

DIRECTOR OF THE DEPARTMENT OF LABOR & INDUSTRIES  
STATE OF WASHINGTON

In re: San Miguel, LLC and Marta Araujo,

Citation and Notice of Assessment No.  
W-208-20

OAH Docket No. 03-2020-LI-01339

No. 2022-007-WPA

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 July 9, 2021, the petition for administrative review filed by San Miguel, LLC, and Marta Araujo (the Appellant), briefing submitted to the Director's Office, and having reviewed the record created at hearing and the records and files herein, issues this Director's Order.

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 July 9, 2021.
2. The Appellant timely filed a petition for review with the Director.
3. The Director adopts and incorporates all the Initial Order's findings of facts.

## II. CONCLUSIONS OF LAW

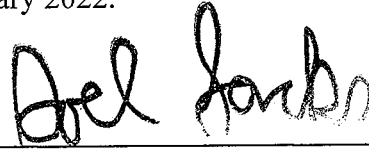
1. Based on the Appellant's timely filed petition for review, there is authority to review and decide this matter under RCW 49.48.084 and RCW 34.05.

2. I have considered the findings and conclusions of the Initial Order, which correctly analyze the legal issues in this appeal and adopt and incorporate all the Initial Order's conclusions of law and order.

## III. DECISION AND ORDER

Consistent with the above Findings of Fact and Conclusion of Law, the citation and notice of assessment is affirmed in part and reversed in part and is remanded to the Department with instructions to recalculate the wages owed consistent with this opinion. The Initial Order of July 9, 2021 is incorporated by reference herein.

DATED at Tumwater this 15 day of February 2022.



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](mailto: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 Deck, hereby declare under penalty of perjury under the laws of the State of Washington, that the DIRECTOR'S ORDER was mailed on the 15 day of February 2022, via U.S. Mail, postage prepaid, and email to the following:

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DATED this 15 day of February 2022, at Tumwater, Washington.

  
\_\_\_\_\_  
LISA DECK

**WASHINGTON STATE  
OFFICE OF ADMINISTRATIVE HEARINGS**

In the matter of:

Docket No. 03-2020-LI-01339

San Miguel, LLC and Marta Araujo as  
an individual,

**INITIAL ORDER**

Appellant/Employer.

Agency: Labor and Industries  
Program: Wage Payments  
Agency No. W-208-20

**Language Access Notice**

**English**

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**1. ISSUES**

- 1.1. Whether the Appellant, San Miguel LLC and Marta Araujo as an individual, violated Chapter 49.46 RCW and RCW 49.46.130 by failing to pay overtime wages to Nora Arreguin Zuniga, as alleged in Citation and Notice of Assessment No. W-208-20?<sup>1</sup>
- 1.2. If so, what wages and interest are due?

**2. ORDER SUMMARY**

- 2.1. Yes. Appellants San Miguel LLC and Marta Araujo violated Chapter 49.46 RCW and RCW 49.46.130. The amount of overtime wages owed is REVERSED and REMANDED for recalculation.
- 2.2. Appellants are responsible for paying interest in the amount of 1% per month, and a penalty of 10% of the total unpaid wages or \$20,000.00, whichever is less. The amount of interest and penalty is REVERSED and REMANDED for recalculation.

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<sup>1</sup> The prehearing conference order in this matter identifies another issue on appeal, i.e. Appellants' failure to pay Ms. Zuniga for sick leave. However, Appellants have admitted liability on this finding, and chosen not to appeal it. Araujo Testimony. It is therefore not addressed herein.

### 3. HEARING

- 3.1. Hearing Date: May 3-7, 2021
- 3.2. Administrative Law Judge: Lisa N. W. Dublin
- 3.3. Appellants: San Miguel LLC and Marta Araujo
- 3.3.1. Witnesses:
- 3.3.1.1. Eva Araujo
  - 3.3.1.2. Rosa Katalina Araujo
  - 3.3.1.3. Olivia Contla
  - 3.3.1.4. Anna Maria Garza
  - 3.3.1.5. Tanya Santiago
  - 3.3.1.6. Marta Araujo
- 3.4. Agency: Department of Labor and Industries
- 3.4.1. Representative: Lisa Roth, Assistant Attorney General
- 3.4.2. Witnesses:
- 3.4.2.1. Marta Araujo
  - 3.4.2.2. Clemente Garcia
  - 3.4.2.3. Nora Arreguin Zuniga
  - 3.4.2.4. Rosalba Lozano
  - 3.4.2.5. Luz Gonzalez-Virgen
  - 3.4.2.6. Sandra Valencia
- 3.5. Exhibits: Exhibits 1 through 19, A-D, and F-H<sup>2</sup> were admitted.
- 3.6. Interpreter: Nelson Avilan
- 3.7. Court Reporters: Caryn Winters and Rachael Hall

