DIRECTOR OF THE DEPARTMENT OF LABOR & INDUSTRIES
STATE OF WASHINGTON

In re: GOLD MOUNTAIN, INC., dba CASA DE ORO Citation and Notice of Assessment Nos. W-420-15 OAH Docket No. 07-2015-LI-00150	DIRECTOR'S ORDER RCW 49.48.084(4); RCW 34.05

Joel Sacks, Director of the Washington State Department of Labor & Industries, having considered the Initial Order served on February 4, 2016, having considered the petition for administrative review filed by the Department of Labor and Industries (Department) with the Director's Office and briefing submitted to the Director's Office by the Department and by Gold Mountain, Inc., dba Casa De Oro (Employer), and having reviewed the record created at hearing, issues this Director's Order. This Order intends to resolve the contested issue of whether the Employer failed to pay all the wages due to Julio Santos in violation of the wage payment laws. **The Employer is ordered to pay wages to Julio Santos in the amount of $55,902.99. The Employer is also ordered to pay interest in the amount of one percent per month under RCW 49.48.083(2) for these wages except for the time period of February 4, 2016, to the date this order is served. The Employer is ordered to pay the Department a penalty in the amount of $5,590.30.**

This Order supersedes the order served June 30, 2016, that was withdrawn on July 11, 2016.

The Director makes the following Findings of Fact, Conclusions of Law, and Final Decision and Order.

I. FINDINGS OF FACT

1. The Office of Administrative Hearings issued and served the Initial Order on February 4, 2016. The Initial Order reversed the Order Modifying Citation and Notice of Assessment dated April 13, 2015, and the Citation and Notice of Assessment dated April 1, 2015.

2. The Department timely appealed on March 7, 2016.

3. Casa De Oro is a restaurant in Spokane. It is owned and operated by Enrique Torres. He exercised control over wage-related decisions. Eva Torres is his wife who also has involvement in the restaurant. The restaurant is open for lunch and for dinner. The restaurant's posted closing time for Monday through Thursday is 10 p.m. and for Friday and Saturday is 11 p.m.

4. Julio Santos worked for the Employer for several years. This includes the time period at issue in this case: July 1, 2011, through June 30, 2014.

5. The Employer paid Mr. Santos a salary of $949.60 per pay period. On occasion it deducted hours from the paycheck. For example, in the pay period of November 16, 2011, to November 29, 2011, the Employer paid Mr. Santos $886.33, instead of $949.60. It used $11.87 an hour to calculate this amount. It also listed on the wage earning statements a rate of $11.87 an hour. Mr. Santos testified that his wage rate was $11.87. By the course of the parties conduct, the parties had an agreement that they would use the rate of $11.87 an hour as Mr. Santos's hourly wage rate if an hourly rate was necessary.

6. Mr. Santos worked as a dishwasher. His job duties included washing dishes and pots, and putting food into storage. He was the first employee to arrive in the morning. When he came in the morning he watered plants at times, let vendors in (such as technicians to check the alarms) when necessary, cleaned pots, worked with the deep fryer, prepared the dorado (which is served with chips to eat), finished cleaning dishes he had not finished the night before, and prepared the area where the cooks prepared vegetables and meats by cleaning the area and mopping the floors.

7. On July 1, 2014, Mr. Santos filed a wage complaint with the Department, claiming that the Employer did not pay him correctly for the hours he worked. He provided a calendar detailing the hours he worked. He usually worked 10.5 hours a day Monday through Thursday, 11.5 hours on Friday, and 5.5 hours on Saturday. He did not include two 15 minute meal breaks in his hours worked. He also did not include time he did not work, such as doctor's appointments and holidays. His hours were 8 a.m. until 2:00 p.m. and from 5 p.m. to 10 p.m., Monday through Thursday; 8 a.m. until 2:00 p.m., and 5:00 p.m. to 11:00 p.m. on Fridays; and 8:00 a.m. until 2:00 p.m. on Saturdays. He generally worked 59 hours a week. This was time worked to benefit the Employer and to perform job duties. He did not work on Sundays. Sometimes he would be at the restaurant when not working, such as on Sundays. He did not claim hours worked for that time.

8. A Department investigator investigated Mr. Santos's wage complaint. She provided the complaint and calendar with hours worked to Mr. Torres and Ms. Torres. On September 8, 2014, the Department investigator met with them to discuss Mr. Santos's hours. Mr. Torres stated that they did not disagree with Mr. Santos's claimed hours. They agreed with the wages owed. At that point in time they would have had no reason to misstate that Mr. Santos worked the claimed hours, and the Director relies on these statements over Mr. Torres's later

attempt to disavow them. Mr. and Ms. Torres acknowledged that the Employer's record of the time that Mr. Santos took off matched the information provided by Mr. Santos.

