentage." Tomasson "was part of the management team" with directly negotiated compensation; petitioner did not state what that was.

Caruso informed workers of the November 2009 signing of the APA immediately because with business bad, he "wanted to let them know that we had a future." In early January 2010, Local 210 notified Caruso that a majority of employees chose not to be

represented by the union any longer and that Local 210 was disclaiming interest. Around the same time, Caruso met with employees including all claimants with the possible exception of Braun, and told them Country Imported had "great difficulty in cash flow." According to Caruso, he told the workers that the APA required him to stay open, which he could do either "with the personnel I have or I can just stand there myself with another person. I told them all I could guarantee to them is the base pay, as long as I can pay you, and that there was a future, and that if they wanted to stay, they were more than welcome. But I would understand if they wanted to leave." Although he had no records, Caruso testified that Country Imported's service and parts business as well as its sales were very low in the winter of 2009-2010: "I was there every day and there was just barely anybody coming in." Caruso further testified that some of the workers were working part time during the relevant period.

Testimony of Claimant Joseph Braun

Braun was a Country Imported service writer from June 17, 2009 to January 19, 2010, paid $700 per week plus 2.5% commission on gross profit on the services he sold. Since Country Imported's computer program, which calculated and printed out commissions had been turned off, Braun based his claim for unpaid commissions for December 2009 on his average monthly commissions for the months June through November 2009. Braun testified that while month-to-month figures fluctuated, the parts and service department was busy throughout his employment. According to his claim, when Braun requested his December commission from petitioner and Jennifer Rogers on January 19, 2010, Caruso "stated there were no funds available to pay December 2009 commissions. He would pay them when he could."

Testimony of Claimant David Strough

Strough began work as a Country Imported service writer in 1995. Immediately prior to the relevant period, he was paid $800 per week plus a 3% commission on gross profit on the parts and labor for the sales invoices he wrote. There was no computer printout to show earned commissions during the relevant period, so Strough based his claim for unpaid commissions on the commissions he earned during the same period for the prior year because business in the winter of 2009-10 was "about the same as it normally was for that time of year." Strough also filed a claim for unused sick, personal and vacation time, which he testified was paid out at the end of each calendar year.

In 2009, Strough became aware that the dealership was in financial trouble because employees lost their health insurance when Country Imported failed to pay insurance premiums. Most of the information about the company's financial status came from Jennifer Rodgers, the controller, who told employees that accumulated sick days from 2009 would no longer be carried over to 2010. There was no specific conversation about vacation pay. Neither Caruso nor anyone else stated in January 2010 that commissions would no longer be paid and if he wished to stay on, he would only earn base pay. According to Strough: "No one ever told me that my pay plan or compensation would change in any way, other than the inability to pay it currently when it was due, that we would, you know, figure it all out at the end...We were told essentially that anything that was due as far as outstanding commissions or compensation would be settled upon sale of the dealership," Strough testified that each commissioned salesperson received an $800.00 check on February 19, 2010 as partial payment for December and January's commissions with a handwritten notation in Jennifer Rodgers' handwriting stating "partial pymt of commissions owed from Dec & Jan."

Testimony of Claimant Maron Tomasson

Thomasson, who began working for Country Imported in 2000, was the service shop foreman. He was paid $20 per hour or $800 per week plus a commission on sales of repairs of Minis and BMWs, which was computed by Rogers: "Jen would actually come up with that figure." He guessed, "one was like 1.5% other was 2.35%." but he was "not very sure at what point she would bring it down." He testified that commissioned employees did not receive sales and commission information after the cessation of computerized record-keeping, and he filed his claim for unpaid commissions based on an earlier period because the level of service-shop business was "pretty much the same" as the previous year. Tomasson testified that the only way to know what commissions were due to employees during January through March of 2010 would be through the controller, Jennifer Rogers, who computed employee commissions. In February 2010, Rodgers provided each commissioned employee with a check for $800.00 and wrote on the check "partial pyment of commissions owed from Dec & Jan." The $13,329.50 Thomason claimed was net of that $800 payment.