### 4. FINDINGS OF FACT

I find the following facts by a preponderance of the evidence:

#### *Jurisdiction*

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<sup>2</sup> As Appellant's exhibits were initially submitted with number markers rather than letters as directed, Appellant's exhibits 1-7 have been remarked with letters A-G respectively to avoid confusion with the Department's numbered exhibits.

- 4.1. On November 8, 2019, the Department of Labor and Industries (“Department”) issued Citation and Notice of Assessment W-208-20 against Appellants San Miguel LLC and Marta Araujo, individually, for violation of the state Wage Payment Act and/or Minimum Wage Act. Ex. 1
- 4.2. On December 6, 2019, the Department received correspondence from Marta Araujo appealing the portion of Citation and Notice of Assessment W-208-20 relative to overtime pay. Ex. 3.

*The Parties*

- 4.3. Appellant San Miguel LLC (“San Miguel”) was a business located in Fife, Washington, that was owned and operated as of approximately January 2014 by Marta Araujo. Ex. 4, Ex. 18, p.8; Ex. 12, p.3. San Miguel sold groceries including fresh meat at its butcher shop, and sold services such as money transfers. San Miguel also prepared food onsite including burritos, tacos, tortas, quesadillas, carne aside, fajitas, and carnitas, which it sold hot to customers. It was generally open for business 9:00 a.m. to 10:00 p.m. on weekdays, and 9:00 a.m. to 9:00 pm on weekends. See Ex. 6, p.10, 12; Ex. 18, pp. 9, 36.
- 4.4. Appellant Marta Araujo (“Ms. Araujo”) supervised the approximately seven employees of San Miguel, and determined their work schedules and wages in consultation with her accountant. Ms. Araujo maintained inventory, paid taxes, made bank deposits, and oversaw daily operations at San Miguel. Araujo Testimony.
- 4.5. At the time Ms. Araujo acquired San Miguel, wage claimant Nora Arreguin Zuniga (“Ms. Zuniga”) was already employed with the previous owner. Marta Araujo maintained Ms. Zuniga’s employment. Ms. Zuniga worked for San Miguel until approximately December 22, 2018. See Ex. 8, p.36.

*Ms. Zuniga’s Work Schedule*

- 4.6. Throughout her employment, Ms. Zuniga’s job duties included opening and closing the store, prepping food in the kitchen, cutting meat for display in the butcher shop, cashiering, and making money transfers. Zuniga Testimony.
- 4.7. At this point, the testimony of the parties conflicted on material points. Ms. Araujo testified that Ms. Zuniga’s work schedule was Mondays, Wednesdays and Fridays from 8:00 a.m. to 3:00 p.m., Thursdays from 2:00 to 10:00 p.m., and Sundays from 1:00 to 9:00 p.m., with Tuesdays and Saturdays off. Ms. Araujo testified that this schedule never changed, except for the week of May 16, 2016, when Ms. Araujo got married. Ms. Araujo also testified that Ms. Zuniga worked on a Saturday once or twice, but she could not remember when.

