

STATE OF NEW YORK  
INDUSTRIAL BOARD OF APPEALS

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In the Matter of the Petition of: :

GABRIEL RABINOVICH AND OLEG :  
YEMYASHEV AND G&L AMBULETTE CO., INC., :

Petitioners, :

DOCKET NO. PR 14-151

To Review Under Section 101 of the Labor Law: :  
An Order to Comply with Article 19 of the Labor Law, :  
Two Orders To Comply with Article 6 of the Labor :  
Law, and An Order Under Article 19 of the Labor Law, :  
all dated June 23, 2014, :

RESOLUTION OF DECISION

- against - :

THE COMMISSIONER OF LABOR, :

Respondent. :  
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**APPEARANCES**

Alan Feinsilber, C.P.A., P.C., for petitioners.

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

**WITNESSES**

Elizabeth Cintron, Oleg Yemyashev, and Alan Feinsilber, for petitioners.

Lawrence Lide, Angela Lucas, Daquan St. Julian, Bobby Collins, Jason Vanager, Harold Allen, Frank A. McLaurin, Labor Standards Investigator Ruth Gonzalez Cruz, and Supervising Labor Standards Investigator Mary Coleman, for respondent.

**WHEREAS:**

On July 28, 2014, petitioners Oleg Yemyashev, Gabriel Rabinovich<sup>1</sup> and G&L Ambulette Co., Inc. (G&L) filed a petition for review of four orders that the Commissioner of Labor (respondent, Commissioner or DOL) issued against them on June 23, 2014.

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<sup>1</sup> The petition states that petitioner Rabinovich is deceased. At hearing, petitioners' representative stated that Rabinovich passed away in October 2013.

The order to comply with Article 19 of the Labor Law (minimum wage order) finds total wages of \$88,565.00 owed to Harold Allen, Dwayne Bowens, Bobby Collins, Lawrence Lide, Angela Lucas, Frank McLaurin, Rahsaan Smith, Da Quan St. Julian, and Jason Vanager (together, claimants) for periods between February 6, 2006 and June 8, 2013, and directs payment of those wages, interest continuing at 16% calculated as \$52,750.72 through the date of the order, 25% liquidated damages of \$22,141.25 and a civil penalty of \$88,565.00, for a total due as of the date of the order of \$252,021.97.

The first order to comply with Article 6 of the Labor Law (unpaid wages order) finds total wages of \$780.00 owed to claimants Bowens and McLaurin for periods from March 18, 2012 to June 8, 2013, and directs payment of those wages, interest continuing at 16% calculated as \$130.51 through the date of the order, 25% liquidated damages of \$195.00 and a civil penalty of \$780.00, for a total due as of the date of the order of \$1,885.51.

The second order to comply with Article 6 (supplemental wage order) finds vacation pay of \$400.00 owed to claimant Allen for the period January 1, 2009 to November 30, 2011, and directs payment of those supplemental wages, interest continuing at 16% calculated as \$164.12 through the date of the order, 25% liquidated damages of \$100.00 and a civil penalty of \$400.00, for a total due as of the date of the order of \$1,064.12. The supplemental wage order is affirmed, because petitioners withdrew their challenge to it at hearing.

The order under Article 19 (penalty order) finds that petitioners violated Labor Law § 661 and 12 NYCRR 142-2.6 by failing to keep and/or furnish true and accurate payroll records for each employee for the period January 7, 2008 through June 11, 2013, and directs payment of a civil penalty in the amount of \$9,000.00.

The petition alleged that (1) the DOL's calculations in the minimum wage order were erroneous and the correct amount of unpaid wages was \$16,674.00; (2) Lide was an administrative employee and exempt from overtime pay; (3) Lucas was never an employee; and (4) petitioners should be relieved from the penalty order, wage order and supplemental wage orders. Petitioners later amended the petition to (1) admit that Lucas was an employee, but that her dates of employment and amount owed were different from those in the minimum wage order; and (2) contest the civil penalties and liquidated damages in the minimum wage, wage, and supplemental wage orders. The respondent answered the amended petition.

Upon notice to the parties, hearings were held on December 18, 2014, and February 10 and 11, 2015, in New York, New York before Administrative Law Judge Jean Grumet, Esq., the Board's designated Hearing Officer in this proceeding. Each party was afforded a full opportunity to present documentary evidence, to examine and cross-examine witnesses, and to make statements relevant to the issues. Post-hearing briefs were filed by petitioners and respondent on May 4, 2015.

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## SUMMARY OF EVIDENCE

### Petitioners' Evidence

#### *Testimony of Oleg Yemyashev*

Since May 15, 2006, Oleg Yemyashev has been the sole owner of G&L, a Brooklyn, New York, based ambulette company, which transports patients to and from hospital and other medical appointments Monday through Saturday. Yemyashev is actively involved in G&L's day-to-day operations, hires and fires employees and is responsible for weekly payroll.

When G&L drivers reported to work during the relevant period, they received a schedule listing the employees' stops for the day. This schedule was prepared by dispatcher Lawrence Lide until January 2010, and thereafter by Elizabeth Cintron. Dispatcher Lide arrived at G&L before 6:00 a.m. to schedule the drivers' routes. Lide communicated with clients and drivers, and prepared payroll sheets. Lide also drove on an as-needed basis.

A few G&L employees, including claimant Allen, started work between 4:30 a.m. and 5:00 a.m., driving patients to dialysis centers that open as early as 5:00 a.m. G&L keeps its ambulettes in an attached yard, to which employees are given a key. Claimant Allen clocked out around 3:50 p.m. Lide, later Cintron, opened the G&L office before 6:00 a.m.; a regular shift started at 7:00 a.m.; and evening shift hours were 2:00 or 3:00 p.m. until closing time, which varied from 9:00 p.m. to 10:30 p.m. Because weather and other factors cause the need for non-emergency medical transport to vary, regular shift drivers worked from 7:00 or 7:30 a.m. to after 5:00 p.m. On days that were not busy, they may have left work as early as 2:00 p.m. Dialysis centers, from which patients were taken home, stayed open until 10:00 p.m. Even when the office was closed, last minute work assignments came in after 9:00 or 10:00 p.m. from a company called Logisticare, and required G&L to open earlier the next morning in order to have additional drivers available if needed, and to have time to adjust the drivers' schedules to accommodate the additional assignments.

G&L typically sees 10% to 20% of scheduled appointments canceled, and other appointments, though not as many, are added during the day in their place. G&L's unwritten policy is that cancellations give drivers free time to take a half an hour lunch break. Though breaks occur at various times, everyone was given a break before 2:00 p.m. No record of particular breaks was kept by the company.