9. Mr. Torres wrote a letter to the investigator indicating that Mr. Santos was a trusted employee and so they gave him a key to the restaurant. He acknowledged that "Mr. Santos knows what his duties are and he knows . . . accordingly, what time . . . he has to arrive and at what time he has to leave his place of employment. Mr. Santos is the one that actually knows what his schedule is." Tr. 63.

10. Mr. Torres later testified that Mr. Santos spent more than 59 hours a week at the restaurant, but Mr. Torres did not think Mr. Santos worked all that time. When Mr. Torres came into work he did not always see Mr. Santos working; sometimes "he was sitting in his area having lunch or dinner or breakfast." Tr. 252. According to Mr. Torres, Mr. Santos also took breaks to prepare meals or to drink coffee and eat donuts. Mr. Torres did not quantify how many hours Mr. Santos did not work, nor did he testify how long Mr. Santos took for meals or whether these breaks were during his work shifts. Beyond the references to meals and donuts, Mr. Torres provided no specifics to support his suggestion that Mr. Santos did not work during the hours he claimed. Mr. Torres's testimony corroborates that Mr. Santos was at the restaurant at times that Mr. Santos did not claim that he was working. Mr. Torres observed that Mr. Santos came in earlier than 8:00 a.m., usually 7:00 a.m. and sometimes 6:00 a.m. He even observed him at 5:00 a.m. watering plants. Watering plants benefitted the Employer. Despite an opportunity to do so, Mr. Torres never testified that Mr. Santos worked only 40 hours a week.

11. Mr. Torres kept Mr. Santos on salary so Mr. Santos could work at his own pace, which meant, according to Mr. Torres, that "[h]e had a key to get in and get out and do his time on his own pace." Tr. 236. Mr. Torres recognized Mr. Santos's lengthy hours and talked to him about switching from salary to hourly because it was not necessary for him to be working so

many hours due to a downturn in the business. He, however, did not stop Mr. Santos from working the hours despite the downturn in business.

12. Jorge Jimenez, a server at the restaurant who works during the lunch and dinner shift, testified on the behalf of the Employer. He testified that sometimes the restaurant closed early on Fridays or during the winter season. He testified that there were a "few occasions" (Tr. 169) when Mr. Santos would leave the lunch shift early. Other than mentioning the "few occasions" Mr. Santos left early, he did not testify that Mr. Santos did not work during the times they had shifts together. He also did not quantify how often the restaurant closed early. Mr. Jimenez observed Mr. Santos working during the lunch shift.

13. Daniel Valencia, a bartender for the restaurant and a nighttime manager who works the night shift, testified on the behalf of the Employer. He agreed that the restaurant closed early more often in the last five years than previous years. He did not quantify how often this occurred. He testified that Mr. Santos did a good job and he observed him working during the dinner shift. Mr. Valencia described Mr. Santos as in charge of doing dishes, so they let him work at his own pace. He observed Mr. Santos leaving projects at the end of the night to finish in the morning. He did not say that Mr. Santos left work early. Instead he observed that Mr. Santos "was in his area all the time." Tr. 177-78. He indicated that Mr. Santos took meals at the restaurant. He did not say how long Mr. Santos took for meals.

14. Erick Garcia, a server at the restaurant who worked the evening shift, testified on the behalf of the Employer. He testified that if it was slow the restaurant would close a "little bit earlier." Tr. 198. Sometimes this meant 9 p.m. or 9:30 p.m. during the week or 10:30 p.m. on the weekend. He did not quantify how often this occurs. He did not talk to Mr. Santos during the shift—"We just work." Tr. 199. He noticed that Mr. Santos did not always finish his work, though he tried to finish at the same time everybody left. Mr. Garcia said that Mr. Santos liked to

work with no one else around so he came in earlier than other employees. He observed him preparing and eating dinner. He did not quantify how much time this took. He believed that Mr. Santos was a skilled dishwasher and observed him working.

15. The Employer provided no records that showed what days it shut down early. The Employer also had no records of Mr. Santos's hours. Mr. Torres did not require Mr. Santos to check in or out. He did not require him to record his hours or breaks on the belief that this was not required because Mr. Santos was a salaried employee. Before he developed the salary agreement with Mr. Santos, Mr. Torres did not look into whether there was any state laws regarding what types of jobs could be paid on a salary basis. The facts also support the inference that Mr. Torres did not believe he needed to pay Mr. Santos for his overtime because the Employer paid him on a salary basis. This was shown in part by Mr. Torres's acknowledgment that Mr. Santos worked "many hours" (Tr. 64, 254) and his offer that Mr. Santos could elect to work on an hourly basis to reduce his hours. It is also shown by Mr. Torres's goal to permit Mr. Santos to work at his own pace regardless of the amount of time it took to complete the tasks. He agreed that he paid him a salary because "he was taking his time to do things and I would let him do his thing at his own pace." Tr. 236.