- 4.8. Ms. Zuniga, on the other hand, testified that she worked Mondays from 7:00 a.m. to 4:00 p.m., or sometimes until 5:00 or 6:00 p.m., but always the same. She testified that she worked Tuesdays sometimes three to four hours cutting meat. She testified she worked Wednesdays from 7:00 a.m. to 4:00 or 5:00 p.m., and then testified she worked until 5:00 or 6:00 p.m. various Wednesdays because of deposits, and never stopped work at 4:00 p.m. as she was scheduled. She testified she started work on Thursdays starting at 3:00 p.m. (or 1:00 p.m.), and worked until 10:00 or 10:30 p.m. when the store closed. She testified she worked Fridays 7:00 a.m. to 4:00, 5:00, or 6:00 p.m. She testified she worked every Saturday starting at 6:00 a.m., and worked until 4:00 or 5:00 p.m. with Ms. Araujo present for a portion of this time. She testified she worked Sundays starting at approximately 1:00 p.m. or earlier, and worked until closing which was 10:00 or 10:30 p.m.
- 4.9. Based on the totality of the circumstances, I resolve this conflict in favor of Ms. Zuniga in part, and Appellants in part. Several witnesses saw Ms. Zuniga working at San Miguel before 8:00 a.m. on Mondays, Wednesdays, and Fridays, and saw her working there on Saturdays. See Ex. 6, pp.8-9, 11, 13-14; Ex. 9. Ms. Zuniga also testified repeatedly that her actual hours worked went into a notebook, that she started keeping right after Ms. Araujo took over the business. Ms. Zuniga and her roommate, Ms. Valencia, then inserted these hours into a calendar format for purposes of the Department's investigation. Ex. 8. Ms. Zuniga's calendar of work hours also supports her testimony about her work hours these four days. Appellants' calendar of Ms. Zuniga's work hours, and their revised wage transcription sheet, on the other hand, were made only after the Department's investigation began, are derived from documents received during the investigation, are supported only by self-serving testimony, and are thus generally less credible on these days as to Ms. Zuniga's start times and days off. Exs. 13 and 14. I therefore find that Ms. Zuniga worked Mondays, Wednesdays, Fridays and Saturdays as set out in her calendar (Ex. 8) with the following exceptions:
- (a) Friday, May 20, 2016, when Ms. Zuniga did not work, but rather participated in the wedding of Ms. Araujo;
  - (b) Saturday April 1, 2017, when Ms. Zuniga did not work, as no hours for that day are entered on her written calendar, and the entire month is mis-calendared by a day.
  - (c) All Fridays in September 2017, when Ms. Zuniga's work ended as set out in Appellants' closing reports (Ex. A);
  - (d) All Saturdays in October 2017, when Ms. Zuniga's work ended as set out in Appellants' closing reports;



- (e) Friday November 17, 2017, when Ms. Zuniga's work ended as set out in Appellants' closing report; and
- (f) Monday December 25, 2017, Christmas Day, when Ms. Zuniga's work ended as set out in Appellants' closing report.

4.10. However, on Thursdays, there is no evidentiary support for Ms. Zuniga's testimony that she started work at 3:00 pm or 1:00 pm., or ended work at 10:30 p.m. Ms. Zuniga's testimony that she worked until 10:00 p.m., while supported at times by her calendar and Appellants' closing reports, is belied many other times by closing reports showing the store closed well before 10:00 pm. See Ex. A. Ms. Zuniga's calendar also states that many times she worked during the daytime on Thursdays and did not close the store. I therefore find that Ms. Zuniga worked Thursdays as set out in her calendar with the following exceptions:

- (a) February 16, 2017, when Ms. Zuniga did not work because the store was closed for Immigrant Day (see Ex. 8, p.14; Ex. 12, p.3; Ex. 18, p.15); and
- (b) November 22, 2018, Thanksgiving Day, when Ms. Zuniga's work ended as set out in Appellants' closing report. See Ex. A.

4.11. Regarding Sundays, Ms. Zuniga's written calendar supports her testimony about her starting time and is more credible than Appellants' post-hoc written calendar. However, Appellants' closing reports show that Ms. Zuniga often did not work until 10:00 p.m. on Sundays. Also, text messages contradict Ms. Zuniga's work hours on some dates. I therefore find that Ms. Zuniga worked Sundays as set out in her written calendar with the following exceptions:

- (a) May 14, 2017, when Ms. Zuniga's work ended as set out in Appellants' closing reports (Ex. A);
- (b) April 1, 2018, when Ms. Zuniga's work ended as set out in Appellants' closing reports; and
- (c) September 23, 2018, when Ms. Zuniga's work ended as set out in Appellants' closing reports.