The starting wage for most drivers – a category including all claimants except dispatcher Lide and Daquan St. Julian, a helper for wheelchair-bound patients who was paid minimum wage – was either \$10.00 or \$11.00 per hour. Harold Allen and Angela Lucas were paid \$10.00 per hour.

G&L paid employees weekly using a payroll company. Yemyashev calculated and called in G&L employees' gross pay each Wednesday or Thursday. Although petitioners did not provide any records to the DOL during the investigation, Yemyashev produced the following documents at hearing: (1) time cards for about seven months in 2008 for three of the nine claimants (Lucas, Smith and St. Julian); (2) payroll registers for the period December 29, 2007 to December 26, 2009; (3) payroll reports for the periods January 7, 2008 to December 27, 2009, and December 24,

2012 to May 25, 2013; and (4) quarterly income statements for the fourth quarters of 2010, 2011, 2012, and 2013.

Asked why he submitted records only for some periods, Yemyashev stated that some records were destroyed in an April 2010 fire at his office. Records from 2008 and 2009 were not destroyed because they were in the control of his accountant. Asked how an April 2010 fire could have destroyed records for the rest of 2010, 2011 and 2012, none of which were produced at the hearing, Yemyashev testified that he still had those records at his office. He did not bring them to the hearing, which continued the following day.

The payroll registers for the weeks ending December 29, 2007 through December 26, 2009, show each employee's total gross pay, deductions and net pay, but do not include daily or weekly hours. Yemyashev testified that an employee's gross pay was calculated by multiplying the number of work hours contained in weekly payroll sheets by that employee's hourly rate. Hourly rates were not shown in any document in evidence and were not always recorded. Job applications kept in Yemyashev's office, which were not produced to DOL or at hearing, indicated an employee's starting wage. Subsequent employee raises were told to employees orally rather than in writing.

During the relevant period, G&L used two different methods to track employees' daily hours. For a time, employees punched in and out on an office clock, which did not accurately reflect hours worked because breaks were not recorded. Weekly time cards for claimants Lucas, Smith and St. Julian, covering weeks ending from January 5, 2008 to August 16, 2008, include "in" and "out" punches, a clock-generated "daily net" for each workday and clock-generated "accumulated reg" for the whole week, and handwritten indications and sometimes calculations of weekly gross pay. For example, Smith's card for the week ending January 5, 2008 shows, for Monday, an "in" punch of 6:47, an "out" punch of 5:04 and a "daily net" of 9:47 and an "accumulated reg" of 40:17 for four punched-in days (Monday, Wednesday, Thursday and Friday); also, a handwritten notation on the line for Tuesday states "+8." A handwritten notation at the top of the card states: "48.17 x 10 = 481.7 48.17 x \$.50 24.85 \$505." According to the payroll register, Smith's gross pay for that week was \$505.00.

Yemyashev initially testified that employees were paid for hours from punch-in to punch-out: on Monday, December 31, 2007, in the above example, Smith was paid for ten hours 17 minutes. On cross-examination, Yemyashev agreed that the "daily net" of 9:47 reflected that the clock automatically deducted 30 minutes from paid time each day, consistent with his testimony that "we would allocate basically half an hour for break and for lunch and we would deduct it." According to Yemyashev, the "accumulated reg" notation indicated 40 hours 17 minutes of total work time on Monday, Wednesday, Thursday and Friday (two hours having been deducted from the punch times for lunch breaks); "+8" indicated that Smith also worked Tuesday but forgot to punch in; and "48.17 x 10 = 481.7" meant that he "worked 48.17 hours [multiplied] by \$10 an hour." As for "48.17 x \$.50 24.85 \$505," Yemyashev testified that this "must have meant that this person was maybe promised along the way an increase in salary and we gave him another 50 cents per hour . . . which came to 24.85 [actually, \$24.09] and we added 481.70 plus 24.85 to arrive at the \$505."

Lide, later Cintron, prepared weekly payroll sheets that Yemyashev reviewed. Payroll reports in evidence for most weeks ending January 7 through August 16, 2008<sup>2</sup> indicated by a check mark those days when an employee worked, and the employee's total pay for the week, such as "\$536" or "500." According to Yemyashev, a check mark meant "a full day and that full day could have been eight hours, nine hours, six hours, I don't know, but it means that that person got paid for a full day of employment." In addition to or instead of the daily check marks and figures for total weekly pay, a few payroll reports included a notation about particular days (e.g., "3 hours" or "1/2 day") or weekly pay (e.g., "50 hrs" or "\$592-50=542"). Employee attendance reports and week of forms in evidence for most weeks ending August 31, 2008 through December 27, 2009<sup>3</sup> and for weeks ending December 29, 2012 through May 25, 2013, either stated start and end times each day (e.g., "5a 3.5p" or "7A 6P," with "A" or "P" denoting a.m. or p.m.) or included a notation using "F" for full day and "H" for half day (e.g., "F," "F+6" or "H+3"). Yemyashev testified that the figures for hours in the payroll sheets were "round about numbers" lacking minutes – "just flat, 7 to 5, 7 to 6."

On a date Yemyashev did not recall, after the Taxi and Limousine Commission began requiring ambulette companies to have a GPS system in every vehicle, G&L ceased using the punch clock and instead relied on the GPS system to track employees. The system, linked to G&L's computers, tracked the time from when a vehicle's ignition was turned on up to the moment the employee parked the vehicle in G&L's yard thereby completing the work day. G&L could access this information when noting employees' hours in the weekly payroll sheet. GPS records were not printed out, but Yemyashev testified "we have it somewhere in the archives." These GPS records were not provided during the investigation nor were they produced at the hearing.

#### *Testimony of Elizabeth Cintron*

Elizabeth Cintron has worked for G&L since July 2007 in a variety of jobs including call taker, billing, dispatcher, and office manager. Cintron continues to dispatch and handle billing for G&L today; she also hires and fires drivers. She was familiar with Lide's duties because G&L's office is small. According to Cintron, Lide "was always a dispatcher," who spent "97 to 98 percent" of his time dispatching and the other 2 or 3 percent driving. Cintron dispatched when Lide "would at times go out on the road" driving for "maybe an hour or two" to make sure clients were picked up when a driver was running late or didn't come to work. Lide also drove on Saturdays. Lide's functions as a dispatcher were similar to Cintron's.

