STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of:	
AMMAR A. ZABARAH (T/A GUY R. DELI),	
Petitioner,	
To Review Under Section 101 of the Labor Law: An Order to Comply with Article 19 and an Order Under Article 19 of the Labor Law, both dated March 13, 2014,	DOCKET NO. PR 14-062
- against -	CLARIFIED AND REISSUED RESOLUTION OF DECISION
THE COMMISSIONER OF LABOR,	
Respondent.	

APPEARANCES

The Antonious Law Firm (Jacqueline S. Antonious, Esq. of counsel), for petitioner.

Pico Ben-Amotz, General Counsel, NYS Department of Labor (Larissa C. Bates of counsel), for respondent.

WITNESSES

Ammar Zabarah, for petitioner.

Brigido Cazares and Maria Elizabeth Cueva, Labor Standards Investigator, for respondents.

WHEREAS:

On March 26, 2014, petitioner Ammar A. Zabarah filed a petition to review two orders that the Commissioner of Labor (Commissioner or DOL) issued against him on March 13, 2014. The respondent filed its answer on May 28, 2014.

The first order under review is an order to comply with Article 19 of the New York Labor Law (minimum wage order) and directs petitioner to pay $81,562.57 in unpaid wages owed to Brigido Cazares, Leonardo Castellano, and Elena Thtlahuetle during periods from September 3, 2005 to July 9, 2011, with interest at the rate of 16% calculated to the date of the order at $46,013.01, 25% liquidated damages in the amount of $20,390.37, and a 100% civil penalty of $81,562.57 for a total due of $229,528.52. The second order issued under Article 19

(penalty order) directs the petitioner to pay $1,600.00 in civil penalties based on (1) the failure to keep and/or furnish the requisite payroll records for the same period covered by the minimum wage order ($800.00), and (2) the failure to provide wage statements to employees with every payment of wages for the same period covered by the minimum wage order ($800.00).

The petition challenges the minimum wage order by alleging that (1) the wage computations are erroneous because the three claimants were not employed by the petitioner for all of the periods claimed and did not work the overtime hours claimed, and the petitioner was not credited for two daily free meals and breaks; and (2) the DOL's failure to serve the September 14, 2011 Notice of Labor Law Violation until July 29, 2013, after the petitioner was out of business, prejudiced petitioner with respect to the preservation of records for the required six-year period, and he should only have been responsible to maintain records from July 2007 on. The petition also contests the civil penalties in the minimum wage order and the penalty order.

Upon notice to the parties, a hearing was held on October 1, 2014, in New York, New York before Administrative Law Judge Jean Grumet, 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.

A resolution of decision in this matter dated March 11, 2015, was served on the parties on March 13, 2015. By letter dated April 9, 2015, the respondent sought clarification of how the minimum wage order should be modified based on the language of the decision. We are clarifying the decision to indicate that the only modification is that the applicable wage orders in this matter are the Minimum Wage Order for the Restaurant Industry (12 NYCRR Part 137) and the Wage Order for the Hospitality Industry (12 NYCRR Part 146) rather than the Wage Order for Miscellaneous Industries (12 NYCRR Part 142).

SUMMARY OF EVIDENCE

Testimony of Petitioner Ammar A. Zabarah

Petitioner Ammar A. Zabarah is the owner of Guy R. Deli, which was in business in Jamaica, New York from 2003 to 2011. Petitioner generally employed five employees, although the number would vary from winter to summer. Petitioner's business operated twenty-four hours a day. The deli opened at 9:00 or 10:00 a.m., the doors closed at 10:00 or 11:00 p.m., and an employee operated an all-night window on the side of the deli and also prepared the food for the next morning. Zabarah was on the premises nearly 10 hours per day, and sometimes as many as 13 hours.

Zabarah testified that he kept records, but after selling the business, "I went back to my country and when I came back to my place I didn't find them." At other points in his testimony, Zabarah stated: "I discarded those records" and "after I sold the business, I didn't keep those records." Zabarah testified that he "used to record everything for each worker on a weekly schedule" and that employees also kept their own records of hours worked. Each week, he compared the number of hours he had to theirs, and they always matched. Zabarah testified that during the time he owned the deli, none of his employees worked overtime, and explained that

employees worked the number of hours "they were supposed to work." He further testified that "the business couldn't take overtime." Employees were paid in cash.