16. Mr. Santos ate meals at the restaurant. No one testified that Mr. Santos ate breakfast at a time when he should be working. Mr. Torres testified that Mr. Santos arrived generally at 7:00 a.m. If Mr. Santos ate a breakfast, he did so before his start time of 8:00 a.m. Mr. Santos did not claim hours worked for two 15 minute periods. He additionally had two 10 minute periods to have paid rest breaks. WAC 296-126-092. There is no testimony that he took longer than this time for his meals. Instead there was testimony from Mr. Santos that he took 15 minutes for each meal.

17. The Director has given due regard to the credibility finding of the Administrative Law Judge about Mr. Santos. The Director does not find Mr. Santos less credible than other witnesses, and finds him a credible witness. Significantly, throughout the investigation and the case, Mr. Santos was consistent about the hours he claimed as worked in all material respects. As is often the case with witnesses, Mr. Santos has some inconsistencies in other aspects of his testimony but evidence corroborates his claim of hours worked. Because of the corroboration described throughout these findings and in particular in Finding of Fact No. 18, the Director accepts his testimony regarding the material issues here.

18. At a point in time when there was no motivation to dispute the hours that Mr. Santos worked, Mr. and Ms. Torres admitted to the hours claimed by Mr. Santos; these are the credible statements. Mr. Torres wrote that Mr. Santos was the person in the position to know his hours. Mr. and Ms. Torres admitted that the hours provided by Mr. Santos were consistent with the records the Employer had as to time taken off from work. Even when Mr. Torres later claimed that Mr. Santos did not work all the time he was at the restaurant, he could only point to time spent taking or preparing meals; but Mr. Santos could take a meal break. No witness testified that Mr. Santos took unduly long breaks, and the restaurant staff were in the position to observe Mr. Santos. Mr. Torres's testimony established that Mr. Santos came in early in the morning, but Mr. Santos did not claim all this time as working, he claimed hours after 8:00 a.m., not the early hours that Mr. Torres's observed him at the restaurant. This demonstrates that Mr. Santos did not claim all the hours he was on the premises as hours worked, showing credibility in the hours he did claim. Mr. Torres also admitted that Mr. Santos worked in the early morning watering plants; this was uncompensated work time. One witness said that on a "few occasions" (Tr. 169) Mr. Santos would leave early, but this was not quantified, and instead corroborates that Mr. Santos usually worked through the lunch shift until 2:00 p.m. Likewise the testimony about

the dinner shift shows that he would work until everybody left. Witnesses also verified that he left work uncompleted at night to finish during the next morning. This shows that Mr. Santos had work in the morning to perform.

19. The Employer claims that Mr. Santos spent his time socializing and hanging out at the restaurant. But although there is evidence that he came in on his day off, the record supports that he did not socialize during work time. A staff person denied talking with Mr. Santos: "We just work." Tr. 199. The nighttime manager said that Mr. Santos "was in his area all the time" and he did a "good job." Tr. 177-78. Mr. Santos was described by witnesses as someone that wanted to work alone. The Employer also claimed that Mr. Santos spent time watching TV in the restaurant's lounge, which is not supported by the record.

20. The Employer emphasized that the salary arrangement was to allow Mr. Santos to work at his own pace. Mr. Torres agreed that the benefit of paying Mr. Santos on salary was "he could take as much time as wanted to complete his tasks." Tr. 235. This meant the Employer believed that Mr. Santos could work beyond 40 hours at his own pace and Mr. Torres knew that Mr. Santos was working more than 40 hours a week. The Employer acted willfully with the intent to deprive Mr. Santos of his wages. The Employer acted volitionally when it entered into the salary arrangement with Mr. Santos that allowed Mr. Santos to work more than 40 hours a week, which resulted in unpaid hours and overtime. It acted volitionally when it permitted Mr. Santos to work more than 40 hours a week, without compensating him for overtime pay. The error was not mere carelessness as shown by the failure to keep payroll records to document Mr. Santos's hours worked. Additionally, there was no bona fide dispute. The failure to determine obligations under RCW 49.46 and RCW 49.52 does not create a bona fide dispute.

21. Mr. Santos did not represent to the Employer that he agreed to work without compensation for all hours worked and overtime, or agreed to waive wage and hour protections.