4.12. In addition, I resolve conflicting evidence over Ms. Zuniga's start time on Sunday October 28, 2018 in favor of Appellants. Ms. Zuniga's text message at 12:58 p.m. that afternoon stating she was on her way, along with Appellants' calendar stating Ms. Zuniga started work at 1:30 p.m. that date, are more credible than Ms. Zuniga's calendar stating she started work at noon that day. See Exs. D and 14.

4.13. Regarding Tuesdays, I find Ms. Zuniga's testimony about her work not credible. There are no work hours documented for Ms. Zuniga in her calendar, and no other evidentiary support for any specific hours she worked on any specific Tuesdays during the relevant time period. In contrast, Ms. Araujo and others testified that Tuesday was Ms. Zuniga's day off each week. See Ex. 6, p.8; Ex. 18, pp. 25-26. Ms. Zuniga also appeared to share with the Department investigator that she worked every day but Tuesday. Ex. 6, pp. 2, 17. I therefore find that Ms. Zuniga did not work on Tuesdays during the relevant time period.

#### *Ms. Zuniga's Wages*

4.14. Testimony of the parties also conflicted on Ms. Zuniga's rate of pay during her employment with San Miguel. Ms. Araujo testified that she or another family member paid Ms. Zuniga on Fridays at the store in the amount of \$500.00 to start, and that this amount increased to \$550.00 per week, and then \$600.00 per week, over time. Ms. Araujo also testified that she paid Ms. Zuniga bonuses from time to time for additional work hours; this included a bonus of more than \$100 in September 2016, and other bonuses in September 2017 and September 2018 in unknown amounts.

4.15. Ms. Zuniga, on the other hand, testified that her pay remained the same throughout her employment with San Miguel, at the rate of \$500.00 per week. Ms. Zuniga admitted receiving \$100 on approximately three occasions from Ms. Araujo's husband as a 'thank you'.

4.16. Given the totality of the circumstances, I resolve this conflict in favor of Ms. Zuniga. The payment receipts Appellants submitted show a payment date and amount, but are not signed by Ms. Zuniga. See Ex. C. As Appellants paid Ms. Zuniga in cash, there are no paycheck stubs or other documentary evidence on record supporting the specific amounts paid to Ms. Zuniga, or a wage increase over time. Appellants admit that they continued to pay Ms. Zuniga \$500 per week at the time they took over the store.

#### *Investigation*

4.17. On February 22, 2019, Ms. Zuniga filed a complaint with the Department, claiming unpaid wages. Ex. 5. An investigation ensued, and was conducted by Luz Gonzalez-Virgen. Ex. 6. The investigation covered the three years prior to Ms. Zuniga's complaint, i.e. beginning February 21, 2016, up until the end of her employment on December 21, 2019.

4.18. Ms. Gonzalez-Virgen reviewed Ms. Zuniga's calendar of work hours for this relevant time period, spoke with witnesses for both sides, and analyzed documents submitted by the parties. As Appellants had not submitted the notebook of hours that employees worked, that Ms. Araujo allegedly maintained,

despite her repeated requests, Ms. Gonzalez-Virgen relied on Ms. Zuniga's calendar for the times and dates she worked. As the last task of every work day before closing shop at San Miguel was to run a closing report at the cash register, Ms. Gonzalez-Virgen used the time stamp on these closing reports to identify the time Ms. Zuniga ended work on the days she closed the store. In case of conflict between the time stamp on the closing report, and the time Ms. Zuniga wrote on her calendar that she stopped work, Ms. Gonzalez-Virgen resolved the conflict in favor of the closing report. Ms. Gonzalez-Virgen then compiled a Wage Transcription Sheet setting out the hours she found that Ms. Zuniga worked each day during the relevant time period, the amount she was paid, and the amount she was still owed. Ex. 16, as amended.

- 4.19. In some instances, in the Wage Transcription Sheet, Ms. Gonzalez-Virgen did not apply the time stamp on the closing report to resolve conflict with Ms. Zuniga's calendar, and instead used Ms. Zuniga's calendar alone. These instances are as follows:

December 24, 2016 -- Ms. Zuniga's calendar: 5:00 pm; Closing Report: 5:21 pm.