Tomasson attended a meeting at the beginning of 2010 at which Caruso stated he was in discussions to sell the dealership subject to BMW approval and that the dealership remaining "a functioning franchise.... So... if we stay on and help him, we would be paid at the final of the sale." Tomasson would not have continued to work just for base salary since "I could double my base salary at any other location across Long Island." Tomasson was told commissions due would be paid on sale of the dealership. Service work continued and BMW shipped parts through the majority of March 2010. Although Tomasson had known Country Imported was in serious financial difficulty for two years, he was surprised when the bankruptcy petition was filed because service work kept coming in and he knew negotiations with purchasers were going on. Caruso told Tomasson that the bankruptcy was just posturing to keep the creditors at bay.

Claim of James Castoro

The petitioner entered James Castoro's March 6, 2010 sworn claim into evidence. It stated that Castoro was Country Imported's parts manager, hired in 1994, was paid $1,100 per week plus 3% commission on gross profit from parts sales, and was owed $5,643.00 in unpaid commissions earned beginning December 1, 2009. An attachment to the claim listed gross profits on parts sales for December 2009, January 2010 and February 2010, and "special parts returns to BMW NA" for "Feb-May 2009." The figures listed were $56,988 for December 2009, $53,280 for January 2010, $57,534 for February 2010 and $51,000 for February-May 2009. Another attachment was a month-by-month print-out of gross sales of parts from January 2002 through July 2009. The $5,643 claimed was 3% of these four figures, less $800 which the claim stated was paid February 19, 2010 as "partial pymt of commissions owed from Dec & Jan." Castoro's claim stated that when he requested commissions on February 20, 2010, Caruso responded: "I do not have the money yet."

Testimony of Labor Standards Investigator Armando Gonzalez

Gonzalez was not the investigator in this matter, but has reviewed the investigative file. According to documents maintained in the file, a letter dated April 16, 2010 indicates that DOL advised Country Imported of its investigation concerning three of the four Claimants (all but Braun), and requested "any payroll record, policy, contract, etc. to substantiate your position" if Country Imported disagreed with the claims. On January 27, 2011 the DOL wrote to petitioner advising him that it was pursuing the matter, that he was

required to submit documentary evidence, and unless DOL received payment "or conclusive documentary evidence that the claims are invalid within 10 days" an order to comply would issue. The letter also advised Caruso of his personal liability.

A DOL "Background Information – Imposition of Civil Penalty" form dated January 27, 2011 states that the employer failed to produce records, notify employees in writing of its policy on fringe benefits, have and furnish to the Commissioner a signed commission agreement with commissioned employees, and pay Strough and Thomason fringe benefits due them, and that the employer "provided no substantive responses... and no evidence that the claims were invalid other than responding with evidence indicating that his company had filed for bankruptcy, that at his request the bankruptcy was dismissed... but that the company had no assets." Taking into account the employer's size, good faith, and other factors, the original investigator recommended a 150% penalty. Gonzalez did not testify as to how the DOL arrived at the 150% civil penalty.

STANDARD OF REVIEW AND BURDEN OF PROOF

When a petition is filed, the Board reviews whether an order issued by the Commissioner is "valid and reasonable" (Labor Law § 101[1]). A petition must state "in what respects [the order on review] is claimed to be invalid or unreasonable," and any objections not raised shall be deemed waived (Labor Law § 101[2]). The Labor Law provides that an order of the Commissioner 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]). Pursuant to Board Rules of Procedure and Practice § 65.30 (12 NYCRR § 65.30): "The burden of proof of every allegation in a proceeding shall be upon the person asserting it" (State Administrative Procedure Act § 306; *Angello v. Nat'l Fin. Corp.*, 1 AD3d 850, 854 [3d Dep't 2003]). Therefore, the burden is on the petitioner to prove by a preponderance of the evidence that the orders are invalid or unreasonable.

Because the hearing before the Board is de novo (Board Rule 66.1[c]), we must consider the testimony and evidence received at the hearing in making our determination to affirm, revoke or modify the Orders (*Matter of Henry Foods, Inc.*, Board Docket No. PR 10-060 [March 20, 2013]).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Board having given due consideration to the pleadings, hearing testimony, arguments and documentary evidence, makes the following findings of fact and conclusions of law pursuant to Board Rule 65.39 (12 NYCRR § 65.39). We find that the petitioner failed to meet his burden of proving that claimants were paid all commissions and wage supplements. We affirm the wage order and supplemental wage order as modified below, and affirm the penalty order.

The Wage Order Is Affirmed as Modified

Caruso was an Employer

"Employer" as used in Articles 6 of the Labor Law means "any person, corporation, limited liability company, or association employing any individual in any occupation, industry, trade, business or service." (Labor Law § 190 [3]). "'Employed' means permitted or suffered to work" (Labor Law § 2 [7]).

