STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of:	:	
RUBEN QUISPE AND ELYS QUISPE A/K/A ELYS CRUZ AND RUBEN PIZZAS INC. AND R & Q INC. (T/A DOMINOS PIZZA),	:	
Petitioners,	:	DOCKET NO. PR 11-122
To Review Under Section 101 of the Labor Law: An Order to Comply with Article 19 of the Labor Law, dated March 11, 2011,	:	RESOLUTION OF DECISION
- against -	:	
THE COMMISSIONER OF LABOR,	:	
Respondent.	:	

APPEARANCES

Ruben Quispe and Elys Quispe, petitioners *pro se*, and for Ruben Pizzas Inc. and R & Q Inc.

Pico Ben-Amotz, Acting Counsel, NYS Department of Labor (Matthew Robinson-Loffler of counsel), for respondent.

WITNESSES

Ruben Quispe and Elys Quispe for the petitioners; Elizabeth Hernandez and Labor Standards Investigator Erin Gibbons for the respondent.

WHEREAS:

The petition in this matter was filed with the Industrial Board of Appeals (Board) on April 25, 2011, and seeks review of an order issued by the Commissioner of Labor (Commissioner or respondent) against petitioners Ruben Quispe and Elys Quispe A/K/A Elys Cruz and Ruben Pizzas Inc. and R & Q Inc. (T/A Dominos Pizza) on March 11, 2011. Upon notice to the parties a hearing was held on June 21 and September 20, 2013, in Garden City, New York, with the Commissioner appearing by video from Albany, New York, before Devin A. Rice, the Board's Associate Counsel, and the 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.

The order on appeal is an order to comply with Article 19 of the Labor Law, which finds that the petitioners failed to pay minimum wages in the amount of $28,836.00 to claimants Elizabeth Hernandez and Mahir Koylouglu from December 5, 2001 to January 15, 2008. The order further finds interest due at the rate of 16% calculated to the date of the order, in the amount of $17,405.86, and assesses a civil penalty in the amount of $28,836.00, for a total amount due of $75,077.86.

The petition, filed on behalf of petitioners by counsel who withdrew prior to hearing, alleges, *inter alia*, that (1) the individual petitioners did not employ the claimants; (2) R & Q Inc. did not employ the claimants; (3) the claimants were employed by Ruben Pizza Inc.; (4) a settlement between Ruben Pizza Inc. and the United States Department of Labor (USDOL) covered the wages claimed by Elizabeth Hernandez; (5) the wage claims are barred in whole or in part by the six year statute of limitations; and (6) Ruben Pizza Inc. was a small business, acted in good faith, maintained proper payroll records, did not engage in violations of the Labor Law, and has no prior history of violations with the New York State Department of Labor (DOL). The respondent filed an answer on June 17, 2011 denying the allegations set forth in the petition. Petitioners, who were represented by counsel at the time, filed a reply to the answer on June 29, 2011.

SUMMARY OF EVIDENCE

In March 2008, claimant Elizabeth Hernandez filed a claim with DOL alleging that from November 5, 2005 to January 15, 2008, she worked as a cook at a Dominos Pizza franchise located in Mastic, New York. She alleged that the "responsible person at the firm" was petitioner Elys Quispe, that she was supervised by petitioner Elys Quispe, that she was paid bi-weekly by check, worked 65 to 72 hours per week, and was paid $7.00 per hour in 2005, increased to $7.50 an hour in 2006. A statement provided by Ms. Hernandez to DOL, memorialized by Immigrant Community Liaison Geovanny Trivino, alleges that the petitioners did not pay the claimant for any hours worked over 40 in a week, and that:

> "Prior to August 2007, Ms. Hernandez seems to have punch [sic.] in under her name and number for all the time worked; however, from around August 2007 until she stopped working . . . Ms. Hernandez was assigned a second employee number '51' with another name . . . . Ms. Hernandez was instructed to punch a different card every other day, but only received wages under her name or original number. She would get a check, sign and the employer would cash the check from the register."

Prior to Ms. Hernandez's claim, DOL employee "J. Restrepo" took an unsigned complaint from Mahir Koylouglu on December 5, 2007 against a Dominos Pizza located in Wyandanch, New York, owned by petitioner Ruben Quispe, alleging that Mr. Koylouglu worked as a driver seven days per week from 11:00 a.m. to 12:00 a.m. for $6.00 per hour plus tips with "no overtime."

Ms. Hernandez testified through an interpreter at hearing that she worked for petitioner Ruben Quispe making pizzas from November 2005 to November 2008. She testified that she mostly worked at the Dominos in Mastic, but sometimes worked at a location in Patchogue. Ms. Hernandez testified that she was interviewed and hired by petitioner Elys Quispe, and that Ms.