22. Mr. Santos worked more than forty hours a week and was not compensated for overtime. He should have been compensated for his overtime hours at $17.81 an hour. In its Citation and Notice of Assessment, the Department claimed the total amount due for the unpaid wages as $56,107.81. Three corrections are made to the hours underlying this calculation. On October 21, 2013, Mr. Santos worked 10 hours, not 10.5 hours. On October 22, 2013, Mr. Santos worked 10 hours, not 10.5 hours. And on October 30, 2012, Mr. Santos had a doctor's appointment and did not work 10.5 hours. The total amount of wages owed is $55,902.99. With these corrections, Exhibit 17 provides the hours worked by Mr. Santos and the wages owed.[1]

II. CONCLUSIONS OF LAW

1. Based on the Department's timely filed petition for review, there is authority to review and decide this matter under RCW 49.48.084 and RCW 34.05.

2. The Initial Order made a determination about Mr. Santos's immigration status. This was improper because immigration status was not relevant to any issues before the tribunal in this case. No exception exists in Washington to the requirement that an employer pay his or her employee the wages due based on immigration status. RCW 49.46.010(3) does not exclude from the definition of employee any individual based on immigration status. This definition applies to the minimum wage requirements under RCW 49.46.020. There is also no exception for immigration status for the overtime requirements of RCW 49.46.130. Likewise, the definition of employee under RCW 49.12.005(4) does not contain such an exception. This definition applies to the requirements of RCW 49.52.050 under RCW 49.48.082(5). Furthermore our Supreme Court has recognized that such testimony is prejudicial. *Salas v. Hi-Tech Erectors*, 168

[1] The Citation and Notice of Assessment contains a mistake. It references a second violation for the failure to pay a final paycheck. However, the Department alleges only one violation. This mistake did not affect the total amount due.

Wn.2d 664, 672, 230 P.3d 583 (2010).[2] In any event, the record does not support a determination either way about Mr. Santos's immigration status. There were references to this issue in the discovery deposition, but they are not admitted into evidence.[3]

3. Mr. Santos was an employee subject to the Minimum Wage Act under RCW 49.46 and to the Wage Rebate Act under RCW 49.52.050. Dishwashers are not excluded as employees under RCW 49.46.010(3) or from the overtime provisions under RCW 49.46.130(2). Likewise they are not excluded under RCW 49.52.050. RCW 49.12.005(4); RCW 49.48.082(5).

4. An employer must compensate an employee for the hours worked by the employee. Hours worked means all the hours that the employer authorizes or requires the employee to be on duty on the employer's premises or at a prescribed work place. WAC 296-126-002(8). An employer must pay an employee for time that it has permitted the employee to work. RCW 49.46.010(2).

5. The Department's Administrative Policy ES.C.2 states in part:

> "Hours worked," means all hours during which the employee is authorized or required, known or reasonably believed by the employer to be on duty on the employer's premises or at a prescribed work place. An analysis of "hours worked" must be determined on a case-by-case basis, depending on the facts. See WAC 296-126-002(8). See Administrative Policy ES.C.1.
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> The department's interpretation of "hours worked" means all work requested, suffered, permitted or allowed and includes travel time, training and meeting time, wait time, on-call time, preparatory and concluding time, and may include meal periods. "Hours worked" includes all time worked regardless of

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[2] There may be circumstances in which the Department or employee may argue that such testimony is relevant (such as to prove willfulness on the part of the employer), but no need exists to determine the parameters of this in this case. As the Supreme Court recognized in *Salas*, immigration status presents a sensitive issue and all involved should exercise care regarding the issue. Employees should not have to consider whether their immigration status will be the subject of an administrative proceeding if they file a wage claim.

[3] The only portions of the discovery deposition admitted are as follows: page 11, lines 12-16; page 14, lines 19-20.

> whether it is a full hour or less. "Hours worked" includes, for example, a situation where an employee may voluntarily continue to work at the end of the shift. The employee may desire to finish an assigned task or may wish to correct errors, prepare time reports or other records. The reason or pay basis is immaterial. If the employer knows or has reason to believe that the employee is continuing to work, such time is working time.
>
> An employer may not avoid or negate payment of regular or overtime wages by issuing a rule or policy that such time will not be paid or must be approved in advance. If the work is performed, it must be paid. It is the employer's responsibility to ensure that employees do not perform work that the employer does not want performed.

(Emphasis omitted.)

6. The Employer suggests that Mr. Santos was not using his time productively and was instead socializing or hanging out. This characterization of Mr. Santos is not supported by the facts. But in any event, it was the Employer's responsibility to monitor and enforce work place rules regarding productivity. An employer cannot fail to compensate an employee properly because of the caliber of the work or productivity level. The Employer argues that "he did not need to work all of those hours to adequately complete the job." Tr. 20. That an employee could possibly have been more efficient is not relevant. Lack of efficiency cannot form the basis to not pay an employee when the employer, as here, authorized the employee to be on duty on the employer's premises.