May 14, 2017 – Ms. Zuniga's calendar: 10:00 pm; Closing Report: 9:03 pm

September 1, 2017 – Ms. Zuniga's calendar: 10:00 pm; Closing Report: 9:48 pm

September 8, 2017 – Ms. Zuniga's calendar: 10:00 pm; Closing Report: 9:50 pm

September 15, 2017 – Ms. Zuniga's calendar: 10:00 pm; Closing Report: 9:25 pm

October 7, 2017 – Ms. Zuniga's calendar: 10:00 pm; Closing Report: 9:04 pm

October 14, 2017 – Ms. Zuniga's calendar: 10:00 pm; Closing Report: 9:46 pm

October 21, 2017 – Ms. Zuniga's calendar: 10:00 pm; Closing Report: 9:02 pm

October 28, 2017 – Ms. Zuniga's calendar: 10:00 pm; Closing Report: 9:24 pm

November 17, 2017 – Ms. Zuniga's calendar: 10:00 pm; Closing Report: 9:49 pm

December 25, 2017 – Ms. Zuniga's calendar: 5:00 pm; Closing Report: 3:45 pm

April 1, 2018 – Ms. Zuniga's calendar: 9:30 pm; Closing Report: 8:56 pm

July 5, 2018 – Ms. Zuniga's calendar: 9:30 pm; Closing Report: 9:44 pm

September 23, 2018 – Ms. Zuniga's calendar: 9:30 pm; Closing Report: 8:59 pm

November 22, 2018 – Ms. Zuniga's calendar: 10:00 pm; Closing Report: 5:15 pm

- 4.20. Ms. Gonzalez-Virgen admitted that the use of Ms. Zuniga's calendar on December 25, 2017, rather than the closing report was an inadvertent error. Consequently, I find all fifteen instances above are inadvertent error.

- 4.21. In other instances on the Wage Transcription Sheet, Ms. Gonzalez-Virgen appears to apply the closing report time stamp and a noon start time on days

when Ms. Zuniga did not work a closing shift per her calendar, nor start at noon. These dates are the following:

2016: June 2, June 9, June 16, June 23, June 30

2017: May 11, May 18, June 1, June 8, June 15, June 22, June 29, July 6, July 13, July 20, July 27, September 7, September 14, September 28, October 5, October 12, October 19, October 26, November 2, November 9, November 16, November 30, December 14, December 28

As nothing in the evidentiary record from either party supports the amount of time the Department found Ms. Zuniga worked these days, I find that Ms. Zuniga worked the hours she set out on these days in her calendar. See Exhibit 6.

4.22. On November 8, 2019, the Department issued Citation and Notice of Assessment W-208-20 to Appellant San Miguel LLC and Marta Araujo individually. Ex. 1. Therein, the Department found San Miguel LLC responsible for paying Ms. Zuniga \$35,171.40 in unpaid wages for the period of February 22, 2016 to December 21, 2018. *Id.* The Department also found both Appellants responsible for unpaid sick leave owed to Ms. Zuniga, and charged Appellants \$9,057.12 in interest, and a penalty of \$3,602.84. *Id.*

4.23. On December 6, 2019, Appellants submitted a written response to the Citation and Notice of Assessment. Ex. 3. Appellants appealed the assessment of unpaid wages, and specifically declined to appeal the assessment of unpaid sick leave. *Id.*

## 5. CONCLUSIONS OF LAW

Based upon the facts above, I make the following conclusions:

### *Jurisdiction*

5.1. The Office of Administrative Hearings has jurisdiction over the persons and subject matter of this case under RCW 34.05, RCW 49.46, RCW 49.48, and RCW 49.52.

### *Wage Payment Law*

5.2. Under the Minimum Wage Act, Chapter 49.46 RCW, “employers” are “any individual, partnership, association, corporation, business trust, or any person or group of persons acting directly or indirectly in the interest of an employer in relation to an employee.” RCW 49.46.010(4). Employers are liable for wage payment violations, including deductions, minimum wage, overtime, final wages, and agreed wages. RCW 49.48.082(6), RCW 49.48.083(2).

5.3. Wage payment requirements are those “set forth in RCW 49.46.020, 49.46.130, 49.48.010, 49.52.050, or 49.52.060, and any related rules adopted by the

department.” RCW 49.48.082(10). These wage payment requirements include, but are not limited to, requirements to pay minimum wages, overtime wages, agreed wages, and wages for final pay periods. RCW 49.48.082(12).