The dispatcher arrives at 6:00 a.m. to schedule drivers' routes for the day. When Lide was dispatcher, Cintron arrived at work at 6:30 or 6:40 a.m. and found Lide already planning the routes. G&L has about 13 vehicles, each with a driver or two. Drivers start arriving at 6:45 a.m. to begin work at 7:00 a.m. When drivers start the day, the dispatcher gives them a dispatch sheet with clients' names, pick-up and destination addresses and pick-up times. During the day, the dispatcher and drivers communicate by radio, and the dispatcher receives calls from clients who cancel or add on appointments, and from drivers who report on each pickup or drop off, and the dispatcher modifies drivers' schedules accordingly. When the driver calls the dispatcher to report that a patient has been dropped off, Cintron, after checking the dispatch schedule, either tells the driver

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<sup>2</sup> Weeks ending January 14, February 4, May 12, and August 2, 2008 are missing.

<sup>3</sup> Weeks ending September 14 and 21, October 5, and December 14, 2008, and January 11, March 8, and May 31, 2009 are missing.

to take a return (a client ready to be brought back home) or an add-on, to continue to stand by, or to take a break. The schedule that drivers start with in the morning changes: on average, drivers start the day with 10 to 15 scheduled pickups, of which 4 to 6 typically cancel, while 1 to 3 assignments are added as facilities call in jobs. Cancellations are noted on a dispatch sheet, which, with the exception of records lost in the fire, G&L retains.

Harold Allen was a driver who worked five days a week from 4:00 a.m. to 2:00 p.m. He began early in the morning because dialysis patients had to be at their appointments before 6:00 a.m. Allen did not need to pick up an early-morning schedule since his dialysis patients were on a steady schedule. Once he dropped his dialysis patients off, Allen would go to the office for his next assignment or get breakfast, until the office opened at 7:00 a.m. During that hour, he had no responsibility and there was no work for him. Cintron considered this non-work time. The same was true of the other dialysis drivers.

Cintron testified that every employee had time to take a 30 minute break. Drivers whose assignments were canceled, unless immediately assigned another job, were told "to standby, take a break," during which time, the drivers were off duty. After 30 minutes, Cintron would call and give them another pick up or drop off. Cancellations and add-ons could not be predicted, but during the day everyone had a cancellation, at which point they were told they could go ahead and have a break.

*Testimony of Alan Feinsilber, Certified Public Accountant*

Alan Feinsilber is petitioners' certified public accountant. Feinsilber testified that petitioners did not pay their employees time and one half for overtime, and in preparation for the hearing, he sought to calculate the petitioners' overtime underpayment to G&L employees. To do so, he compared the gross wages as stated in the petitioners' payroll register with what he calculated the employee should have been paid, including an overtime premium for work over 40 hours. To obtain the hourly rates, Feinsilber used the DOL's recapitulation sheet prepared by Labor Standards Investigator Bautista. To derive Allen's hourly rate, for example, Feinsilber performed a "reconciliation" of how DOL arrived at \$9,987.50 for 52 and a half hours a week worked. By dividing the gross wage paid to an employee for a week by the hourly rate so derived, Feinsilber was, according to his testimony, "able to back into the hours that employees worked."

Next, Feinsilber deducted 2.5 or 3 hours (depending whether the employee had worked five or six days) from the number of weekly hours he had derived for the employee, to allow for a 30-minute daily paid meal break. Feinsilber then computed what the employee was owed for the resulting number of hours at the derived hourly rate, taking into account that hours over 40 should have been paid at time and a half. According to Feinsilber, the difference between this figure and what was paid – not the higher figure found due by the DOL – actually constituted underpayment.

On cross-examination, Feinsilber acknowledged that there were errors in his calculations. For example, while he deducted 2.5 or 3 hours from his figure for weekly work hours because he believed G&L had paid for 30-minute breaks, both Yemyashev's testimony and the time cards discussed earlier indicate that G&L had in fact already deducted 30 minutes per day from employees' pay. Likewise, Feinsilber's calculation – like that done by G&L when paying employees, according to Yemyashev's testimony – treated 17 minutes as equivalent to .17 hours, so that pay at \$10.00 per hour for 17 minutes would be \$1.70. Since an hour has 60 minutes, such

an approach invariably understated earned pay (for 17 minutes at \$10.00 per hour, \$2.83). As a result, Feinsilber agreed, his calculation was “slightly off for every week for a period of years.” In light of such acknowledged errors as well as its speculative and after-the-fact nature, Feinsilber’s calculations were not accepted as evidence.

### Respondent’s Evidence

#### *Testimony of Harold Allen*

Harold Allen worked as a driver for G&L from 2009 to 2011. He worked from 5:00 a.m. to 2:00 p.m. or 2:30 p.m., six days a week until the end of his employment, when he worked five days per week. He was paid \$10.00 per hour. Allen drove several patients from their homes to dialysis appointments that began at 5:45 a.m.; typically the last patient was dropped off by 6:00 a.m., and he would then have a regular 6:00 a.m. pickup to drive a client to a doctor’s office. Allen received all his scheduled assignments, including assignments to follow the 6:00 a.m. drop-offs, the day before he performed them. On many days Allen had 12 scheduled pickups; only 2 or 3 pickups per week canceled, and not on the same day. Dialysis clients rarely canceled, and if other clients canceled, Allen usually learned of a cancellation only after he arrived at the client’s residence. Allen was not paid time and a half for overtime hours, never received lunch breaks, and he denied that he ever had a 45-minute hiatus between a cancellation and the next pickup.

#### *Testimony of Bobby Collins*

Collins worked for G&L from November 20, 2009 to April 20, 2011, driving elderly, disabled and sick patients to medical facilities. He generally worked from 7:00 a.m. to 3:00 p.m., and sometimes until 5:00 p.m. Collins’ starting wage was \$9.00 per hour, later raised to \$10.00 per hour. When cancellations occurred, the dispatcher would either give Collins an add-on or tell him to standby while an add-on was found. Lide sometimes told Collins to “take a personal” while on standby, which Collins understood meant he had time to use the bathroom. Standby or personal times never exceeded 15 minutes. Cintron occasionally told Collins to take a break or get a meal, but such uninterrupted breaks lasted no more than half an hour.

#### *Testimony of Lawrence Lide*

Lawrence Lide worked for G&L from before Yemyashev purchased the company in 2006 until February 2010. Lide’s pay rate was \$12.50 per hour, he was paid \$500.00 a week, ( $\$12.50 \times 40 = \$500.00$ ), but worked at least ten hours per day, from 7:00 a.m. to 5:00 p.m., six days per week. Lide sometimes started work as early as 3:30 or 4:30 a.m. He was not paid for overtime.

