STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of: LAUREN H. SIMONS AND GRJH, INC., Petitioners, To Review Under Section 101 of the Labor Law: An Order to Comply with Article 6 of the Labor Law, and an Order Under Article 19 of the Labor Law, both dated October 6, 2017, - against - THE COMMISSIONER OF LABOR, Respondent.	DOCKET NO. PR 17-160 RESOLUTION OF DECISION

APPEARANCES

Lauren H. Simons, petitioner pro se, and for GRJH, Inc.

Pico P. Ben-Amotz, General Counsel, NYS Department of Labor, Albany *(Benjamin T. Garry* of counsel), for respondent.

WITNESSES

Lauren H. Simons for petitioners.

Senior Labor Standards Investigator Nathan Lazelle for respondent.

WHEREAS:

The petition in this matter was filed with the Industrial Board of Appeals (Board) on November 10, 2017, and amended January 17, 2018. The petition seeks review of two orders issued by respondent Commissioner of Labor on October 6, 2017, against petitioners Lauren H. Simons and GRJH Inc. Respondent filed an answer on March 12, 2018.

Upon notice to the parties a hearing was held in this matter on June 19, 2018, in Albany, New York, before Devin A. Rice, Counsel to the Board, 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 make statements relevant to the issues.

The order to comply with Article 6 of the Labor Law (unpaid wages order) under review directs compliance with Article 6 and payment to respondent for unpaid wages due and owing to claimant Mark R. Letus in the amount of $2,362.75 for the time period from February 15, 2015 to February 24, 2015, with interest continuing thereon at the rate of 16% calculated to the date of the order, in the amount of $989.12, liquidated damages in the amount of $2,362.75, and assesses a civil penalty in the amount of $4,725.50, for a total amount due of $10,440.12.

The order under Article 19 of the Labor Law (penalty order) assesses a $500.00 civil penalty against petitioner for violating 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 from on or about February 15, 2015 through February 24, 2015.

The petition alleges petitioners did not employ claimant. For the reasons set forth below, we find that the individual petitioner, Lauren H. Simons, did not employ claimant, but that the corporate petitioner, GRJH, Inc., is liable. The orders are revoked with respect to Simons, but otherwise affirmed.

SUMMARY OF EVIDENCE

Mark R. Letus filed a claim for unpaid wages with respondent Department of Labor on May 11, 2015. Letus' claim alleges he worked for GRJH as a gasoline delivery driver from February 15, 2015 to February 24, 2015, that his pay rate was $26.00 an hour, and that he was not paid for 63.25 hours he worked the week ending February 21, 2015, or for 16 hours he worked the week ending February 28, 2015. Letus' claim states he was hired and supervised by Lloyd Helm and petitioner Lauren H. Simons is the "responsible person at the firm," and that he left her several messages about his unpaid wages, but she never returned his call.

Senior Labor Standards Investigator Nathan Lazelle testified that he was assigned to investigate Letus' claim on March 10, 2016. On September 1, 2017, Letus called Lazelle and stated that he had been hired by Lloyd Helm, that he delivered gasoline in the Capitol District and Hudson Valley, and that he stopped working for GRJH because the job required more travelling than he had expected. Letus explained to Lazelle that he worked for more than a week, was never paid, and that Helm told him to contact Simons. Letus further told Lazelle that he left several messages for Simons, but she never called him back. Lazelle testified that Letus also told him that Lloyd Helm was his supervisor, told him what is pay rate was, and made his schedule, but that he was supposed to be paid by Simons. Lazelle testified that the orders were issued against Simons personally because "all indications were that Ms. Simons had the ability to – to pay Mr. Letus his wages or not" and that "Mr. Helm had made it clear to Mr. Letus that he had nothing to do with getting him paid; that was Ms. Simons' area of responsibility." Further, based on Lazelle's contacts with Simons, he believed she was individually liable because "[s]he indicated that if we submitted [Letus'] log books, she would be happy to send a check."

Petitioner Laura H. Simons testified that petitioner GRJH Inc. is a convenience store and gas station company headquartered in Millerton with approximately 21 locations. Simons is a vice president of the corporation and described her role as managing the convenience stores, which includes hiring employees for the convenience stores, making schedules for the

convenience store employees, merchandising, and handling accounts payable and receivables. She testified that she had no role in managing the drivers and that they were "for the most part" handled by a separate part of the company. She explained that Lloyd Helm runs the petroleum side of the business, including environmental compliance, inspections, and keeping track of the daily reports of gas deliveries. Simons testified she never hires, fires, or supervises drivers, nor does she set their pay rates or give them their checks. Simons, also testified, however, that she, along with her sister, and Helm, handled payroll as it is a family business and there is no designated person assigned to do payroll.

Simons testified that the log books drivers are required by federal and state law to keep were completed by the drivers every day and faxed each week to her detailing the hours the drivers worked. Simons testified she had no log books for Letus and that the company has over 70 employees but has no record that Letus ever worked there. Simons further testified that during respondent's investigation she explained to Lazelle that she had no evidence Letus had worked for petitioners and requested DOL to provide "documentation of employment" for Letus. According to Simons, she never consulted anybody else at the company when determining Letus had never worked there, simply relying on the lack of payroll records and log books. Simons explained that a letter written to DOL during the investigation, dated June 15, 2015, stating Letus had been paid in full for all hours submitted was just a standard form letter written in response to an investigation where she had checked for log books, and finding none assumed he had been paid for all hours worked.