7. Mr. Santos was entitled to two 10 minute compensated breaks. WAC 296-126-092. There is no evidence that he was required to stay at the restaurant for meal breaks, so meal breaks did not need to be compensated. *Id.* Mr. Santos did not claim two 15 minute periods for meal breaks as paid and he was entitled to his rest breaks. The evidence does not show that he took breaks longer than this. Even if he did it would be the employer's obligation to document the length of the break, and this did not occur here.

8. Special rules apply to evaluating the evidence and the burden of proof when an employer has failed to keep adequate records. *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 66 S. Ct. 1187, 90 L. Ed. 1515 (1946), is the seminal case addressing the effect of an employer's failure to keep adequate records and is followed in Washington. *MacSuga v. Cty. of Spokane*, 97 Wn. App. 435, 445, 983 P.2d 1167 (1999); *see generally Drinkwitz v. Techsys, Inc.*, 140 Wn.2d 291, 298, 996 P.2d 582 (2000) (Washington often looks to the Fair Labor Standards Act as persuasive authority in interpreting the Minimum Wage Act). Washington, like federal law, requires employers to keep records about the hours worked by its employees. RCW 49.46.040, .070; WAC 296-128-010; *Anderson*, 328 U.S. at 687. Under *Anderson*, employees should not be punished for the inability to prove with precision the amount of hours worked by the employees because the employer failed to keep adequate records:

> Due regard must be given to the fact that it is the employer who has the duty under [FLSA] to keep proper records of wages, hours and other conditions and practices of employment and who is in position to know and to produce the most probative facts concerning the nature and amount of work performed. Employees seldom keep such records themselves; even if they do, the records may be and frequently are untrustworthy. It is in this setting that a proper and fair standard must be erected for the employee to meet in carrying out his burden of proof.

328 U.S. 687; *see also Brock v. Seto*, 790 F.2d 1446, 1448 (9th Cir. 1986) ("an award of back wages will not be barred for imprecision where it arises from the employer's failure to keep records . . . .").

9. The *Anderson* Court provided for a shifting burden of proof in the event the employer does not keep adequate records:

> [W]e hold that an employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. The burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with

> evidence to negative the reasonableness of the inference to be drawn from the employee's evidence. If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result be only approximate.

328 U.S. at 687-88. The *Anderson* Court developed the burden-shifting standard because of FLSA's remedial nature and the "great public policy which it embodies" and because lack of evidence is within the control of the employer. 328 U.S. at 687. Placing responsibilities on the employer when it fails to keep adequate records is "a result consistent with Washington's long and proud history of being a pioneer in the protection of employee rights." *Drinkwitz*, 140 Wn.2d at 300.

10. Under *Anderson*, although the preponderance of the evidence standard applies, the burden of proof is relaxed when an employer does not keep adequate records. *Lamonica v. Safe Hurricane Shutters, Inc.*, 711 F.3d 1299, 1315 (11th Cir. 2013) (FLSA places upon the employee "the burden of proving that he performed work for which he was not properly compensated. . . . However, if the employer failed to keep time records, as in this case, that burden is relaxed.") (citation omitted); *Reich v. Gateway Press, Inc.*, 13 F.3d 685, 701 (3d Cir. 1994) ("The Secretary's burden in these cases, however, is merely to present a prima facie case. Indeed, it is settled that the burden (with respect to a given employee) is met if it is proved that the employee has in fact performed work for which he was improperly compensated and if the employee produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference."); *Sec'y of Labor v. DeSisto*, 929 F.2d 789, 793 (1st Cir. 1991) (the "initial

burden in these cases is minimal."); *McLaughlin v. Ho Fat Seto*, 850 F.2d 586, 589 (9th Cir. 1988) ("burden is not on the employees to prove the precise extent of uncompensated work.").

11. In its prima facie case, the party seeking wages must (1) prove that the employee has performed work that he or she was not properly compensated for and (2) provide evidence to show the amount of such work by reasonable inference. *Anderson*, 328 U.S. at 687. This is viewed by the totality of the evidence. *See MacSuga*, 97 Wn. App. at 446. If the initial burden is met, "The employer must then rebut the inference that the employee worked the number of hours required to accomplish this amount of work." *MacSuga*, 97 Wn. App. at 446.

