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STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of: IRA HOLM AND RSI, INC. AND RISC MIDLAND AVE. CORP., Petitioners, To review under Section 101 of the New York State Labor Law: An Order to Comply under Article 6, dated January 25, 2008, -against- THE COMMISSIONER OF LABOR, Respondent.	DOCKET NO. PR-08-025 RESOLUTION OF DECISION

WHEREAS:

The Petition for review in the above-captioned case was filed with the Industrial Board of Appeals (Board) on March 7, 2008. The Answer was filed on April 3, 2008. Upon notice to the parties a hearing was held on October 28, 2008 before Board Chairperson Anne P. Stevason, designated hearing officer in this matter. Petitioner Ira Holm (Holm or Petitioner) represented himself and Respondent Commissioner of Labor (Commissioner) was represented by Maria Colavito, Counsel to the Department of Labor (DOL), Mary McManus of counsel. 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 Commissioner issued the Order to Comply (Order) under review in this proceeding on January 25, 2008 against Holm, RSI, Inc. and RICS Midland Ave. Corp. (RISC). The Order is based on the alleged non-payment of wages due to one named Complainant for the period of May 30, 2003 through June 15, 2003. The Order demands payment of $1,458.33 in unpaid wages, $1,061.55 in interest and a civil penalty of $365.00, for a total due of $2,884.88.

The Petition alleges that the Holm was not the employer of the Complainant and was never an employee, agent or shareholder of RISC, which was the employer. It also alleges that RSI, Inc. was not the employer. There is no challenge to the amount of wages due to Complainant.

SUMMARY OF EVIDENCE

Holm testified that he shared an office suite with RISC as well as other insurance businesses. Holm was the president of a business that was separate from RISC called RSI Services, Inc. Holm volunteered to assist RISC with office administration duties as a favor since Frank Polloni, Manager of RISC during the time period in question, was out of the office much of the time selling. Polloni testified on behalf of Holm that he authorized Holm to interview and hire a bookkeeper for RISC. When RISC's bookkeeper had to leave, Holm placed employment ads in the newspapers and interviewed and hired Complainant. Holm was also authorized to give work to the Complainant, pay bills, sign checks and handle payables. He supervised Complainant, explained her job duties and gave her work to do. After Complainant worked for two weeks, Holm informed Polloni that Complainant was not working out and recommended that she be fired. Holm gave Complainant her paycheck. A "Stop Payment" was later put on the check by RISC.

Complainant testified that she responded to an advertisement for a bookkeeper in the newspaper and first spoke with Holm over the phone. She then was interviewed and hired by Holm. She worked from May 30, 2003 until June 15, 2003 when she quit work after being yelled at by Holm. Holm was the only person that she ever reported to and the only person to give her work. He also trained her in her job. Complainant received a paycheck from Holm which was written on the checking account of RISC but which was signed by Holm. A "Stop Payment" was put on her paycheck and Complainant has still not been paid for the two weeks of work. She filed a claim with DOL on June 23, 2003. DOL Senior Investigator Delois Le testified concerning the DOL investigation. A letter denying that Complainant was Holm's employee was received from Holm in July 2003 in response to the claim for wages but all further attempts at contacting Holm were unsuccessful. A Department of State record obtained by Le indicates that RSI, Inc. (not RSI Services, Inc.) is a New York corporation doing business in Rockland County and was incorporated in January of 2004.

DISCUSSION

When a petition is filed, the Board reviews whether the Commissioner's order is valid and reasonable. The Petition must specify the order "proposed to be reviewed and in what respects it is claimed to be invalid or unreasonable. Any objections . . . not raised in the [petition] shall be deemed waived" (Labor Law § 101). The Board is required to presume that an order of the Commissioner is valid. (Labor Law § 103 [1]). Pursuant to the Board's 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 that the Order under review is not valid or reasonable.

DEFINITION OF EMPLOYER

"Employer" is defined by Labor Law Article 6 as "any person, corporation or association employing any individual in any occupation, industry, trade, business or service" (Labor Law §190 [3]). "Employed" means "suffered or permitted to work" (Labor Law § 2 [7]).

Like the New York Labor Law, the federal Fair Labor Standards Act (FLSA) defines "employ" to include "suffer or permit to work" (29 U.S.C. § 230 [g]), and it is well settled that "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" (*Chung v. The New Silver Palace Rest., Inc.*, 272 FSupp2d 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 explained the test used for determining employer status:

> "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 the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records" (internal quotations and citations omitted).

Considering these four factors, the Board finds that Holm was Complainant's employer. Holm hired Complainant, supervised and controlled her work schedule, trained her, gave her work to do, and signed her paycheck. The term "employer" is to be interpreted broadly. Under Labor Law §2(6) the term "employer" is not limited to the owners or proprietors of a business, but also includes any agents, managers, supervisors, and subordinates, as well as any other person or entity acting in such capacity.

Under the broad New York and FLSA definitions of "employer," more than one entity can be found to be an employee's employer. *See, e.g.* Section 791.2 of the U.S. Department of Labor regulations, 29 CFR §791.2, which provides that two or more employers may be found to be "joint employers:"

> "[A] joint employment relationship generally will be considered to exist in situations such as: . . .
>
> "(2) Where one employer is acting directly or indirectly in the interest of the other employer (or employers) in relation to the employee; or
>
> "(3) Where the employers are not completely disassociated with respect to the employment of a particular employee and may be

> deemed to share control of the employee, directly or indirectly, by reason of the fact that one employer controls, is controlled by, or is under common control with the other employer."

Holm satisfactorily showed that RSI, Inc. was unrelated to either Holm or RISC and therefore, was improperly named and is an entity separate from RSI Services, Inc.

CIVIL PENALTIES FOR FAILURE TO PAY WAGES

The Orders assess civil penalties in the amount of 25% of the wages ordered to be paid. The Board finds that the considerations and computations required to be made by the Commissioner in connection with the imposition of the civil penalty amount set forth in the Order is proper and reasonable in all respects.

INTEREST

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 banks pursuant to section fourteen-a of the banking law per annum from the date of the underpayment to the date of payment. Banking Law section 14-A sets the "maximum rate of interest" at "sixteen percent per centum per annum."

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

The Order to Comply with Article 6 of the Labor Law, dated January 25, 2008, is hereby modified to remove the name RSI, Inc. from the Order and otherwise affirmed in full.

Anne P. Stevason, Chairman

Susan Sullivan-Bisceglia, Member

J. Christopher Meagher, Member

Mark G. Pearce, Member

Jean Grumet, Member

Dated and signed in the Office
of the Industrial Board of Appeals
at New York, New York, on
December 17, 2008.