Petitioner remembered hiring claimant Brigido Cazares, who worked from some time in 2007 until 2009. Cazares worked 35 to 38 hours per week cooking on the grill and stocking the refrigerators, and "very rarely" worked an hour of overtime if another employee was late. Cazares was paid time and a half when he worked overtime. Cazares' starting pay was $8.00 per hour, and two or three months later, Zabarah raised his pay to $8.50 per hour, which continued to be Cazares' hourly rate for the duration of his employment. While Cazares was supposed to work a six-day week, he had lots of absences. Although Cazares was absent "weekly," Zabarah allowed him to continue to work because "I did not need him that much because he was like extra." Cazares was provided with three meals a day, and was paid for his meal breaks. Zabarah denied that Cazares worked 69 hours for $350.00 per week. He testified that while employed at petitioner's deli, Cazares also worked at Hollis Deli, a deli "affiliated with my deli," but not owned by Zabarah.

Zabarah could not remember when he hired claimant Castellano, who worked until Zabarah sold the deli in 2011. Castellano filled the refrigerator with juices and collected the garbage. According to Zabarah, Castellano "used to work an hour or two hours [overtime] but not all the time." Castellano's starting pay was $7.50 per hour, but when petitioner realized he was a good worker, his hourly wage was raised to $8.00 and "towards the end" to $8.50. Castellano got free meals and like Cazares, took as long as necessary to eat the meal, with such time paid. When asked if Castellano's claim that he worked 54 hours a week for $400.00 straight pay was correct, Zabarah testified: "He didn't work that amount of hours. Fifty-six hours when we were very busy in the summer . . . but not on a weekly basis." According to Zabarah, Castellano was paid time and a half for overtime.

Zabarah testified that Thtlahuetle worked for a short period of time, cutting salads at an hourly rate of $8.00 to $8.50. Although he could not recall how many hours per week she worked, "She used to work for a few hours . . . Not more than 40 hours." She worked "[s]ometimes five days and sometimes six days." He could not recall the dates that she was employed but remembers that she "never" worked overtime, but later stated that she may have worked overtime "but very rarely" and was paid time and half when she did. Zabarah denied that Thtlahuetle worked 70 hours per week for $320.00 straight pay. He stated that like his other employees, Thtlahuetle was given more than two free meals per workday, and got to take a paid break when she ate.

Testimony of Claimant Brigido Cazares

Cazares testified that he was employed by petitioner from November 25, 2005 to January 1, 2009, cooking in the kitchen and preparing sandwiches. He worked a six day/69 hour work week, consisting of three days when he worked 13 hours, and three days when he worked 10 hours. Cazares was paid $350.00 per week in cash, and was never given a wage statement. Cazares identified his sworn claim, filed with the DOL on January 9, 2009, which additionally indicated that he worked Sunday and Monday 7:00 a.m. to 8:00 p.m.; Tuesday off; Wednesday 5:00 p.m. to 6:00 a.m.; Thursday and Friday 2:00 p.m. to 12:00 midnight; and Saturday 12:00 noon to 10:00 p.m., was paid $350.00 per week for a six day/69 hour work week, did not receive any meal periods and ate when not busy, and was absent a total of 20 days during his

employment from 2005 to 2009. Cazares testified that although food was available, he was never given a break to eat. He testified that Castellano was a co-worker, and used to take the garbage out. According to Cazares, Castellano worked from 11:00 a.m. to 9:00 p.m. six days per week.

On cross-examination, Cazares testified that Zabarah never showed him a written schedule of his hours or wages, no schedule of hours was ever posted, and he never received a wage statement. Cazares further testified that from 2005 to 2009 he worked solely at Guy R. Deli, and did not work anywhere else. His employment at Hollis Deli, which was owned by "Younis," ended in 2005, when Younis closed or sold to a new owner. Cazares' supervisor at Hollis Deli, Yahya Saleh, who worked as a supervisor at both Hollis Deli and Guy R. Deli and was in charge of Guy R. Deli when Zabarah was not there, told Cazares to go work for Guy R. Deli in 2005.