12. *Anderson* applies here. The Employer did not keep adequate records that showed the hours worked. Regardless that Mr. Santos was paid on a salary basis, a dishwasher is subject to the Minimum Wage Act under RCW 49.46.010, .020, and .130, and the recordkeeping statutes and rule apply to him. RCW 49.46.040, .070; WAC 296-128-010.

13. The Department met its burden of proof. First, it proved that Mr. Santos performed work that he was not properly compensated for. This is based on the findings that show the Employer permitted him to work more than 40 hours a week and did not compensate him for that overtime. Second, the Department provided evidence to show the amount of his work by reasonable inference. Mr. Santos produced a calendar that had his days and hours worked. Mr. and Ms. Torres acknowledged that the Employer's record of the time that Mr. Santos took off matched the information provided by Mr. Santos. These are reasonable sources to infer hours from and this evidence satisfies the burden to show his hours by a "just and reasonable inference." *See Anderson*, 328 U.S. at 687.

14. The Employer did not rebut the inference that Mr. Santos worked the number of hours required to accomplish his amount of work. The Employer did not negate the Department's claims. Although it raised an issue that the restaurant closed early, it could not quantify this. It was within the Employer's control to produce records that showed when it closed. The Employer contests the time spent for meals but did not produce any evidence that this was beyond the time allocated for Mr. Santos to take meals, nor did it track his hours. In short, the Employer provides no specific proof as to the hours that Mr. Santos worked and as such has not rebutted the Department's evidence. Accordingly, the hours provided in Exhibit 17, with the corrections outlined above, are correct.

15. Mr. Santos is owed overtime wages at "one and one-half times the regular rate at which he . . . is employed." RCW 49.46.130. In order to aid resolving the question of how to calculate the overtime, the Director asked the parties for briefing about *Fiore v. PPG Industries, Inc.*, 169 Wn. App. 325, 279 P.3d 972 (2012). The Director asked the parties to assume that Mr. Santos worked 59 hours a week, and then provide briefing about the calculation of the wages under *Fiore* if that assumption was correct. The Department and the Employer both filed briefs. *Fiore* raises two questions: (1) Should the Employer pay Mr. Santos at one-half the regular rate for his overtime hours or should the Employer pay him at one and one-half times the regular rate? (2) What is the regular rate?

16. Regarding the first question, there is no disagreement between the parties that the wages should be calculated at one and one-half times the regular rate. In its brief dated July 22, 2016, the Employer calculated the overtime rate as one and one-half times the hourly rate. *See*

Appellant's Br. re Calculation of Wages Owed at 3 (for 2011, the regular rate is "$8.67 per hour" and the overtime rate is "$13.01 per hour"). The Employer affirmed this position in its reply brief, stating "nor does the Appellant contend that Claimant is entitled to anything less than 1.5 times his regular rate of pay." *See* Appellant's Reply Br. re Calculation of Wages Owed at 2.

17. Regarding the second question about which rate to use for the regular rate, WAC 296-128-550 defines the regular rate of pay:

> The regular rate of pay shall be the hourly rate at which the employee is being paid, but may not be less than the established minimum wage rate. Employees who are compensated on a salary, commission, piece rate or percentage basis, rather than an hourly wage rate, unless specifically exempt, are entitled to one and one-half times the regular rate of pay for all hours worked in excess of forty per week. The overtime may be paid at one and one-half times the piecework rate during the overtime period, or the regular rate of pay may be determined by dividing the amount of compensation received per week by the total number of hours worked during that week. The employee is entitled to one and one-half times the regular rate arrived at for all hours worked in excess of forty per week.

18. For salaried employees, "the regular rate of pay may be determined by dividing the amount of compensation received per week by the total number of hours worked during that week." WAC 296-128-550; *Fiore*, 169 Wn. App. at 344. Calculating Mr. Santos's wages in this method results in a regular rate that is less than the minimum wage. The Employer's answer to this problem is to use the minimum wage rates in effect during the relevant time periods to calculate the regular rate. The Department's answer is to calculate the wage rate he would have earned if he worked only 40 hours a week and use this as the regular rate. The parties were asked to provide briefing on whether WAC 296-128-550's provision that "the regular rate of pay may be determined by dividing the amount of compensation received per week by the total number of hours worked during that week" was permissive or mandatory. And if permissive, whether the

parties could set the regular rate by agreement and if so by what type of agreement. The parties differed in their answers. The Director finds persuasive that the regulation's use of the word "may" is permissive, and allows for alternative methods of calculation if consistent with RCW 49.46.130 and if used when the regular rate calculated under WAC 296-128-550 falls below the minimum wage. The Employer argues that if so, any agreement needs to be express and not by implication and in any event that there was not an implied contract. The Department offers contradictory analysis but does ultimately conclude that a regular rate may be determined under a course of conduct to establish an implied contract.[4]