Lide testified that as a dispatcher, he scheduled routes for drivers and checked their time. Lide scheduled 100 to 150 driver pick-ups at the start of each day. There is an expected 10% cancellation rate each day, as well as a 5% reasonable expectation of add-ons. When a cancellation occurred, the driver’s next scheduled pickup was typically a half hour to an hour later. The driver was not off duty before the next pickup, however, and Lide would give the driver an add-on or tell the driver to pick up a client who was waiting at a doctor’s office to be driven home. Drivers were told to stand by, and after ten minutes on stand-by, to “take a personal,” which meant “You might want to go to the bathroom, you might want to grab a soda,” but they would likely be called again within 15 to 20 minutes. “They are always on duty, but there are times when there is nothing to

do.” Such a break might stretch to 30 minutes, but never longer. An employee would not know beforehand that he had half an hour free. Lide never told an employee to take a half hour break. Drivers were not given meal breaks; they ate as they drove.

Dialysis appointments start at 6:00 a.m. but drivers aimed to be 15 minutes early because “if you have five patients, they all are not going to get on the machine at 6:00.” Early dialysis pickups were usually between 5:00 and 5:30 a.m. Allen started work between 4:00 and 4:30 a.m. After Allen’s 6:00 a.m. drop-offs, Allen might have a 7:00 a.m. pickup, and Allen remained on duty. In general, non-dialysis patients are picked up beginning at 8:00 a.m. Lucas and Smith started work at 8:00 a.m. St. Julian, a helper, started at 7:00 or 8:00 a.m. According to Lide, G&L’s first ten-hour shift was from 4:00 a.m. to 2:00 p.m., its second was from 7:00 a.m. to 5:00 p.m., and the last shift “starts at 3, can start at 4, and it goes until there is nothing else to do. We might get discharges at 11 o’clock at night, they might be finished at 9 o’clock. That’s the mystery shift.”

Lide kept track of employees’ time, which took a couple of hours per week. Lide did not fill in any Employee Attendance Reports after August 31, 2008. Lide filled in check marks and dollar amounts on the G&L payroll reports, with a check mark indicating a full day’s work, which was considered to be 10 hours. Lide would use a check mark even if an employee worked 9.5 or 10.5 hours. He was probably told drivers’ rates so as to be able to fill in their gross pay so that, for example, a driver with a \$10.00 per hour rate and five check marks for a week was paid \$500.00. When completing payroll reports, Lide did not take hours off for breaks. He gave the payroll reports to petitioner Rabinovich, who was G&L’s office manager; Rabinovich told Lide what numbers to write in for gross pay; and Rabinovich called the payroll company and faxed in the information. Lide does not remember G&L using time cards.

#### *Testimony of Angela Lucas*

Angela Lucas worked for G&L for about two and a half years starting towards the end of 2007, driving patients to and from doctors’ appointments. She worked 10 or more hours a day, 5 or 6 days a week, for \$9.50 and later \$10.00 per hour. Lucas does not remember how many hours she worked in the weeks listed in her DOL claim form, but “if I wrote this on here . . . [i]t’s accurate.” Lide wrote down when she arrived, and G&L could tell when she turned off her vehicle through GPS records. Lucas does not remember punching a time card. Lide gave Lucas her daily schedule each morning when she reported to work; there were one or two cancellations and some add-ons in a day. Lucas was never told to take a break for lunch, and she ate while driving. Lucas stated that when there was a cancellation, there might be an hour between one appointment and the next, but during that time, the dispatcher would tell her to standby and would give her a return, which is when drives go to pick up a patient that one of the other drivers dropped off.

#### *Testimony of Frank McLaurin*

Frank McLaurin worked for G&L from March 2012 to 2013 driving patients to doctor’s, dialysis and clinic appointments, for \$10.00 per hour. McLaurin worked Monday to Saturday, sometimes starting about 7:00 a.m., and sometimes working from about 2:30 p.m. to as late as 12:00 a.m. Cintron or a dispatcher named Christine gave McLaurin his daily schedule. Cancellations occurred but any gap before his next assignment would be for between two and five minutes, as the dispatchers checked their routes and sent him to the next available pickup. McLaurin received no meal breaks and ate while driving. There was never a period when he had



no pickups for 30 minutes, nor did Cintron ever tell him to stand by for more than 5 minutes. "Every so often" she did tell him to take a break, but never for more than 20 minutes.

McLaurin identified his claim for unpaid wages which indicated that he worked for 50 hours during the week ending June 8, 2013, was paid \$100.00, and was owed \$450.00.

*Testimony of Daquan St. Julian*

St. Julian worked for G&L from July 2008 to 2010, helping wheelchair-bound patients up and down stairs for \$8.00 per hour. He worked 50 hours a week, and never received time off for meals. Lide sometimes told St. Julian to take personal time because there were no pickups to make, which St. Julian understood to mean he had time to use the bathroom. The longest such breaks lasted was 10 minutes. St. Julian identified his July 9, 2010 claim, stating that he worked for G&L from July 6, 2008 to May 28, 2010, earned \$8.00 per hour, and was discharged because he asked for overtime pay. He stated that he did not fill out the nine page attachment to his claim and does not know if numbers stated there for hours worked in particular weeks are accurate.

*Testimony of Jason Vanager*

Jason Vanager worked as a driver for G&L for about a year beginning in 2009. He was paid \$10.00 per hour, and worked six days per week: Monday through Friday from 7:00 a.m. until 6:00 p.m. and Saturdays from 4:00 a.m. to 3:00 p.m. Vanager was never provided with meal breaks and ate while he was driving. When Cintron informed Vanager of a cancellation, she would tell him to standby for 5 or 10 minutes, and then would tell him to pick up a patient. Vanager did not recall gaps of an hour, 45 or even 30 minutes between assignments.

*Testimony of Labor Standards Investigator Ruth Gonzalez Cruz*

Ruth Gonzalez Cruz, a DOL Labor Standards Investigator for seven years, was assigned to investigate the claims against the petitioners. DOL's investigative file included claims filed by Lide, Lucas, St. Julian, Smith, Vanager, Collins, Allen, Bowens and McLaurin. In a letter dated January 22, 2014, which Cruz believed was incorrectly dated and was actually sent on December 30, 2013, Senior Labor Standards Investigator Emy Bautista notified G&L of the claims and informed them, among other things, that the Labor Law required employers to maintain accurate records of daily and weekly hours worked by employees and the wages paid to them for a period of six years. The letter further requested that petitioners provide by January 10, 2014, "all records of hours worked and wages paid" to the claimants "including time cards, sign in sheets, computer logs, payroll journals, or any other material which you have in your possession."

The DOL contact log states that in a January 10, 2014 conversation between CPA Feinsilber and DOL Senior Labor Standards Investigator Emy Bautista, Feinsilber indicated that petitioners only had records from 2012 forward because records for previous years were destroyed by fire or Hurricane Sandy. He requested and was granted an extension to January 17, 2014 to supply additional payroll records.