Cazares also testified on cross-examination that both Hollis Deli and Guy R. Deli gave him letters to prove to a hospital that "the work that I was doing was not enough to support [me] and a wife and kids." A July 10, 2004 letter from Hollis Deli, signed by Saleh (whom Cazares testified he asked to sign because Younis was on vacation), "certif[ied] that Brigido Cazares . . . has been working at Hollis Deli . . . for approximately one year. He works 42 hours a week, and his weekly salary averages $230.00." A nearly identically worded February 20, 2008 letter from Guy R. Deli, signed by Zabarah, "certif[ied] that Brigido Cazares . . . has been working at Guy R. Deli . . . for approximately one year. He works 50 hours a week, and his gross weekly [salary] is $350.00." Cazares stated that he also obtained other such letters from Zabarah, "each time that I have to renew the Medicaid," but did not bring them to the hearing and did not remember their exact wording. He testified that although the February 20, 2008 letter's statements about his hours and how long he had worked were incorrect, he submitted it to Medicaid and did not ask Zabarah, who was on vacation at the time, to correct it, because Medicaid accepted the letter.

Testimony of Labor Standards Investigator Maria Elizabeth Cueva

Labor Standards Investigator (LSI) Maria Elizabeth Cueva testified that on August 26, 2011, she and another DOL investigator made a field visit to petitioner's deli and attempted to interview Zabarah, who was not there at the time of their visit. A person who first identified himself as a manager, then as an employee, contacted Zabarah by phone and Cueva explained the purpose of the visit to Zabarah, and told him that there would be a revisit to inspect payroll records. On cross-examination, LSI Cueva stated that she could not be sure that the person she spoke to was Zabarah.

During her August 26, 2011 visit, LSI Cueva interviewed four employees, including Castellano and Thtlahuetle. Castellano's interview sheet, which both he and LSI Cueva signed, stated that he had worked as a stock room worker since August 12, 2004, and was paid $400.00 per week. He worked from 11:00 a.m. to 9:00 p.m., Tuesday to Sunday with Monday off. He was given a daily meal break of one hour, for a total of 54 hours per week. Castellano stated that he was not given free meals. Thtlahuetle's interview sheet, which both she and LSI Cueva signed, stated that she worked as a cook since August 31, 2005, and was paid $320.00 per week. She worked from 6:00 a.m. to 8:00 p.m. on Monday, Wednesday, Thursday, Friday and Saturday

with Sunday and Tuesday off and was provided with two free meals per day, but did not get a 30 minute uninterrupted meal break.

LSI Cueva testified that during her records inspection on September 14, 2011, an accountant for South Road Deli Corp. provided her with a bill of sale indicating that Zabarah had sold the deli to South Road Deli Corp. on July 6, 2011. The DOL later reached a settlement with South Road Deli Corp. (the new owner) with respect to pay claimed by Castellano and Thtlahuetle for the period beginning July 9, 2011.

LSI Cueva did an Accurint search and sent out a post office tracer to locate Zabarah's and Guy R. Deli's last known addresses. On July 29, 2013, she sent Zabarah a letter addressed to "Guy R. Deli, Attention: Ammar Zabarah, President," at the deli's address. The letter detailed the results of the DOL's investigation and included a notice of labor law violation and a recapitulation sheet showing calculations of amounts due to the three claimants, based on Cazares' claim form and Castellano's and Thtlahuetle's interview sheets.

In August 2013, petitioner's attorney contacted the DOL and on October 17, 2013, LSI Cueva sent petitioner's attorney an amended recapitulation sheet, which reduced the amount owed to Thtlahuetle from $31,440.00 to $29,827.00 based on the two meals Thtlahuetle stated she received in her interview sheet. The wages owed to Cazares and Castellano were unchanged because they both indicated that they received no free meals during their employment.

A compliance conference was held on January 14, 2014. The Compliance Conference Summary Record entered into the record indicates that Cazares reiterated the allegations in his claim, and stated that while he was provided with two free meals per day, he was not given time to eat. Castellano stated that he did not like the food offered by the employer and brought his own food from home.

On cross-examination, LSI Cueva testified that the DOL tried to contact Zabarah before July 2013 "but he was out of the country. Mr. Younis Yafai told us that." She testified that the DOL attempted to trace Zabarah's address and did not write to him at the deli until a tracer "still identified his address" as that of the deli.