The federal Fair Labor Standards Act (FLSA), like the New York Labor Law, defines "employ" to include "suffer or permit to work" (29 USC § 230 [g]). It is well settled that "the test for determining whether an entity or a person is an employer under the New York Labor Law is the same test ... for analyzing employer status under the Fair Labor Standards Act" (*Chu Chung v The New Silver Palace Rest, Inc.*, 272 FSupp 2d 314, 319 n.6 [SDNY 2003]).

In *Herman v RSR Security Services, Ltd.*, 172 F3d 132, 139 (2d Cir 1999), the Second Circuit articulated the test for determining employer status:

> " ... the overarching concern is whether the alleged employer possessed the power to control the workers in question ... with an eye to the 'economic reality' presented by the facts of each case ... Under the 'economic reality' test, the relevant factors include whether the alleged employer (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records."

When applying this test "no one of the four factors standing alone is dispositive. Instead, the 'economic reality' test encompasses the totality of circumstances, no one of which is exclusive" (Id). The Board has repeatedly found individuals who possess the requisite control to be employers (*see, e.g., Matter of Steven Sacher*, PR 11-151 [April 10, 2014]; *Matter of David Fenske T/A AMP Tech and Design, Inc.*, PR 07-031 [Dec. 14, 2011]; *Matter of Robert H. Minkel and Millwork Distributors, Inc.*, PR 08-158 [Jan. 27, 2010]); *Matter of Franbilt, Inc.*, PR 07-109 [July 30, 2008]).

It is undisputed that Caruso was an owner, officer, and the general manager of Country Imported. He hired, supervised and fired employees, controlled their schedules, was responsible for payroll, determined the rate and method of payment, including commissions and vacation pay, and maintained employment records. These facts more than suffice to establish Caruso's employer status.

An Employer's Obligation to Maintain Records and DOL's Calculation of Wages in the Absence of Employer Records

The 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 12 NYCRR 142-2.6.) Employers are required to keep such records open to inspection by the Commissioner or a designated representative.

As the Appellate Division stated in *Matter of Mid-Hudson Pam Corp v Hartnett*, 156 AD2d 818, 821 (3rd Dept 1989), "[w]hen an employer fails to keep accurate records as

required by statute, the Commissioner is permitted to calculate back wages due to employees by using the best available evidence and to shift the burden of negating the reasonableness of the Commissioner's calculations to the employer" (*see* Labor Law § 196-a; *Angello v National Finance Corp.*, 1AD3d 850 [3d Dept 2003]).

In *Anderson v Mt. Clemens Pottery Co.*, 328 US 680, 687-88 (1949), superseded on other grounds by statute, the U.S. Supreme Court opined that a court may award damages to an employee, "even though the result be only approximate. . . [and] [t]he 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" (Id. at 688-89). New York courts, following *Mt. Clemens Pottery Co.* have consistently held that when incomplete or unreliable wage and hour records are available, DOL is "entitle[d] to make just and reasonable inferences and use other evidence to establish the amount of underpayments, even though the results may be approximate" (*Hy-Tech Coatings v New York State Dept. of Labor*, 226 AD2d 378, [1st Dept 1996], citing *Mid-Hudson Pam Corp. v Hartnett*, 156 AD2d 818, 821 [3d Dept 1989]; see also *Matter of Bae v Industrial Board of Appeals*, 104 AD3d 571 [1st Dept 2013]; *Matter of Ramirez v Commissioner of Labor*, 110 AD3d 901 [2d Dept 2013]). Wages may be found due even if based on an estimate of hours (*Reich v Southern New England Telecommunications Corp.*, 121 F.3d 58, 70 [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"]).

We give no credence to Caruso's averments that he was unable to compute commissions because the computers were turned off in January 2010, or the foreclosure sale resulted in the surrender of all physical assets to the new owner, making it impossible to comply with record-keeping requirements. Caruso testified that he still retains on his AOL account the "hundreds" of e-mails he sent to Sobel regarding "every aspect of our dealership" including "pay plans to every employee, our benefit packages, the expenses."[1] Petitioner testified that after the computers were turned off in January 2010, Country Imported's controller, Jennifer Rodgers maintained sales and payroll records by hand, and that she provided Caruso with necessary records to FAX or e-mail to Sobel. Caruso testified that he lost control of the sales and payroll records when he was ordered to leave the premises June 10, 2010. However, he had access to all the information maintained in his own files as well as in controller Jennifer Rogers computer when the DOL sent its April 16, 2010 letter notifying Country Imported of the claims and requesting copies of payroll records, policies or contracts. Caruso offered no evidence to show or suggest it would have been impossible or even difficult to retain or copy records relevant to the claims prior to the time he left the premises.