After receiving no response, Bautista prepared a spreadsheet computing minimum wage and overtime underpayments based on the hourly rates and other information supplied by the claimants. On January 23, 2014, Cruz wrote to Feinsilber stating, "our office contacted you by

letter on 12/30/2013 and asked you to send records to the department so that we could determine if the claims are valid. You have not responded to our request.” Cruz’s letter recounted the minimum wage/overtime, unpaid wage, and supplemental wage claims, enclosed the DOL’s spreadsheet indicating the petitioners’ overtime underpayments, and explained how the overtime underpayments were calculated. The DOL received no response to Cruz’s letter and issued the orders to comply on June 23, 2014.

According to Cruz, petitioners’ records eventually introduced into evidence at hearing were inadequate because they showed only the amounts paid to claimants, but not the daily and weekly hours worked or claimants’ wage rates.

#### *Testimony of Supervising Labor Standards Investigator Mary Coleman*

Mary Coleman has been a Supervising Labor Standards Investigator for three years, and supervised the G&L investigation. On March 20, 2014, she approved Cruz’s recommendation for issuance of the orders to comply against petitioners, including a 100% civil penalty in the minimum wage order. In assessing the 100% penalty, Coleman considered the history of the employer, including that an earlier order to comply was issued against petitioners on May 13, 2010 finding that they failed to pay overtime, made illegal deductions, and failed to furnish requested payroll records. Coleman additionally considered that “the accountant said that he would send records, but then failed to do so,” which Coleman believed showed a lack of good faith. Coleman stated that the 100% civil penalty assessed in the minimum wage order was “low, given the employer’s history. It would ordinarily be 200 percent.” The \$9,000.00 penalty in the penalty order was for G&L’s failure to produce required records for nine employees. The unpaid wages order was issued because petitioners failed to pay \$330.00 and \$450.00 respectively to claimants Bowens and McLaurin based on separate unpaid wage claims alleging they were each paid only \$100.00 for their last week of work.

### **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. Any objections not raised shall be deemed waived (Labor Law § 101 [2]). The Labor Law provides that an order of the Commissioner is presumed to be valid (Labor Law § 103 [1]). The hearing before the Board is *de novo* (Board Rule 66.1 [c] [12 NYCRR 66.1 (c)]), and based on that hearing, if the Board finds that the order, or any part thereof, is invalid or unreasonable, the Board is empowered to affirm, revoke or modify the order (Labor Law § 101 [3]). Petitioners have the burden to prove by a preponderance of the evidence that the orders are not valid or reasonable (*Matter of Ram Hotels, Inc.*, PR 08-078, at 24; Board Rule 65.30 [12 NYCRR 65.30]; State Administrative Procedure Act § 306; *Matter of Angello v Natl. Fin. Corp.*, 1 AD 3d 850, 854 [3d Dept 2003]).

### **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). We find petitioners’ evidence submitted at hearing insufficient to meet their burden of proof. The orders, as discussed below, are affirmed.

At the outset, we reject an argument raised for the first time in petitioners' post-hearing brief that the driver claimants were not employees within the meaning of the Labor Law because 12 NYCRR 142-2.14 (c) (6) excludes from coverage any individual working as a taxicab driver, which the regulation defines as:

“an individual employed to drive an automobile equipped to carry no more than seven passengers, which is used in the business of carrying or transporting passengers for hire on a zone or meter fare basis, and the use of which is generally limited to a community's local transportation needs and which is not operated over fixed routes, or between fixed terminals, or under contract.”

Labor Law § 101 (2) provides that any objection to the order not raised in the appeal shall be deemed waived; and although Board Rule 66.2 allows for an amendment to the petition with the approval of the Board at any time prior to the close of the hearing, petitioners here failed to request leave to amend the petition until after the hearing record was closed. We find that Labor Law § 101(2) forecloses petitioners from belatedly raising this objection and we deny petitioners' post-hearing attempt to raise the issue after submission of evidence is completed, which would be prejudicial to respondent (*Matter of Piotr Golabek and Amica Corp.*, PR 09-127 at p. 9 [December 14, 2011]; *Matter of NYC Dep't of Transportation [5 Dubois Avenue, Staten Island, NY]*, PES 06-004 at p. 7 [December 17, 2008]). Furthermore, there is no evidence in the record that suggests that the G&L drivers fell within the definition in the regulation.

Petitioners Failed to Establish that Claimant Lide Was an Administrative Employee Exempt from the Requirement of Overtime Pay

*Lide was an “employee” under the Labor Law*

Although petitioners allege that claimant Lide was an administrative employee exempt from overtime requirements, we are not persuaded. The Minimum Wage Order for Miscellaneous Industries and Occupations, 12 NYCRR 142-2.14(c) (4) (ii) defines covered employees and excludes any individual permitted to work in a bona fide administrative capacity. The regulation sets forth four criteria, all four of which must be met, before such a classification may be made. The fourth criterion, 12 NYCRR 142-2.14(c)(4)(ii)(d), requires that an employee must have been paid a salary of at least \$536.10 per week on and after January 1, 2007 or \$543.75 per week on and after July 24, 2009 to be classified an administrative employee. It is undisputed that Lide earned \$500.00 per week, therefore he does not meet all the requirements of the regulation and is covered by the Labor Law as an employee.

*Lide was not exempt from overtime*

The overtime pay requirement of the Miscellaneous Wage Order is found at 12 NYCRR 142-2.2 and provides that an employee shall be paid at the overtime rate of one and one-half times the regular rate of pay “subject to the exemptions of sections 7 and 13 of 29 USC § 201 *et seq.*, the Fair Labor Standards Act of 1938 [FLSA],” incorporating federal overtime law by reference (*Scott Wetzel Servs., Inc. v IBA*, 252 AD2d 212, 214 and n1 [3d Dept 1998]). Lide was therefore exempt from overtime only if he fell within FLSA's administrative exemption provision, 29 USC § 213 [a] [1], which provides that an employer does not have to pay overtime to any salaried

employee earning a rate of not less than \$455.00 week, and who is employed in a bona fide \ administrative capacity (29 CFR 541.200 [a]). Whether Lide was employed in an administrative capacity depends upon whether his duties fell within the test outlined in 29 CFR 541.200 [a]. The inquiry under this test is whether (1) Lide met the salary threshold of \$455.00 per week; (2) his primary duty was the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and (3) whether his "primary duty includes the exercise of discretion and independent judgment with respect to matters of significance."

Employees are exempt for overtime purposes only if the employer shows they meet all the requirements of the regulation. The FLSA overtime exemptions are "narrowly construed against the employers seeking to assert them" (*Arnold v Ben Kanowsky, Inc.*, 361 US 388, 392 [1960]), with the administrative exemption, in particular, "narrowly construed against the employer and . . . applied only where the employee fits plainly and unmistakably within its terms . . . . [T]he employer bears the ultimate burden of establishing that its employee falls within the exemption" (*Scott Wetzel*, 252 AD2d at 214). While Lide's salary was in excess of \$455.00 a week, we find that petitioners did not meet their burden of proof to show that Lide met the other requirements for an administrative exemption, and as discussed below, we find that he was not exempt from overtime.