The DOL's contact log records that on September 7, 2011 Cueva left a voice message for Zabarah at a number given to her for him by the person who answered the deli's phone. On September 12, 2011 she called that number again and spoke to someone who "said that Mr. Zabarah was already in Chicago;" she again left a message. On September 23, 2011 Cueva did an Accurint search for Zabarah and Guy R. Deli; no address for Zabarah was returned, while when she called the number for Guy R. Deli she "was able to speak with a Younis Yafai who informed me that Mr. Zabarah allegedly left for another state." On November 23, 2011 the DOL sent Post Office tracers for Zabarah at the deli's address and a Brooklyn address. Only the one to the deli's address -- where the DOL had already tried unsuccessfully at least four times to contact Zabarah since August 26 -- was delivered. The contact log also indicates that a search of the NYS Department of State files yielded no result for Guy R. Deli, but showed that South Road Deli filed with the Department of State on July 6, 2011, and a subpoena to the NYC Department of Health was returned stating: "No information is available for Guy R. Deli."

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 (*Id.* § 101 [2]). The Labor Law provides that an order of the Commissioner shall be presumed valid (*Id.* § 103 [1]). If the Board finds that the order, or any part thereof, is invalid or unreasonable it shall revoke, amend or modify the same (*Id.* § 101 [3]). 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." Therefore, the burden is on the petitioner to prove by a preponderance of the evidence that the orders are not valid or reasonable. (*See* 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). With the modification that follows, we affirm the wage and penalty orders, and find petitioner's evidence submitted at the hearing insufficient to meet his burden of proof.

Labor Law Article 19 requires every employer to pay each of its covered employees the minimum wage in effect at the time payment is due, which during the time period covered by the wage order was $6.00 an hour in 2005, $6.75 an hour in 2006, $7.15 an hour in 2007, and $7.25 an hour after July 24, 2009 (*see* Labor Law § 652 [1]; 12 NYCRR 142-2.1; 12 NYCRR 137-1.2; and 12 NYCRR 146-3.1). An employer must also pay every covered employee overtime at a wage rate of 1 1/2 times the employee's regular rate of pay for all hours worked in excess of 40 in a given work week (12 NYCRR 142-2.2; 12 NYCRR 137-1.3; and 12 NYCRR 146-1.4).

Article 19 additionally requires employers to maintain payroll records and to keep those records available for inspection by the Commissioner at any reasonable time (Labor Law § 661). DOL regulations at 12 NYCRR 142-2.6; 12 NYCRR 137-2.1, and 12 NYCRR 146.2-1 provide that weekly payroll records must be maintained and preserved for six years and shall show, *inter alia*, the name and address; social security number; wage rate; number of hours worked daily and weekly; amount of gross wages; deductions from gross wages; allowances if any claimed as part of minimum wages; and net wages paid for each employee. Sections 137-2.2, 146-2.3, and 142-2.7 further provide:

> "Every employer . . . shall furnish to each employee a statement with every payment of wages, listing hours worked, rates paid, gross wages, allowances, if any, claimed as part of the minimum wage, deductions and net wages."

Therefore, it is an employer's responsibility to keep accurate records of the hours worked by and the amount of wages paid to its employees, and to provide employees with a wage statement every time they are paid. This required recordkeeping provides proof to the employer, the employee, and the Commissioner that the employee has been properly paid.

The Penalty Order is Affirmed

We find that Zabarah presented no credible evidence that he complied with statutory and regulatory recordkeeping requirements with respect to any employee, and affirm the penalty order. While Zabarah claimed he "used to record everything," he provided contradictory testimony regarding his alleged retention of records, variously testifying "I didn't find them" when he returned from his country, that "I discarded those records," and that "after I sold the business, I didn't keep the records." Zabarah provided no specificity as to his method of recordkeeping, other than that he "used to record everything for each worker on a weekly schedule." Zabarah did not claim to have provided wage statements to employees.

In *Matter of Michael Caruso*, PR 11-040 (August 7, 2014) (internal citations to Board decisions omitted), the Board rejected a petitioner's contention that he was unable to comply with record-keeping requirements because the foreclosure sale of his business resulted in the surrender of all physical assets to the new owner, stating:

> "In analogous situations where a financing factor seized an employer's assets and where an employer was put into foreclosure by its financier, 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."

In the present case, where the petitioner made no credible showing that he was unable to comply with record-keeping requirements, such a result is also warranted.

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

Where an employee files a complaint for unpaid wages with DOL and the employer has failed in its statutory obligation to keep records, the employer bears the burden of proving that the employee was properly paid. Labor Law § 196-a provides, in relevant part:

> "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."