Although petitioner testified that all of these records are still in Jennifer Rodgers computer at the new dealership, BMW of the Hamptons, where she continues to act as controller, Caruso did not subpoena her as a witness to provide records or to provide testimony to corroborate his testimony that employees were notified that they would no longer receive commissions. Strough and Tomasson credibly testified that Rogers calculated their commissions, that they were never told that they would no longer earn commissions, and that a notation in her handwriting appeared on each commission salesperson's February 19, 2010 wage statement stating that $800.00 was partial payment for December and January

[1] Petitioner's Post-Trial Brief Reply Brief argues that "the various emails and agreements in Mr. Caruso's possession are silent as to the terms of Claimant's employment." Nothing in the record supports this characterization.

commissions. While Caruso's attorney asserted that Madison Acquisitions was subpoenaed and notified petitioner that "we don"t have the records any more" Caruso provided no testimony or documentary evidence that the subpoena was even served or that Madison Acquisitions responded.

In analogous situations where a financing factor seized an employer's assets (*Matter of David Schlockman and/or Mitchell Zimmerman and/or D.A.M Clothing, Inc.*, Docket No. PR 07-047 [June 25, 2008]) and where an employer was put into foreclosure by its financier (*Matter of Mark Hochlerin*, Docket No. PR 09-055 [March 25, 2009]), the Board found that the employer is not absolved of its responsibility to maintain records. The Appellate Division, in *Angello v. National Finance Corp.*, 1 AD3d at 854, stated that if the employer does not provide the records required under the Labor Law, "regardless of the reason therefor", the presumption favoring the Commissioner's determination based on the employees' complaints applies (*see Andrew Andruszko and Peter Kay Auto Sales*, PR 10-189 [October 2, 2013]). We, likewise, find that Caruso has failed to meet his burden of proof.

Commissions due to Claimants

The claimants were paid on a commission basis, and a commission is considered a wage under § 190 (1) of the Labor Law (*Pachter v Bernard Hodes Group, Inc.*, 10 NY3d 609, 617-18 [2008]). Labor Law § 191 (1) (c) in effect during the relevant period, required that commission salespersons be paid "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" unless they are substantial, in which case they may be paid less frequently "but in no event later than the time provided in the employment agreement or compensation plan."

> "The agreed terms of employment shall be reduced to writing, signed by both the employer and the commission salesperson, kept on file by the employer for a period not less than three years and made available to the commissioner upon request.... 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."

Commissions are, therefore, determined based on the agreement of the parties. In this case, the parties have testified differently concerning the terms of the agreement with regard to the commission. Caruso testified that he directly negotiated wages with Tomasson and Castoro, but that they received benefits as stated in the CBA. Braun and Strough, on the other hand, were "completely covered" by the CBA. Caruso did not provide a copy of the written commission agreements for any of the four claimants. The section of the CBA which covered service writers and parts counter personnel working on commission was silent as to the agreed-upon terms, and Caruso admitted that the CBA, which he had subpoenaed from the Union, was not complete. He could not remember any of the claimants' base salaries or their commission rates. Strough, Tomasson and Braun's testimony, and Castoro's sworn claim, on the other hand, were specific and credible as to their base salary and commission rate. Pursuant to Labor Law § 191 (1) (c), since Caruso cannot provide a written contract provision, there is a presumption that the terms presented by the claimants are the agreed upon terms.

We find that it was reasonable and valid for the Commissioner to find that the four claimants were owed unpaid commissions. Petitioner's contrary claims – that claimants chose to continue working after being told commissions would no longer be paid, that the amounts found due by the Commissioner were inflated, that claimants' awareness of Country Imported's financial straits means they waived their entitlement to earned wages, that claimants are ungrateful since petitioner did them a favor by continuing their employment, and/or that the Union's departure somehow excused payment of commissions – must be rejected.