Quispe informed her that her salary would be $5.75 and that she would be paid overtime. Ms. Hernandez testified, however, that she never received any overtime pay while working for the petitioners.

Ms. Hernandez testified that she worked six days a week for the petitioners. She was off work on Tuesdays, but whenever she was needed, the petitioners called her, and she would work seven days a week. Ms. Hernandez testified that from November 2005 to June 2006, she used a time card. She said that after June 2006:

> "They invented a name for me. The name was Lillibeth Fernandez, and they gave me a card number . . . that was 51[1] . . . I would enter the place and work for eight hours under my name, then I would punch the card under the other name. I never received payment with the other name. I would just receive a check under my real name."

Ms. Hernandez explained that she worked 65 hours under two names, and was only paid for 40 hours of work. She alleges she is, therefore, owed 25 hours of wages at time and one half her regular hourly wage rate.

Labor Standards Investigator Erin Gibbons testified that she was assigned to investigate the claims made by Ms. Hernandez and Mr. Koylouglu against the petitioners, although she did not initially receive the claim forms or interview the claimants. Investigator Gibbons testified that she determined the wages due and owing to the claimants based on their statements, because the records provided by the petitioners were deemed inaccurate since Ms. Hernandez had informed DOL she worked under two names and the cancelled checks for the other name she worked under, Lillibeth Fernandez, were never produced to DOL.

Investigator Gibbons further testified that wages paid as part of a USDOL settlement were deducted prior to issuing the orders under review, and the petitioners provided no evidence to contradict Gibbons' testimony on this point.

Petitioner Ruben Quispe testified that he owned and operated numerous Dominos Pizza franchises in Suffolk County, New York incorporated as Ruben Pizzas, Inc., including locations in Wyandanch and Mastic. Mr. Quispe denied that his wife, petitioner Elys Quispe, had any involvement in the stores he owned and operated, or that she hired or supervised Hernandez. Petitioner Quispe admitted that he had been investigated and audited by the USDOL and had settled that investigation.

Mr. Quispe testified that claimant Elizabeth Hernandez worked as a cook and runner at the Mastic Store, which was managed by Ali Wacas, who made the employee schedules, supervised and trained the employees, set the pay rates and paid the employees, and, according to Mr. Quispe, hired Herhandez. Mr. Quispe testified that in 2008, Hernandez worked from 4:00 p.m. to 12:00 or 1:00 a.m. depending on the day, and that the number of days she worked per week varied as well as her starting and ending times. Mr. Quispe estimated that Hernandez worked four days per week on average, stating that "the most, the average they worked

[1] A typo in the transcript incorrectly states "15" where the claimant testified "51."

Thursday, Friday, Saturday and Sunday." Mr. Quispe testified that Hernandez did not have a consistent schedule.

Mr. Quispe further testified that he was not in the Mastic store very often and estimated that he was there once a week or once every 15 days. Mr. Quispe stated that he was the owner, but "you can't control ten, eleven stores, the individual store. You got to have a manager. You have to have a supervisor." Mr. Quispe hired the managers and sometimes fired employees. Mr. Quispe explained that he supervised the managers along with the supervisor, "but I control more because I am, you know, the owner." Mr. Quispe met with the managers every two weeks or every month to discuss how things were going in the stores, how to improve the business, and how to minimize costs.

With respect to pay rates, Mr. Quispe testified that all employees of Dominos Pizza per corporate policy are paid minimum wage and that Dominos Pizza records all employee hours by a computer time clock. Mr. Quispe denied that his stores used time cards, testifying that hours were recorded in the computer.

Mr. Quispe testified that he hired Mahir Koyouglu and that he worked in "every store" as a delivery driver. He worked three or four days per week from 2001 to 2005 for $6.00 per hour plus tips and mileage. Mr. Quispe could not remember how many hours Koyouglu worked per day.

Petitioner Elys Quispe testified that she owned only one Dominos Pizza franchise, the store located in Patchogue, New York, and the other stores were owned by Mr. Quispe. She stated that she did not have "anything to do" with Mr. Quispe's stores, and although she knows Hernandez and Koyouglu, she did not hire or fire them, did not supervise them, and they did not work at the Patchogue location. According to Ms. Quispe, the employees of her store only worked at her store and not at the stores owned by her husband, although she conceded that Koyouglu did work for "a short time" in Patchogue. Ms. Quispe explained that she sometimes worked at the Wyandanch store and also worked "a couple of times" in Mastic.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Board makes the following findings of fact and law pursuant to the provision of Board Rules of Procedure and Practice (Rules) 65.39 (12 NYCRR 65.39).

The petitioners' burden of proof in this matter was to establish by a preponderance of the evidence that the orders issued by the Commissioner are invalid or unreasonable (Labor Law § 101, 103; 12 NYCRR 65.30; *see also* State Administrative Procedure Act § 306 [1]).