In *Anderson v Mt. Clemens Pottery Co.* (328 US 680, 687-88 [1949]), superseded on other grounds by statute, the U.S. Supreme Court long ago discussed the fairness of relying on employee statements where the employer failed to keep adequate records:

> "[W]here the employer's records are inaccurate or inadequate . . . [t]he solution . . . is not to penalize the employee by denying him

> any recovery on the ground that he is unable to prove the precise extent of uncompensated work. Such a result would place a premium on an employer's failure to keep proper records in conformity with his statutory duty; it would allow the employer to keep the benefits of an employee's labors without paying due compensation as contemplated by the Fair Labor Standards Act."

Anderson further opined that the 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). Wages may be found due even if it is based on an estimate of hours (*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"]).

In the absence of legally required records, DOL may issue an order based on employee complaints and interviews. 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 also Matter of Garcia v Heady*, 46 AD 3d 1088 [3d Dept 2008] [affirming a Board order where the "petitioner failed to maintain records of the hours claimant worked and/or provide them with wage stubs, thus compelling DOL to employ an alternate analysis to ascertain the number of hours that claimants worked and, in turn, imposing upon petitioner the burden of demonstrating the unreasonableness of DOL's calculations"]; *Matter of Bae v IBA*, 104 AD3d 571 [1st 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]; *Matter of Young Hee Oh*, PR 11-017 [May 22, 2014]).

In the present case, however, the burden-shifting described above is applicable only to the period from July 29, 2007 to July 9, 2011, not to the period from September 3, 2005 to July 28, 2007. This is because an employer is required to preserve records for six years. The DOL did not contact Zabarah until July 29, 2013, and there is no evidence that he knew about the DOL investigation until that date. Under these circumstances, he was not legally required to preserve records for longer than six years. Since he was contacted in 2013, Zabarah was legally obligated to have records only for the period since July 29, 2007, and his lack of required records does not shift the burden with respect to underpayment calculations for the earlier period.

The Minimum Wage Order is Affirmed as Modified

Although the parties to this case agreed that the Minimum Wage Order for Miscellaneous Industries (Miscellaneous Industries Order) codified at 12 NYCRR Part 142 was applicable, the Minimum Wage Order for the Restaurant Industry (Restaurant Industry Order) codified at 12 NYCRR Part 137, replaced effective January 1, 2011 by the Wage Order for the Hospitality Industry (Hospitality Industry Order), 12 NYCRR Part 146, defines a restaurant as "any eating or

drinking place that prepares and offers food or beverage for human consumption . . . by such service as . . . box lunch, curb service or counter service to the public . . . and services in connection therewith or incidental thereto," a definition that covers the deli here (*See* 12 NYCRR 137-3.1 [2009]; 12 NYCRR 146-3.1 [2011]). In any event, the minimum wages under the Miscellaneous Industries Order would be the same for these untipped workers. We modify the minimum wage order to find that the applicable wage orders in this matter are the Restaurant Industry Order and the Hospitality Wage Order. The petitioner did not raise the issue of the appropriate wage order in its petition or at the hearing, and we find that the issue was waived pursuant to Labor Law § 101[2].

As discussed above, the six-year duration of Zabarah's unmet obligation to keep and preserve accurate payroll records means that for the period from July 29, 2007 to July 9, 2011, he had the burden of negating the reasonableness of the Commissioner's calculations, while for the period September 3, 2005 to July 28, 2007 the Commissioner had to establish the reasonableness of its calculations by a preponderance of the evidence. Since the evidence presented by both sides with respect to both periods was generally similar, we discuss the evidence with respect to the case as a whole, but we have kept in mind the shift in the burden of proof in reaching our decision. Turning first to the period beginning July 29, 2007 for which Zabarah was legally obligated to keep and preserve accurate records, we find that the claims and interview sheets on which the DOL relied in issuing its orders provided the best available credible evidence of the existence and extent of underpayment. Absent corroborating records or other proof, Zabarah's testimony was not sufficient to meet his burden. With respect to the period prior to July 29, 2007 for which burden-shifting pursuant to Labor Law § 196-a is not applicable, we find that the DOL met the burden of showing by a preponderance of the evidence that the Commissioner's underpayment calculation was reasonable. Accordingly, we find the wage order reasonable, as modified below.