There is no credible evidence that claimants were ever told commissions would not be paid. Although petitioner testified that he met with employees and told them that he could only guarantee the base pay, and could no longer pay commissions, we credit Strough and Thomasson's testimony that what he said was not that commissions would no longer be paid but that Caruso could not pay them on a current basis, lacking the funds to do so, and would defer payment until he sold the business. As Strough testified, workers were told "that anything that was due as far as outstanding commissions or compensation would be settled upon sale of the dealership." Each of the claimants stated in testimony or in his claim form that petitioner refused a request for immediate payment of commissions because he lacked the money but stated he would pay later; Caruso did not assert that commissions would no longer be paid. Tomasson testified that had Caruso notified him that he would no longer be paid commissions, he would not have continued to work just for base salary since he could "double my base salary at any other location across Long Island."

Not only was such evidence credible, it is consistent with petitioner's own original assertion, in his March 3, 2011 *pro se* petition, that "we had taken a deposit on the sale of the business, and in the purchase price would be whatever we owed," as well as his testimony that he told employees in January 2010 that there was "difficulty in cash flow." It is also consistent with Country Imported's issuance of $800 checks on February 19, 2010 to the three claimants who remained employed, in "partial pymt of commissions owed from Dec & Jan." Labor Law § 191 (1) (c) required that any alleged agreement to discontinue commissions "be reduced to writing, signed by both the employer and the commission salesperson" and there is no evidence or contention that petitioner complied.

We do not credit Caruso's testimony that he told employees in January 2010 that employees would no longer receive commissions and that employees were free to leave because he could stay open "either with the personnel I have or I can just stand there myself with another person." Caruso's testimony was undermined by his own contradictory testimony that the APA required him to "maintain standards, which means all the employees I had." Caruso also argued that claimants were aware of Country Imported's financial straits and allowing them to continue working preserved their jobs. While he implied he kept the work force chiefly to help them, selling the dealership pursuant to the APA, including maintaining standards, was necessary in order to sell the dealership and continue Caruso's own employment as general manager under the new ownership. That claimants knew Country Imported was in financial straits does not mean they were not entitled to their wages, including earned commissions. In *Matter of Jason Ellis and Cakes by Jay, Inc.*, PR 11-245 (January 30, 2012), the Board stated:

> "we note that a lack of adequate funds does not excuse a failure to comply with the law, nor does surrendering the premises of a store back to a landlord or liquidating assets and closing bank accounts relieve an employer from its obligations under the

> Labor Law...We find as a matter of law that objecting to the orders on the grounds that the premises of the store were surrendered back to the landlord, all assets were liquidated, and bank accounts closed, does not state a claim that the orders under review are unreasonable or invalid."

Legally, even if evidence supported the idea that petitioner's main motive was to help employees, the Labor Law does not permit employers to "help" workers by keeping them on without payment.

To the extent that the petitioner alleges that he should be relieved from liability to pay the wages because the claimants were aware that the petitioner's financial condition was such that if they continued to work they might not get paid, or that claimants waived their right to commissions when they decertified the Union, we find the respondent's determination that the petitioner is liable is reasonable. Labor Law § 191 (1) (c) requires employers to pay commission salespersons 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, unless the commissions are substantial, in which case they may be paid less frequently "but in no event later than the time provided in the employment agreement or compensation plan." Labor Law § 191 (2) further requires that "no employee shall be required as a condition of employment to accept wages at periods other than as provided in this section." Additionally, "it is settled law that an employee may not waive the protection of the Labor Laws" (*Padilla v Manlapaz*, 643 FSupp2d 302, 322 [EDNY 2004] [internal citations omitted]; *Matter of Mark Barasch and Barasch Sound Studios LLC*, PR 10-333 [November 20, 2013] page 4; *Matter of Steven B. Sacher, Travco, Inc., and Sacher & Co., CPA, PC*, PR 11-151 [April 10, 2014] page 7).

Petitioner's allegation that the amount of commissions found due by the Commissioner was invalid or unreasonable is likewise insubstantial. Petitioner's testimony to a sharp decline in business and the summary of quarterly tax assessments he offered in evidence related not to the service and parts sales on which claimants were owed commissions, but to all sales, including new cars, used cars, service and parts. According to documents petitioner entered into the record, no sales of new cars were generated after June 2008, although Caruso testified that this did not occur until November 2009. Far from asserting, as Caruso did at the hearing without any evidentiary foundation, that there were hardly any sales of services or parts after November 2009, Rogers, Country Imported's controller, made "partial pyment of commissions owed from Dec & Jan." We credit Strough, Tomasson and Braun's testimony that the sale of service and parts remained the same as in similar years. If anything, since the dealership was unable to sell new cars, it appears that the bulk of Country Imported's sales were generated through the sale of parts and service.