Parties can agree to what the regular rate of pay is and, if they do not agree, then the total amount paid is divided by the total hours worked to calculate the wage rate. *Patsy Oil & Gas Co. v. Roberts*, 132 F.2d 826, 827 (10th Cir. 1943); *cf. Fiore*, 169 Wn. App. at 344-46 (parties can agree to terms where the employee is paid at one-half the regular rate). Under the circumstances in this case, if the parties have an agreement about the wage rate, then this amount constitutes the regular rate, provided it is not lower than the minimum wage. RCW 49.46.130 provides that overtime is paid at the "regular rate at which [the employee] is employed"—the language "employed" connotes that the regular rate can be set by agreement of the parties because the

[4] To the extent there is a suggestion that the agreement must be made in advance, the Employer represented that the wage was $11.87 on pay stubs and reduced Santos's pay on individual days by increments of $11.87 early in the claimed time period for wages. Santos does not dispute that $11.87 was the amount. This is a sufficient agreement.

employment relationship is contractual in nature.[5] Additionally, as noted, WAC 296-128-550 is phrased in the permissive; it states "the regular rate of pay *may* be determined by dividing the amount of compensation received per week by the total number of hours worked during that week." (Emphasis added.) By using the word "may" the Department contemplated a circumstance when another lawful way is necessary to calculate the wage rate consistent with RCW 49.46.130. The parties can agree to have a regular rate above the minimum wage rate. Administrative Policy ES.A.8.1 states that "The regular rate may exceed the minimum wage pursuant to RCW 49.46.020, but may not be less." The agreement about the regular rate cannot be less than the minimum wage rate. RCW 49.46.090. The Director is following the rule in Conclusion of Law No. 18 in the situation of where the regular rate calculated under WAC 296-128-550 falls below the minimum wage and makes no ruling on its application in other circumstances.

19. As found in Finding of Fact No. 5, the parties agreed that $11.87 an hour reflected the regular rate. The parties created a contract by their course of conduct. *Powell v. Republic Creosoting Co.*, 172 Wash. 155, 158, 19 P.2d 919 (1933). The Employer expressed its agreement to the $11.87 rate of pay by listing it on the wage earning statements. The Employer argues that it did not pay an hourly rate of $11.87 an hour, but paid a salary. But the Employer used this amount to deduct amounts from the paychecks, so it was at times using the $11.87 rate to

[5] This analysis is confirmed in this case by the agreed wage provisions of RCW 49.52.050(2), which the Department enforces under the Wage Payment Act. RCW 49.48.082(12), .083. The agreed wage here under RCW 49.52.050 is a $949.60 per pay period and $11.87 an hour if an hourly rate was used. *See* Conclusion of Law No. 19, 20. This is enforceable in conjunction with RCW 49.46.130. The analysis in this case is also consistent with a liberal construction of the wage and hour laws. *Drinkwitz*, 140 Wn.2d at 300.

calculate wages. Mr. Santos confirmed in his testimony that this was his wage rate. It is fair to hold the Employer responsible for the wage rate it used to deduct wages, particularly considering that the Employer was in the superior bargaining power position.

20. RCW 49.52.050 makes it unlawful for an employer to willfully withhold wages that it is obligated to pay an employee. The Director determines the appropriateness of penalties under RCW 49.48.083(3) using the willfulness standard in RCW 49.52.050. RCW 49.48.082(13). Our Supreme Court has noted that the test for "willful" failure to pay is not stringent—the employer's failure to pay must simply be volitional. *Schilling v. Radio Holdings, Inc.*, 136 Wn.2d 152, 159, 961 P.2d 371 (1998). An employer's failure to pay wages is not willful where it is due to inadvertence or carelessness or where a bona fide dispute existed between the employer and employee regarding the payment of wages. *Schilling*, 136 Wn.2d at 160. An employer acts willfully in depriving an employee of wages when it "makes no genuine effort to keep a proper record of their payroll account with the [employee] or to determine by audit the correct amount of the wages owing." *Brandt v. Impero*, 1 Wn. App. 678, 680, 463 P.2d 197 (1969). The question of willfulness is a question of fact. *Schilling*, 136 Wn.2d at 160. Here the facts of volitional behavior, failure to keep adequate records, and lack of applicable exception show willfulness.