The individual petitioners are employers under the Labor Law

The petition alleges that the individual petitioners are not liable as employers. "Employer" as that term is used in Article 19 of the Labor Law means "any individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons acting as an employer" (Labor Law § 651 [6]). "Employed" means "suffered or permitted to work" (Labor Law § 2 [7]).

The federal Fair Labor Standards Act, like the New York Labor Law defines "employ" to include "suffer or permit to work" (29 USC § 203 [g]), and "the test for determining whether an entity or person is an 'employer' under the New York Labor Law is the same test . . . for analyzing employer status under the Fair Labor Standards Act" (*Chu Chung v The New Silver Palace Rest., Inc.*, 272 F Supp 2d 314, 319 n6 [SDNY 2003]).

In *Herman v RSR Sec. Servs. Ltd.*, 172 F3d 132, 139 (2d Cir 1999), the Second Circuit Court of Appeals stated that the test used for determining employer status by explaining that:

> "Because the statute defines employer in such broad terms, it offers little guidance on whether a given individual is or is not an employer. In answering that question, the overarching concern is whether the alleged employer possessed the power to control the workers in question with an eye to the 'economic reality' presented by the facts of each case. Under the 'economic reality' test, the relevant factors include whether the alleged employer (1) had the power to hire and fire employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records" (internal quotations and citations omitted).When applying this test, "no one of the four factors standing alone is dispositive. Instead the 'economic reality' test encompasses the totality of the circumstances, no one of which is exclusive." (*Id.* [internal citations omitted]).

We find that the individual petitioners were employers under Article 19 of the Labor Law. Ruben Quispe admitted that he hired the managers, supervised the stores along with the managers and supervisors, sometimes fired employees, and held regular management meetings where he discussed the operation of the businesses with the managers and supervisors. He also admitted that he had hired Koyouglu. While Mr. Quispe, due to the number of franchises he owned and operated, did not supervise the claimants on a daily basis, it is well established that he did not need to be present at each store on a daily basis to be held individually liable as an employer (*See Herman v RSR Security Services Ltd.*, 172 F3d at 139 [quoting *Donovan v Janitorial Services, Inc.*, 672 F2d 528, 531 [5th Cir 1982] ["Control may be restricted, or exercised only occasionally, without removing the employment relationship from the protections of the FLSA, since such limitations on control 'do not diminish the significance of its existence'"]; *see also Carter v Dutchess Community College*, 735 F2d 8, 11-12 [2d Cir 1984] [fact that control may be "qualified" is insufficient to place employment relationship outside statute]; *Moon v Kwon*, 248 F Supp 2d 201, 237 [SDNY 2002] [fact that hotel manager may have "shared or delegated" control with other managers, or exercised control infrequently, is of no consequence]). Additionally, it is uncontested that Mr. Quispe maintained operational control over the store in that he hired and supervised managers, held regular meetings with the managers concerning business policies, and maintained overall financial control of the business (*Irizarry v Catsimatidis*, 722 F3d 99 [2d Cir 2013]). Therefore, we find that the respondent's determination that Mr. Quispe is individually liable as an employer is reasonable.

Petitioner Elys Quispe testified that she owned only one store (Patchogue) and had nothing to do with the stores owned by her husband. However, the credible evidence demonstrated that at least with respect to the claimants, DOL's determination that she is an

employer was reasonable. Hernandez credibly testified that she was hired and supervised by Ms. Quispe at the Mastic store (owned by Ruben Quispe) and sometimes worked at the Patchogue store, which Ms. Quispe admitted that she owned and operated. Ms. Quispe also admitted without elaboration that Koyouglu worked at some point at the Patchogue location. Based on the totality of the circumstances, we find that Elys Quispe did not meet her burden of proof to show that she is not individually liable as an employer of the claimants under Article 19 of the Labor Law, and affirm the respondent's determination.

The petitioners are liable for wages owed to Elizabeth Hernandez

Article 19 of the Labor Law, entitled "Minimum Wage Act" provides that every employer must pay each of its non-exempt employees a minimum hourly wage for each hour of work (Labor Law § 652 [1]), and of one and one-half of their regular hourly wage rate for hours worked over 40 in a week (12 NYCRR 137-1.3 [2008])[2]. Claimant Elizabeth Hernandez alleged that she worked 65 hours per week for $7.00 an hour, raised to $7.50 an hour, from November 5, 2005 to January 15, 2008, and received no overtime pay. She informed DOL that she worked 40 hours under her own name and worked overtime under another name for which she received no pay. DOL investigated Hernandez's allegations by, among other things, requesting that the petitioners produce wage and hour records for their employees, including cancelled checks for "Lillibeth Fernandez," the second name under which Ms. Hernandez claimed she had worked for the petitioners. The petitioners produced some records, but DOL deemed them incomplete and inaccurate as the checks for Lillibeth Fernandez were never produced, although such a name does appear in the petitioners' time records, including the limited set of time records introduced into evidence at hearing.