The petitioner failed to meet his burden of proof on the amount owed to the claimants for commissions. Since there was no written commission agreement between petitioner and claimants, and failing to meet the burden to prove that the claimants were either not entitled to the commissions or that the wages due calculation was in error, we affirm the Commissioner's wage order, but as discussed below, we modify the civil penalty in the wage order.

The Order assesses civil penalties in the amount of 150% of the wages ordered to be paid. Labor Law § 218 (1) provides, in relevant part:

> "In no case shall the order direct payment of an amount less than the total wages, benefits or wage supplements found by the commissioner to be due, plus the appropriate civil penalty....In assessing the amount of the penalty, the commissioner shall give due consideration to the size of the employer's business, the good faith of the employer, the gravity of the violation, the history of previous violations and, in the case of wages, benefits or supplements violations, the failure to comply with recordkeeping or other non-wage requirements."

The investigator who assessed the penalty did not testify, and LSI Gonzalez provided no testimony to explain the factors considered in assessing the 150% penalty. The Background Information- Imposition of Civil Penalty form indicates that the investigator based the determination of the 150% penalty on Caruso's failure to produce records, failure to have and furnish to the Commissioner a signed commission agreement with commissioned employees, notify employees in writing of the policy on fringe benefits, and pay Strough and Tomasson fringe benefits due them, and that the employer "provided no substantive responses... and no evidence that the claims were invalid other than responding with evidence indicating that his company had filed for bankruptcy, then that at his request the bankruptcy was dismissed... but that the company had no assets." Because Gonzalez did not testify as to why a 150% penalty was imposed, we find a 100% penalty to be reasonable and modify the order. Under these circumstances, the Board finds that the assessment of a 150% civil penalty is not reasonable and we modify the penalty to 100% of the wages due (*Cf. National Credit Systems, Inc.*, PR 08-117 [July 28, 2010]).

The Wage Supplements Order Is Affirmed

Strough and Tomasson claim that they were not paid for sick, personal and vacation days. At the hearing, Caruso, for the first time claimed that some of the employees worked part time during the relevant period. He failed to name the specific employees that he claimed were part time, and provided no attendance records to corroborate this allegation. We credit the claimants consistent and credible testimony that they worked the same hours as they had in the prior year. Moreover, Caruso did not testify regarding Country Imported's fringe benefit policy, but he entered into evidence the CBA provided to him by the Union pursuant to subpoena. The CBA indicates that: "Vacation pay for commissioned personnel (except parts personnel) shall be based on 100% of last year's average earnings." The CBA also indicates that "Service writers and parts counter personnel 100% of salary for sick and personal days." Labor Law § 195 (5) requires that every employer shall notify his employees in writing or by publicly posting the employer's policy on sick pay, vacation, personal leave, holidays, and hours. Any employer who is party to an agreement to pay or provide benefits or wage supplements and who fails to pay the amount owed violates Labor Law § 198-c.

We find, for the reasons stated above, that DOL's wage supplements order was a reasonable approximation of the amounts owed to Strough and Thomasson, and because petitioner did not furnish payroll or sales records, it was reasonable for the Commissioner to rely on the approximation listed in the claims to calculate vacation, sick pay and personal leave, even if possibly over-inclusive. To fault the order for its possible imprecision, even when caused by petitioner's failure to keep records, would reward the employer for its unlawful conduct.

The Penalty Order

Caruso did not maintain payroll records or a written commission sales agreement, nor did he meet his burden of proving that employees were notified in writing of the fringe benefit policy. We find that the computations and calculations the Commissioner made in imposing the penalty order were valid and reasonable in all respects.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT

1. The wage order is modified consistent with this decision; and

2. The penalty order is affirmed; and

3. The petition for review be, and the same hereby is, granted in part and denied in part.

Vilda Vera Mayuga, Chairperson

J. Christopher Meagher, Member

LaMarr J. Jackson, Member

Michael A. Arcuri, Member

Absent
Frances P. Abriola, Member

Dated and signed in the Office
of the Industrial Board of Appeals
at Albany, New York, on
August 7, 2014.