21. The Employer argues that the Department is estopped from seeking the wages because the Employer argues that Mr. Santos acquiesced to its unlawful behavior. Estoppel only applies against the party that makes a representation. *See Shelcon Const. Grp., LLC v. Haymond*, 187 Wn. App. 878, 902, 351 P.3d 895 (2015). The Department made no representation to the

Employer that it could fail to comply with Washington's wage and hour laws. RCW 49.48.083 allows the Department to collect wages when an employer violates a wage payment requirement. In any event, Mr. Santos cannot waive the protections of the Minimum Wage Act. RCW 49.46.090. Nor was there any waiver under the Wage Rebate Act.[6]

22. Because the Employer failed to pay its employee his full wages, the Employer must pay wages owed in the amount of $55,902.99, plus interest at one percent per month under RCW 49.48.083(2) (except for the time period of February 4, 2016, to the date this order is served). The interest payment obligation is ongoing until paid in full.

23. The Employer owes a penalty in the amount of $5,590.30 under RCW 49.48.083(3).

III. DECISION AND ORDER

Consistent with the above Findings of Fact and Conclusion of Law, the Order Modifying Citation and Notice of Assessment dated April 13, 2015, and the Citation and Notice of Assessment dated April 1, 2015 are AFFIRMED, as modified.

1. Payment of wages. *See* Citation and Notice of Assessment for payment information and the effect of the failure to pay wages and interest. The Employer is ordered to pay wages to Julio Santos in the amount of $55,902.99. The Employer is also ordered to pay interest in the amount of one percent per month under RCW 49.48.083(2) for these wages

[6] The Employer cites *Cotton v. Weyerhaeuser Timber Co.*, 20 Wn.2d 300, 147 P.2d 299 (1944), for its estoppel theory. This case was an early FLSA case and was not a Minimum Wage Act or Wage Rebate Act case, and does not apply. Its reasoning is also inconsistent with modern FLSA law. *See Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 302, 105 S. Ct. 1953, 85 L. Ed. 2d 278 (1985) ("[T]he purposes of [FLSA] require that it be applied even to those who would decline its protections."); *Barrentine v. Ark.-Best Freight Sys., Inc.*, 450 U.S. 728, 740, 101 S. Ct. 1437, 67 L. Ed. 2d 641 (1981) (noting FLSA rights cannot be waived).

(except for the time period of February 4, 2016, to the date this order is served). The Employer is ordered to make these payments within thirty days of the date of service of this Director's Order.

2. Payment of Civil Penalty: The Employer is ordered to pay the Department a penalty in the amount of $5,590.30. *See* Citation and Notice of Assessment for payment information. This penalty shall be waived if the Employer pays the wages or engages in and successfully follows through with a payment plan to pay the wages within a reasonable period of time after this order is final.

DATED at Tumwater this 20 day of October, 2016.

JOEL SACKS
Director

SERVICE

This Order was served on you the day it was deposited in the United States mail. RCW 34.05.010(19).

APPEAL RIGHTS

Reconsideration. Any party may file a petition for reconsideration. RCW 34.05.470. Any petition for reconsideration must be filed within 10 days of service of this Order and must state the specific grounds on which relief is requested. No matter will be reconsidered unless it clearly appears from the petition for reconsideration that (a) there is material clerical error in the order **or** (b) there is specific material error of fact or law. A petition for reconsideration, together with any argument in support thereof, should be filed by mailing, or by emailing to DirectorAppeal@LNI.WA.GOV, or delivering it directly to Joel Sacks, Director of the Department of Labor and Industries, P. O. Box 44001 Olympia, Washington 98504-4001, with a copy to all other parties of record and their representatives. Filing means actual receipt of the document at the Director's Office. RCW 34.05.010(6).

NOTE: A petition for reconsideration is not required before seeking judicial review. If a petition for reconsideration is filed, however, the 30-day period will begin to run upon the resolution of that petition. A timely filed petition for reconsideration is deemed to be denied if, within twenty (20) days from the date the petition is filed, the Director does not (a) dispose of the petition **or** (b) serve the parties with a written notice specifying the date by which it will act on the petition. RCW 34.05.470(3).

Judicial Review. Any petition for judicial review must be filed with the appropriate court and served within 30 days after service of this Order. RCW 34.05.542. RCW 49.48.084(5) provides, "Orders that are not appealed within the time period specified in this section and Chapter 34.05 RCW are final and binding, and not subject to further appeal." Proceedings for judicial review may be instituted by filing a petition in superior court according to the procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil Enforcement.

DECLARATION OF MAILING

I, Lisa Rodriguez, hereby declare under penalty of perjury under the laws of the State of Washington, that the DIRECTOR'S ORDER was mailed on the 20 day of October 2016, via certified mail, postage prepaid, and by regular mail to the following:

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Spokane, WA 99201

DATED this 20 day of October, 2016, at Tumwater, Washington.

Lisa Rodriguez

Lisa Rodriguez