To meet the "general business operations" requirement of 29 CFR 541.200 [a] [2], an employee "must perform work directly related to assisting with the running or servicing of the business, as distinguished, for example, from working on a manufacturing production line or selling a product in a retail or service establishment." Exempt work can include, for example,

"functional areas such as tax; finance; accounting; budgeting; auditing; insurance; quality control; purchasing; procurement; advertising; marketing; research; safety and health; personnel management; human resources; employee benefits; labor relations; public relations; government relations; computer network, internet and database administration; legal and regulatory compliance; and similar activities."

(29 CFR 541.201 [a] and [b]). Courts have contrasted "such [exempt] tasks as advising management, planning, negotiating, representing the company, purchasing, promoting sales and business research and control" to work "to produce the product or services the employer's business offers to the public." This implies, for example, that an adjustment company appraiser or police department investigator is a non-exempt production worker, unlike a moving company employee "not involved in producing the employer's service of moving goods from point A to point B" (*Scott Wetzel*, 252 AD2d at 214-215). When adopting 29 CFR 541.201, the United States Department of Labor agreed that "when work 'falls squarely on the production side of the line'" the "'production versus staff' dichotomy" is determinative (69 Fed Reg 22122, \*22141 [Apr. 23, 2004]).

To meet the "independent judgment with respect to matters of significance" requirement of 29 CFR 541.200 [a] [3], an employee must compare, evaluate and choose among possible courses of conduct. Factors to consider in connection with this requirement include, for example,

“whether the employee has authority to formulate, affect, interpret, or implement management policies or operating practices; whether the employee carries out major assignments in conducting the operations of the business; whether the employee performs work that affects business operations to a substantial degree . . . ; whether the employee has authority to commit the employer in matters that have significant financial impact; whether the employee has authority to waive or deviate from established policies . . . ; whether the employee has authority to negotiate and bind the company on significant matters; whether the employee provides consultation or expert advice to management; whether the employee is involved in planning long- or short-term business objectives; whether the employee investigates and resolves matters of significance on behalf of management; and whether the employee represents the company in handling complaints . . . .

“The exercise of discretion and independent judgment must be more than the use of skill in applying well-established techniques . . . .

“An employee does not exercise discretion and independent judgment with respect to matters of significance merely because the employer will experience financial losses if the employee fails to perform the job properly.”

(CFR 541.202 [a], [b], [e] and [f]).

Petitioners argue that Lide met the requirements of an overtime-exempt employee because: (1) his duties were those of an office person; (2) in his capacity as a dispatcher, he exercised discretion by directing which drivers pick up which patients; and (3) he had authority to hire employees. We disagree and find that petitioners did not show that Lide met the conditions of either 29 CFR 541.200 (a) (2) or 29 CFR 541.200 (a) (3).

That Lide worked as a dispatcher in an office is not enough to satisfy 29 CFR 541.200 (a) (2)’s “general business operations” requirement. For an ambulette company like G&L, dispatching does not fall in a functional “general business operations” area such as tax, accounting, procurement or even personnel management as required by 29 CFR 541.201, but instead is integral to “the product or services the employer’s business offers,” namely, “moving [patients] from point A to point B” (*Scott Wetzel*, 252 AD2d at 214-215). Similarly, *Iaria v Metro Fuel Oil Co.*, 2009 US Dist LEXIS 6844, \*10-\*13 (EDNY, Jan. 30, 2009), found under FLSA and the Labor Law that a fuel delivery company’s dispatchers, whose primary duties included routing, responding to driver problems and customer calls, monitoring deliveries, checking drivers’ logs and entering data in computers, did not meet the “general business operations” test; their duties related

“more directly to the service and product that Metro Fuel provides – the delivery of fuel for heating – than they do to servicing the business . . . . The tasks performed by plaintiffs were not administrative tasks of the type every business must undertake, such

as those performed by accountants, personnel officers, and computer programmers.”

*Grage v Northern States Power Co.*, 47 F Supp 3d 844, 858-861 (D Minn 2014), *rev'd on other grounds*, 2015 US App LEXIS 22685 (8<sup>th</sup> Cir 2015) held that dispatching “work that is the substantive core of an entity’s business” is not within the administrative exemption. We agree. Dispatching ambulettes for an ambulette company “falls squarely on the production side of the line” and is, therefore, not exempt (69 Fed Reg 22122, *supra*.).

We also do not agree that petitioners proved that Lide exercised discretion over the employees as required by 29 CFR 541.200 [a] [3]’s requirement of “independent judgment with respect to matters of significance.” There is no evidence Lide helped to set or implement any G&L policies apart from scheduling drivers and driving on an as-needed basis himself. Asked how he determined which drivers did pickups, Lide testified that he would “[h]ave the addresses and try to get them in certain orders. You don’t want to be picking up in Coney Island and have to go to Greenpoint . . . . It’s a longer route.” In response to a later question, he confirmed that he “would assign these different routes to different drivers based on where they are.” While expeditious routing may take skill and determine which drivers pick up which patients, that is not “independent judgment with respect to matters of significance” as that concept is explained in 29 CFR 541.202.

Rather, 29 CFR 541.202 expressly states that “discretion and independent judgment must be more than the use of skill,” and that an employee “does not exercise discretion and independent judgment with respect to matters of significance merely because the employer will experience financial losses if the employee fails to perform the job properly.” Factors listed in 29 CFR 541.202 as relevant to the administrative exemption, such as whether an employee can formulate policies, commit the employer financially, decide to deviate from policy, and investigate and resolve significant matters, are not at all like Lide’s job of figuring out expeditious day-to-day routes. As the *Iaria* court stated:

“Even if I were to accept defendant’s contentions that plaintiffs exercised some degree of discretion and independent judgment when they changed routes and delivery schedules, added additional drivers, assigned drivers, reviewed the drivers’ logs, and handled driver accident reports, the level of independent judgment exercised would not qualify for the administrative exemption . . . . These are not the types of tasks that require broad discretion or that involve matters of significance as contemplated by the regulations . . . . Instead, plaintiffs used their knowledge, experience and skills to make ‘simple decision[s]’ when routing the trucks and responding to reports of an accident.”

(2009 US Dist LEXIS 6844, \*15-\*16). The record here is analogous except that there is no evidence he even performed these tasks.