In the absence of sufficient records, petitioners then bear the burden of proving that the disputed wages were paid (Labor Law § 196-a; *Angello v Natl. Fin. Corp.*, 1 AD3d 818, 821 [3d Dept 1989]; *Heady v Garcia*, 46 AD3d 1088 [3d Dept 2007]). 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 calculation to the employer." Therefore, the 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 Ms. Hernandez worked and that she was paid for those hours, or other evidence that shows the Commissioner's findings to be invalid or unreasonable (*In the Matter of Ram Hotels, Inc.* Board Docket No. PR 08-078 [October 11, 2011]). Where 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" (*Hy-Tech Coatings v New York State Dept. of Labor,* 226 AD2d 378, [(1st Dept 1996], *citing Mid-Hudson Pam Corp.*). In this case, the Commissioner used the best available evidence, which was the statement of Elizabeth Hernandez, and the petitioners failed to prove that the wages found due and owing by the Commissioner were unreasonable. Furthermore, we find that Ms. Hernandez's testimony at hearing was credible and convincing, and consistent with the claim she filed with DOL, whereas the petitioners' evidence was insufficient and nonspecific. We affirm the

[2] As of January 1, 2011, the restaurant industry is covered by the Hospitality Wage Order (12 NYCRR 146).

respondent's determination that the petitioners owe Ms. Hernandez $20,383.50, plus statutory interest under Labor Law § 219 (1).

Determination that Mahir Koylouglu is owed wages is revoked

The respondent determined that the petitioners owe $8,452.50 in wages to Mahir Koylouglu. The petitioners admitted that Mr. Koylouglu worked at all of their stores, and, as discussed above, we found that the petitioners employed Ms. Hernandez and Mr. Koylouglu during the relevant time period; however, on the record before us, we cannot uphold the respondent's determination. Mr. Quispe testified that Mr. Koylouglu did not work the number of days set forth on the "SAS" form. Ordinarily, as discussed above, where the petitioners did not produce sufficient records, it would be reasonable for the DOL to calculate wages due and owing based on the best available evidence, including a claimant's statement. However, the best available evidence the respondent is attempting to rely on in this case consists of unreliable, uncorroborated hearsay. The unsigned "SAS" form is the only evidence in the record of Mr. Koylouglu's employment with the petitioners, and it does not contain sufficient detail, reliability, or probative value standing alone to sustain the respondent's determination that the petitioners failed to pay Mr. Koylouglu $8,452.50 in wages. Neither Mr. Koylouglu nor the DOL employee who took his statement testified, nor is there any other evidence in the record related to Mr. Koylouglu. Although the form was admitted into evidence under State Administrative Procedure Act § 306 (2) as a record in DOL's possession, and hearsay may constitute substantial evidence, we find the "SAS" form insufficient on the record before us in the absence of testimony from an individual who can authenticate the document or some other corroborating evidence that Mr. Koylouglu is owed wages. Accordingly, the portion of the order attributable to Mahir Koylouglu is revoked.

The civil penalty is affirmed

The order assesses a 100% civil penalty. The Board finds that the considerations required to be made by the Commissioner in connection with the imposition of a 100% civil penalty were proper and reasonable in all respects.

Statute of limitations

The petition alleges that part of the wages found due and owing was barred by the statute of limitations. We have held that it was reasonable for the Commissioner to collect wages for a six year period commencing at the time a complaint was filed with DOL (*Matter of 238 Food Corp.*, Docket No. 05-068 [April 25, 2008]). Ms. Hernandez filed her claim on March 31, 2008 and the Commissioner is collecting wages for her for a period of less than six years from the date she filed her claim. Accordingly, our decision in *Matter of 238 Food Corp.* is controlling and the time period of the claim is reasonable. Having revoked the order with respect to Mr. Koylouglu on other grounds, we do not reach the issue of whether his claim period was reasonable but note that it appears DOL was only attempting to collect wages for him for the six year period commencing the date that his statement was allegedly taken.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The order to comply with Article 19 of the Labor Law, dated March 11, 2011, is affirmed with respect to Elizabeth Hernandez; and

2. The order to comply with Article 19 of the Labor Law, dated March 11, 2011, is revoked with respect to Mahir Koylouglu; and

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

Anne P. Stevason, Chairperson

J. Christopher Meagher, Member

Jean Grumet, Member

LaMarr J. Jackson, Member

Jeffrey R. Cassidy, Member

Dated and signed in the Office
of the Industrial Board of Appeals
at New York, New York, on
November 20, 2013.