Unlike Cazares, whose testimony was generally consistent and credible, Zabarah's testimony was shifting, often vague, and conclusory in nature. In addition to his already noted shifting, vague accounts of the reason he did not have required records, Zabarah could not recall the specific periods that claimants were employed, and provided no evidence as to the daily hours or shifts worked by any employee. Although he insisted that no employee ever worked more than forty hours per week during the entire period that he owned the business – because "I recall that they used to work only the number of hours they are supposed to work. Besides that, the business couldn't take overtime" – at other points, petitioner testified that Cazares "very rarely" worked an hour of overtime; Thtlahuetle may have worked overtime "but very rarely;" and Castellano only worked "an hour or two" of overtime "but not all the time," but worked 56 hours per week "when we were very busy in the summer," as well as overtime "if an employee was sick."

He testified that "I made sure everybody got what they were supposed to get" and that Cazares worked only 35 to 38 hours a week with at most an occasional hour of overtime, yet Zabarah's own February 20, 2008 letter, introduced in evidence by petitioner, stated that Cazares "works 50 hours a week, and his gross weekly is $350.00." As of the letter's date, $350.00 for a 50-hour week was below the then-applicable $7.15 per hour minimum wage even before applying the required time and a half for weekly hours beyond 40.

Petitioner sought to rely on that letter's statement that Cazares "has been working at Guy R. Deli . . . for approximately one year" to support Zabarah's recollection that Cazares was hired around 2007, not in 2005 as Cazares testified. However, the near-identity between the February 2008 letter and one given Cazares in 2004 by Hollis Deli – signed by Saleh, a supervisor for both delis – confirms, instead, Cazares' testimony that Zabarah gave him a similar letter each time he reapplied for Medicaid. Similarly, Cazares' testimony that when Hollis Deli was sold in 2005, Saleh told him to go work at Guy R. Deli was far more credible than Zabarah's vague testimony that "[i]t looked like" Cazares worked at both delis simultaneously, something Zabareh claimed he knew "[b]ecause that deli was affiliated with my deli." By "affiliat[ion,]" Zabarah then clarified, he meant only that "We know each other . . . . I don't know who is the real owner of that deli, but I know some of the workers who work at that deli."

Petitioner's efforts to undercut Cazares' and other workers' claims by characterizing him as simply a disgruntled, unreliable and almost useless employee also undercut Zabarah's credibility. Zabarah testified that Cazares "wasn't that committed to his work," had unexcused absences "[w]eekly" – something Zabarah indicated was expected since "those people who come from Latin America they always drink" – and was tolerated until he left voluntarily, despite this record, because "I did not need him that much because he was like extra." At the same time he criticized Cazares, Zabarah testified he raised Cazares' purported original $8.00 per hour wage to $8.50, much the same treatment he gave Castellano. Zabarah alleged that Castellano started at $7.50 per hour but was raised to $8.00 and "towards the end" to $8.50 when Zabarah realized he was a good worker. We do not credit either Zabarah's denigration of Cazares or his general and conclusory claims that employees were always paid the required wage.

In short, we find that Zabarah's testimony that the claimants were properly paid was simply too general and conclusory to overcome the presumption favoring the Commissioner's order and meet petitioner's burden. "Petitioner cannot shift its burden to DOL with arguments, conjecture or incomplete, general and conclusory testimony." *Matter of Angela Jay Masonry & Concrete, Inc.*, PR 06-073 [September 24, 2008] p.5; *Matter of Young Hee Oh and Cheong Hae Corp.*, PR 11-017 [May 22, 2014]. In the absence of contemporaneous payroll records for the required period, an accurate estimate of the hours worked and wages paid to employees, or other credible evidence showing the Commissioner's estimates, even if imprecise, to be invalid or unreasonable, it was petitioner's burden to submit sufficient affirmative evidence to negate the Commissioner's determination of wages owed. *Matter of Young Hee Oh, Id*; *Matter of Ram Hotels, Inc.*, PR 08-078 [October 1, 2011]. Petitioner failed to meet this burden. To fault the order for possible imprecision, when caused by petitioner's failure to keep and furnish legally required records would reward the employer for its unlawful conduct. *Anderson v Mt. Clemens Pottery Co.*, 328 US 680, 687-88 [1949].