Lide’s supposed “authority to hire employees,” is also not supported by the record. No witness, including Yemyashev, Cintron, or the seven claimants who testified, stated that Lide did or could hire employees. Lide credibly testified that he never hired or fired employees. Yemyashev testified that he, not Lide, was the person who hired and fired employees. Cintron stated that *she*,

not Lide, had authority to hire and fire drivers. The sole evidence petitioners cite is that in claimant Smith's minimum wage claim, he listed the "Name and position of person hiring you" as "Lawrence Lide." Smith did not testify at hearing, nor did petitioners ask Lide about Smith's hiring. Smith's claim form also states a hiring date of February 6, 2006, before Yemyashev bought G&L and, according to Lide, overhauled the company including changing pay rates and personnel. In any event, the claim form's isolated, unexplained and uncorroborated listing of Lide is simply not enough to establish that he exercised discretion and independent judgment sufficient to meet the requirements of the regulation. Because, Lide did not meet the second and third requirements of the regulation, he is not exempt from overtime.

### The Penalty Order is Affirmed

Labor Law § 661 provides that employers must maintain and preserve true and accurate payroll records for all employees covered by Article 19 of the Labor Law. 12 NYCRR 142-2.6 further provides that:

“(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; . . .

[3] wage rate;

[4] the number of hours worked daily and weekly,

including the time of arrival and departure for each employee working a split shift or spread of hours exceeding 10; . . .

[6] the amount of gross wages.”

Labor Law § 218 (1) provides that where respondent assesses a penalty for a reason other than failure to pay wages, benefits or wages supplements, the order shall assess a civil penalty not to exceed \$1,000.00 for a first violation, \$2,000.00 for a second violation or \$3,000.00 for a third or subsequent violation. The statute further provides that when assessing such civil penalty, the respondent must give due consideration to the size of the business, the good faith of the employer, the gravity of the violation, and any history of prior violations.

Petitioners supplied no records to DOL during the investigation, instead representing that records for the years prior to 2012 had been destroyed either in a fire or by Hurricane Sandy. Petitioner Yemyashev, by contrast, did not even mention Hurricane Sandy, and testified that while there was indeed an April 2010 office fire, records from 2008 and 2009 were not destroyed because they were in the control of his accountant. As to payroll records from May 2010 to December 2012, Yemyashev testified at the February 10, 2015 hearing that he had them at his office but did not bring them to the hearing, which continued on the following day. Yemyashev also claimed that he possessed GPS records that tracked employee hours from the start to the end of the work day and job applications that showed the claimants' wage rates, but these documents were likewise never produced. Petitioners' claim that the records were destroyed by an act of nature was contradicted by Yemyashev's own testimony.

A week before the hearing, petitioners for the first time supplied time cards for three claimants for a few months in 2008, payroll registers for December 29, 2007 to December 26, 2009, and payroll reports for the period January 7, 2008 to December 27, 2009, and from December

24, 2012 to May 25, 2013. Even those records did not include the employees' hourly pay rates or the daily and weekly hours worked by each employee as required by 12 NYCRR 142-2.6. Petitioners' failure to provide payroll records for the period from May 2010 to December 2012, which Yemyashev testified were still in his office, is particularly egregious in light of the timing of petitioners' receipt of the previous May 13, 2010 order to comply based on their earlier failures to furnish requested payroll records and pay overtime. Petitioners were clearly on notice of, and flouted, the legal requirements both to maintain records and pay overtime to their employees. We find that petitioners did not maintain credible or legally sufficient payroll records showing the wage rates or the number of hours worked daily and weekly by their employees. Coleman testified that the \$9,000.00 penalty in the penalty order was for G&L's failure to produce required records for nine employees. We find imposition of a \$9,000.00 civil penalty, \$1,000.00 for each claimant, was reasonable where Article 19 requires that employers maintain records for "all employees" and the record shows that petitioners failed to maintain records for at least nine employees (Labor Law § 661). The penalty order is affirmed.

#### DOL's Calculation of Wages in the Absence of Employer Records

Article 19 of the Labor Law, entitled "Minimum Wage Act," sets forth the minimum wage that every employer must pay each of its non-exempt employees for each hour of work (Labor Law § 652 [1]). Article 19 also requires payment of time and one-half the regular wage rate for hours worked over 40 in a work week (12 NYCRR 142-2.2).

Labor Law § 196-a provides, in relevant part that:

"Failure of an employer to keep adequate records, in addition to exposing such employer to penalties . . . shall not operate as a bar to filing of a complaint by an employee. In such a case the employer in violation shall bear the burden of proving that the complaining employee was paid wages, benefits and wage supplements."

As the Appellate Division stated in *Matter of Mid-Hudson Pam Corp. v Hartnett*, 156 AD2d 818, 821 (3d Dept 1989), "[w]hen an employer fails to keep accurate records as required by statute, the Commissioner is permitted to calculate back wages due to employees by using the best available evidence and to shift the burden of negating the reasonableness of the Commissioner's calculations to the employer" (See *Matter of Garcia v Heady*, 46 AD3d 1088 [3d Dept 2007]; *Matter of Bae v IBA*, 104 AD3d 571 [1<sup>st</sup> Dept 2013]; *Matter of Ramirez v Commissioner*, 110 AD3d 901 [2d Dept 2013]; *Matter of Mohammed Aldeen*, PR 07-093 [May 20, 2009], *aff'd sub nom. Matter of Aldeen v Industrial Appeals Bd.*, 82 AD3d 1220 [2d Dept 2011]).

Therefore, petitioners have the burden of showing that the Commissioner's order is invalid or unreasonable by a preponderance of the evidence of the specific hours that the claimants worked and that they were paid for those hours, or other evidence that shows the Commissioner's findings to be unreasonable (*Matter of Ram Hotels, Inc.*, PR 08-078 [October 11, 2011]). When incomplete or unreliable wage and hour records are available, DOL is "entitled[d] to make just and reasonable inferences and use other evidence to establish the amount of underpayments, even though the results may be approximate" (*Matter of Hy-Tech Coatings v New York State Dept. of Labor*, 226 AD2d 378 [1<sup>st</sup> Dept 1996] *citing Mid-Hudson Pam Corp.*). 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” as required (*Anderson v Mt Clemens Pottery Co.*, 328 US 680, 688-89 [1949]; see also *Mid-Hudson Pam Corp.*, 156 AD2d at 821; *Matter of Mohammed Aldeen et al*, PR 07-093 [May 20, 2009], *aff’d sub nom.*, *Matter of Aldeen v IBA*, 82 AD3d 1220 [2d Dept 2011]). Even if DOL estimates based on employee claims are imprecise, “reasonable estimates are allowed since it is the employer’s burden to maintain accurate records” (*Matter of Karl Geiger and Geiger Roofing Co.*, PR 10-303 [Jan. 16, 2014], at 8, *aff’d sub nom.*, *Matter of Geiger v DOL*, 131 AD3d 887 [1<sup>st</sup> Dept 2015]; *Reich v Southern New England Telecommunications Corp.*, 121 F.3d 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”])).