ANALYSIS

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

Burden of Proof

Petitioner's 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 (State Administrative Procedure Act § 306 [1]; Labor Law §§ 101, 103; 12 NYCRR 65.30). For the reasons set forth below, we find petitioners met their burden of proof to establish Simons is not individually liable as Letus' employer but failed to show that GRJH was not his employer or that he had been paid the wages owed for the hours he alleged he had worked for the company.

"Employer" as used in Articles 6 and 19 of the Labor Law means "any person, corporation or association employing any individual in any occupation, industry, trade, business or service" (Labor Law § 190 [3]; *see also* 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 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 credit Simons' unrebutted testimony that she was not involved in managing the petroleum side of the business, which included drivers, that she did not hire or fire drivers, did not supervise them or make their schedules, and did not determine their rate or method of payment. Although she did maintain, along with Helm and her sister, employment records for drivers as indicated by her testimony that drivers faxed their log books *to her* at the end of each week and that when responding to DOL's investigation she searched through the company's employment records and found none for Letus. We do not find as a matter of economic reality that on the record before us Simons had the power to control drivers, including Letus, or that she had operational control of the drivers sufficient to make her individually liable as Letus' employer.

We find, however that Letus was employed by the corporate petitioner, GRJH Inc., as established by his claim form and the credible and specific information he gave to Lazelle during the investigation. The mere absence of employment records is not proof that Letus was not employed or "suffered or permitted to work" by GRJH, Inc (Labor Law § 196-a). Simons testified she did not know Letus, did not manage the drivers, and that she never spoke to those who did, when responding to DOL's investigation. Furthermore, she did not specifically testify that Letus never worked for GRJH and her apparent belief that respondent had the burden during the investigation to obtain log books from Letus to prove he worked for GRJH is incorrect. (State Administrative Procedure Act § 306 [1]; Labor Law §§ 101, 103; 12 NYCRR 65.30)

Article 6 of the Labor Law, entitled "payment of wages," requires employers to pay manual workers, such as Letus, wages weekly and no later than seven days after the last day of the week in which the wages were earned (Labor Law § 191 [1]). Simons admitted the company had no records of hours worked by or wages paid to Letus (*see* Labor Law §§ 195 and 661 [recordkeeping requirements]). In the absence of required records, GRJH had 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."

GRJH, therefore, had the burden of showing that the Commissioner's orders are invalid or unreasonable by a preponderance of the evidence of the specific hours that Letus worked and that he was paid for those hours, or other evidence that shows the Commissioner's findings to be invalid or unreasonable (*Matter of Ram Hotels, Inc.*, PR 08-078 [October 11, 2011]). Where no 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.*, 156 AD2d 818 [3d Dept 1989]). In this case, respondent used the best available evidence, the information provided by Letus in his claim form and during conversations with Lazelle. Based on the record, respondent's determination that claimant is owed $2,362.75 in wages is reasonable.

We likewise find respondent's assessment of civil penalties, liquidated damages, and interest reasonable. Labor Law § 218 (1) provides for a 200 % civil penalty where an employer has a history of prior wage and hour violations. Lazelle testified that the penalty was based on a history of numerous prior violations, and this testimony was not refuted at hearing. Labor Law § 218 (1) also requires respondent to include liquidated damages of 100 % of the wages found due with the order unless the employer "proves a good faith basis to believe that its underpayment was in compliance with the law."[1] There is no evidence in the record that GRJH had a good faith belief the underpayment was in compliance with the law. Finally, Labor Law § 219 (1) provides that when the Commissioner determines that wages are due, then 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." The unpaid wages order therefore, is affirmed in its entirety, with respect to GRJH, but revoked as to Simons. The penalty order for violating Labor Law § 661 and 12 NYCRR 142-2.6 for failing to keep and/or furnish payroll records is also affirmed with respect to GRJH, but revoked as to Simons, where, as discussed above, records were not maintained of Letus' employment with the company.

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[1] While Labor Law § 218 requires the Commissioner to include 100 % liquidated damages in her orders to comply, Labor Law § 198 provides that liquidated damages shall be calculated by the Commissioner as "no more than" 100% of the underpayments found due.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The orders are revoked as to Lauren H. Simons, but otherwise affirmed;

2. The petition for review be, and the same hereby is, granted in part and denied in part, consistent with this decision.

Molly Doherty, Chairperson

J. Christopher Meagher, Member

Michael A. Arcuri, Member

Gloribelle J. Perez, Member

Dated and signed by the Members
of the Industrial Board of Appeals
in New York, New York,
on August 8, 2018

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The orders are revoked as to Lauren H. Simons, but otherwise affirmed;

2. The petition for review be, and the same hereby is, granted in part and denied in part, consistent with this decision.

Molly Doherty, Chairperson

J. Christopher Meagher, Member

Michael A. Arcuri, Member

Gloribelle J. Perez, Member

Dated and signed by a Member
of the Industrial Board of Appeals
in Utica, New York,
on August 8, 2018