With respect to the period prior to July 29, 2007, the burden-shifting called for by Labor Law § 196-a is not applicable, but we find that a preponderance of the credible evidence nevertheless establishes the reasonableness of the Commissioner's calculations in this case. For reasons already discussed, Cazares' testimony, including testimony with respect to events prior to 2007, was far more credible than Zabarah's. Documentary evidence, including the near-identity between the letter given to Cazares in 2004 and one given him in 2008, also tends to confirm Cazares' rather than Zabarah's testimony, and the internal inconsistency of such testimony as petitioner's claim that Cazares was just a disgruntled unreliable employee further undercut petitioner's case. We have examined the minimum wage order as a whole, with respect

to both the period in which burden-shifting is applicable and the period in which it is not, and we find on the record evidence that as modified, the order reflects a reasonable approximation of hours worked by and payments made to employees and that it was reasonable and valid for the Commissioner to calculate underpayments and wages due accordingly.

The Petitioner is Not Entitled to Meal Allowances for Cazares or Castellano

Under certain circumstances, an employer is entitled to a credit for each meal provided as payment toward the minimum wage.[1] Petitioner argued that he should be credited with the cost of meals provided to the claimants.[2] We do not agree.

Cazares testified that while food was available, he was not provided with breaks in order to eat. Castellano's interview sheet stated that he was not provided with meals, and at the compliance conference, he elaborated by stating that he brought his own food from home. It was reasonable for the Commissioner not to provide a meal deduction with respect to Cazares and Castellano because the petitioners did not provide any evidence that the food provided constituted meals as defined by 12 NYCRR § 137-3.8 (a), 12 NYCRR § 146-3.7 (a) and 12 NYCRR § 142-2.19, which define a meal as including at least one of the types of food from each of fruits and vegetables; cereals, bread or potatoes; eggs, meat, fish or poultry; and milk, tea or coffee, except that for breakfast eggs, meat, fish or poultry may be omitted if both cereal and bread are offered. (*Matter of Yick Wah Chan and Wing Huang Restaurant Corp.*, PR 08-174 [October 17, 2012]; *Padilla v Manlapaz*, 643 F Supp 2d 302, 310 [EDNY 2009]). With respect to the period after July 29, 2007, another reason petitioner is not entitled to the meal credit is its failure to keep and preserve records of the meal allowances claimed (*Padilla v Manlapaz, Id. at* 643 F Supp 2d 310; *Matter of Yick Wah Chan*, PR 08-174, *supra at 10;* 12 NYCRR 137-1.9 [a]; 12 NYCRR 146-1.9; 12 NYCRR 142-2.5[a]). Petitioners are additionally precluded from claiming the meal allowance because 12 NYCRR 137.3-8 (b) and 12 NYCRR 146-3.7 (b), and 12 NYCRR 142-2.5 state that meals shall be deemed to be furnished "when made available to the employee during reasonable meal periods and customarily eaten by the employee." Petitioner did not establish by credible evidence that either of these conditions were met with regard to either Cazares or Castellano.

Meal Breaks

The petition also alleged that the employer should be credited for providing two meal breaks to its employees through a reduction in the work time for which they were required to be paid. Zabarah testified that the length of the meal "break" depended on how long an employee needed to finish a meal, and that "the meal time is included in the work hours." Cazares,

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[1] The meal allowance during the relevant period was as follows: $2.05 per meal from January 1 to December 31, 2005; $2.30 per meal from January 1, 2006 to December 31, 2007; $2.45 per meal from January 1, 2007 to July 23, 2009 and $2.50 from July 24, 2009 through 2011 (12 NYCRR §137-1.9[a][1], 12 NYCRR § 146-1.9[a][i], and 12 NYCRR § 142-2.5.).

[2] LSI Cueva testified that after preparing the preliminary recapitulation sheet, she determined that the petitioner was entitled to two meal credits per day for Thtlahuetle, and the final computation sheet includes this reduction in the minimum wage underpayment.

however, credibly testified that he was not given a meal break and had no time to eat. Thtlahuetle's claim form also stated that there was no fixed meal break. [3]

We found in *Matter of Yung Jin Han T/A Han's Food Deli*, PR 09-095 [December 15, 2010], that break times of less 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 (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] and 12 NYCRR 137-1.2 [d] [providing that state minimum wage may not be lower than federal minimum wage]), and, therefore, allowing for breaks of less than 30 minutes to be uncompensated under the Labor Law would provide less protection in determining hours worked, and therefore hours that must be compensated, than under federal law (*see* 12 NYCRR 137-1.3 and 137-3.5). Zabarah's general testimony that the length of meal breaks varied is insufficient to establish that Cazares and Thtlahuetle received breaks that must be deducted from the work time calculated by the Commissioner.