### The Minimum Wage Order is Affirmed

We find that petitioners have failed to meet their burden of proving that employees were properly paid and the minimum wage order is affirmed. It is undisputed that the claimants were not paid overtime. The payroll records petitioners eventually produced at hearing were unreliable. While petitioners’ post-hearing brief asks us to use their “accurate and certified time records” rather than DOL estimates as a source for hours, petitioners’ records were anything but “accurate and certified.” Not only did petitioners incorrectly deduct 30 minutes a day from clock time, but their payroll sheets, as Yemyashev acknowledged, had only “round about numbers.” Yemyashev himself often could not tell from payroll sheets or time cards just how pay had been calculated. He testified that a check mark in a payroll report meant “a full day and that full day could have been eight hours, nine hours, six hours, I don’t know.” There were numerous instances where one document states that an employee was paid a certain amount of wages for a given week while a different document shows the same employee was paid a different amount for the same week. Far from providing a clear, reliable record of employees’ actual pay, as the law requires, records kept by petitioners, to the extent made available at all, were inaccurate, unreliable, and cannot be credited.

Nine claimants filed detailed minimum wage claims at various times over a period of more than three years; seven of the claimants also credibly testified at hearing consistently with their claims. The credible testimony shows that petitioners did not pay the claimants required overtime. The petitioners did not provide credible evidence or reliable records to meet their burden of showing the precise hours that claimants worked and that they were paid for all hours. We find that the claims and statements on which the DOL based the orders at issue were credible and it was reasonable and valid to rely on them even if the resulting orders are approximate.

With respect to St. Julian, although he testified that he did not fill out the attachment to his claim form, from which DOL based St. Julian’s underpayment, and did not know whether it was accurate, his testimony that he earned \$8.00 an hour was consistent with his claim form. He further testified that he worked 50 hours a week with no overtime from July 6, 2008 to May 28, 2010. Based on his testimony he earned \$440.00 a week, but was only paid straight time of \$400.00, for a weekly underpayment of \$40.00, for a total underpayment of \$3,952.00,<sup>4</sup> the same amount DOL found petitioners owed him. Respondent’s determination is reasonable with respect to St. Julian.

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<sup>4</sup> 99 weeks x \$40.00. The weekly underpayment is based on an overtime rate of \$12.00 an hour (1.5 x \$8.00).

### Meal Breaks

Petitioners allege that drivers received daily 30-minute breaks during which they were off duty, and that petitioners should be credited for providing these breaks through a reduction in the work time for which the claimants were required to be paid. Yemyashev cited an unwritten policy that cancellations gave drivers ample time for meal breaks, while Cintron asserted that there were times throughout the day that every employee was given a 30 minute break.

Seven witnesses credibly testified that drivers, and St. Julian, a helper, rarely or never were given meal breaks of 30 minutes or more, but instead, were only able to occasionally take a 10 to 20 minute break as the work schedule permitted. Lide, the dispatcher, testified that while a break in the schedule may have occasionally stretched to 30 minutes, drivers never knew that in advance.

We found in *Matter of Ammar A. Zabbarah*, PR 14-062, at p.11-12 (April 29, 2015) and *Matter of Yung Jin Han T/A Han's Food Deli*, PR 09-095 at p.6 (Dec. 15, 2010), that break times shorter than 30 minutes must be compensated because, although New York law is silent on the issue, federal law provides that such breaks are counted as working time (*see* 29 CFR 785.19). New York's Minimum Wage Act must be interpreted to be at least as protective as federal law (*See* Labor Law § 652 [1] and [4]; *see also* 12 NYCRR 142-2.1 [providing that state minimum wage may not be lower than federal minimum wage]). The short, unscheduled rest periods claimants sometimes received were not meal periods that could be considered uncompensated time (*see e.g.* 29 CFR 785.15 et seq.).

We credit claimants' testimony that there were almost never announced, definite, uninterrupted breaks of sufficient duration to constitute uncompensated meal times. DOL's determination was reasonable that claimants were not provided break time, and should have been compensated.

### The Unpaid Wages Order is Affirmed

The petition challenged the wage order under Article 6 finding unpaid wages of \$780.00 to claimants Bowen and McLaurin, but asserted no specific basis for doing so, and presented no testimony or evidence proving that Bowen or McLaurin had been paid in full for his final work week. We find that petitioners failed to meet their burden of proof and we affirm the wage order.

### The Civil Penalty, Liquidated Damages and Interest Assessed in the Minimum Wage Order and the Unpaid Wages Order are Affirmed

Both the minimum wage order and the unpaid wages order assess a 100% civil penalty. It is undisputed that petitioners are recidivist employers who were the subject of an earlier order to comply based on their failure to pay overtime, failure to maintain records, and illegal deductions from employees' wages. Labor Law § 218 states that if the Commissioner determines that an employer has violated a provision of Article 6 or Article 19, in addition to directing wages found to be due, "such order, if issued to an employer who previously has been found in violation of those provisions, rule or regulations or whose violation is willful or egregious, shall direct payment to the Commissioner a civil penalty in an amount equal to double the total amount found to be due." The civil penalty assessed, which was lower than that required by statute for an employer with a history of prior violations, is affirmed.

The orders include liquidated damages in the amount of 25% of the wages owed. Labor Law §§ 663(2) and 198 (1-a), as they read when the wage order was issued, provided that 100% liquidated damages could be assessed unless the employer proved a good faith basis to believe that its underpayment was in compliance with the law. Petitioners did not prove a good faith basis to believe their underpayment was in compliance with the law. Accordingly, we affirm the Commissioner's imposition of 25% liquidated damages in the orders.

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 financial services 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 per centum per annum." We therefore affirm the rate of interest imposed in orders.

**NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:**

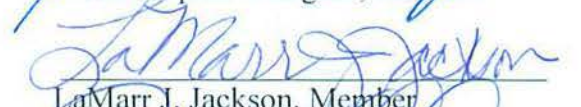
1. The minimum wage order is affirmed;
2. The unpaid wages order is affirmed;
3. The penalty order is affirmed;
4. The supplemental wage order is affirmed; and
5. The petition be, and hereby is, otherwise denied.



Vilda Vera Mayuga, Chairperson



J. Christopher Meagher, Member



LaMarr J. Jackson, Member



Michael A. Arcuri, Member

Dated and signed in the Office  
of the Industrial Board of Appeals  
at Albany, New York, on  
April 13, 2016.