In her opening statement, Commissioner's counsel alleged that claimants were not provided with meal periods as required by Labor Law § 162.[4] We do not reach this issue, however, because it was not raised in the penalty order and the Commissioner did not amend the order prior to hearing to charge petitioners with this violation. *See Matter of Linden Joseph Tudor and HQ Lounge, Inc.*, PR 10-050 [December 14, 2012].

The Civil Penalties in the Wage Order Are Revoked

The wage order assesses a 100% civil penalty. Labor Law § 218 [1] provides, in relevant part:

> "In addition to directing payment of wages . . . found to be due, such order, if issued to an employer who previously has been found in violation of those provisions, rules or regulations, or to an employer whose violation is willful or egregious, shall direct payment to the commissioner of an additional sum as a civil penalty in an amount equal to double the total amount found to be due. 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."

[3] Castellano's claim form stated that he received an hour a day for meals, a statement reflected in the DOL's calculation.

[4] Labor Law § 162 (2) provides that an employee who works a shift of more than six hours extending over the noonday meal period of 11:00 a.m. to 2:00 p.m. is entitled to at least 30 minutes off for the meal period. Labor Law § 162 (3) recognizes an additional meal period of 20 minutes for persons employed for a period or shift that starts before 11:00 a.m. and continues later than 7:00 p.m.

In assessing the civil penalties in this case, the Commissioner was required to give "due consideration" to the size of petitioner's business, their good faith, the gravity of the violation, the history of prior violations, and in the case of petitioner's wage violation, their failure to comply with recordkeeping requirements. Petitioner argued that the civil penalties in both orders should be rescinded because his small business had closed, and any failure to cooperate with DOL's investigation, including the failure to provide documents, was not intentional. The Commissioner presented no evidence of the considerations used to assess the 100% civil penalty in the wage order. In the absence of any explanation for the 100% civil penalty in the wage order, the Commissioner's determination is arbitrary for failure to adequately explain the basis for his administrative determination and the wage order is modified accordingly.

Liquidated Damages

The Wage Order includes liquidated damages in the amount of 25% of the wages owed. Labor Law § 663 (2) as it read when the wage order was issued provided in relevant part that:

> "On behalf of any employee paid less than the wage to which the employee is entitled under the provisions of this article, the commissioner may bring any legal action necessary, including administrative action, to collect such claim, and the employer shall be required to pay the full amount of the underpayment, plus costs, and unless the employer proves a good faith basis to believe that its underpayment was in compliance with the law, an additional amount as liquidated damages. Liquidated damages shall be calculated by the commissioner as no more than one hundred percent of the total of underpayments found to be due the employee."

In the present case, petitioner produced no evidence of, and certainly did not prove, a good faith belief that their wage and hour practices were in compliance with the law. Accordingly, we affirm the Commissioner's imposition of 25% liquidated damages.

Interest is due

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 the Wage Order, but order the amount of interest assessed be reduced based on the reduction in the amount of wages found due.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The Wage Order is modified to find that the applicable wage orders are the Minimum Wage Order for the Restaurant Industry (12 NYCRR Part 137) and the Wage Order for the Hospitality Industry (12 NYCRR Part 146), and as so modified, is affirmed; and

2. The Penalty Order is affirmed; and

3. The Petition is otherwise denied.

Vilda Vera Mayuga, Chairperson

J. Christopher Meagher, Member

LaMarr J. Jackson, Member

Michael A. Arcuri, Member

Frances P. Abriola, Member

Dated and signed in the Office
of the Industrial Board of Appeals
at Albany, New York, on
April 29, 2015.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The Wage Order is modified to find that the applicable wage orders are the Minimum Wage Order for the Restaurant Industry (12 NYCRR Part 137) and the Wage Order for the Hospitality Industry (12 NYCRR Part 146), and as so modified, is affirmed; and

2. The Penalty Order is affirmed; and

3. The Petition is otherwise denied.

Vilda Vera Mayuga, Chairperson

J. Christopher Meagher, Member

LaMarr J. Jackson, Member

Michael A. Arcuri, Member

Frances P. Abriola, Member

Dated and signed by a Member
of the Industrial Board of Appeals
at Buffalo, New York, on
April 29, 2015.