- 5.4. RCW 49.46.010(7) defines “wage” as “compensation due to an employee by reason of employment, payable in legal tender of the United States or checks on banks convertible into cash on demand at full face value, subject to such deductions, charges, or allowances as may be permitted by rules by the director.”
- 5.5. Any hours worked above forty hours in a workweek must be paid at one and one-half the worker’s regular rate of pay. RCW 49.46.130. The statute provides exemptions to the overtime pay found in RCW 49.46.130(2), but as store clerk, Ms. Zuniga is not an exempt employee and must be paid overtime wages.
- 5.6. When an employee ceases to work for an employer, whether by discharge or by a voluntary withdrawal, the employer must pay all wages due. RCW 49.48.010.
- 5.7. Hours worked means all hours which the worker is authorized or required by the business to be on the premises or at a prescribed work place. WAC 296-126-002(8).
- 5.8. RCW 49.52.050(2) provides that it is unlawful to willfully withhold an agreed wage, which includes any wage an “employer is obligated to pay such employee by any statute, ordinance, or contract.” The provisions of RCW 49.52.050(2) include oral or written agreements for hourly wages in excess of the minimum wage.
- 5.9. The Washington Minimum Wage Act (“MWA”), RCW 49.46, is based upon the federal Fair Labor Standards Act (FLSA) of 1938, 29 U.S.C. Secs. 201-219. *Drinkwitz v. Alliant Techsystems, Inc.*, 140 Wn.2d 291, 298 (Wash. 2000). The FLSA pertains to overtime and minimum wage requirements for employees. *Id.*
- 5.10. Under the FLSA, as well as the Washington Wage Payment Act, RCW 49.48 (WPA), the wage claimant has the initial burden of showing prima facie evidence of a wage payment law violation. See *MacSuga v. County of Spokane*, 97 Wn.App. 435, 445-446, 983 P.2d 1167 (1999), citing *Anderson v. Mt. Clemens Pottery Co.*, 328 US. 680, 687-688, S.Ct. 1187, 90 L.Ed. 1515 (1946) (federal minimum wage law under FLSA). This prima facie showing must be supported by a preponderance of the evidence.
- 5.11. A preponderance of the evidence is that evidence which produces the stronger impression, has the greater weight, and is more convincing as to its truth when weighed against the evidence in opposition to it. *Yamamoto v. Puget Sound Lumber Co.*, 84 Wash. 411, 146 P. 861 (1915).

- 5.12. If met, the burden then shifts to the employer to show the precise amount of work performed, or to negate the wage claimant's evidence of hours worked. *Anderson* at 687-688; *MacSuga* at 445.
- 5.13. It is the employer's responsibility to keep records regarding employee hours. Employers shall "make, keep, and preserve such records of the persons employed... and of the wages, hours, and other conditions and practices of employment." RCW 49.46.040(3).
- 5.14. The employer "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.*" *Anderson* at 687 (Emphasis added). The employee has carried out his/her 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. *Id.* The burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negate the reasonableness of the inference to be drawn from the employee's evidence. *Id.*, 687-688.
- 5.15. When an employer does not keep records, the employee need not prove the precise extent of uncompensated work. When the employee does not keep records, the Department allows for reasonable reconstruction of hours to shift the burden onto the employer to disprove the same. *MacSuga*, *supra*, at 445.
- 5.16. The weight of evidence establishes that Ms. Zuniga started work well before 8:00 a.m., her scheduled start time, at least three days each week, and regularly worked during the daytime on Saturdays. Several witnesses observed her working early and on Saturdays, and Appellants' self-serving denial of this, without more, is insufficient dispute. Ms. Zuniga reasonably reconstructed her work hours in her calendar to reflect her work over nearly a three-year period. While Ms. Zuniga's calendar is untrustworthy in its detail, and contains errors, it is reasonable to infer from it generally the amount and extent of her work. Because San Miguel did not keep accurate records of Ms. Zuniga's work hours, but rather created records derived from Ms. Zuniga's imperfect records, Ms. Zuniga need not prove the precise amount of her work time. Rather, her reasonable reconstruction of her hours has shifted the burden to Appellants to disprove these hours.
- 5.17. Appellants disproved Ms. Zuniga's hours in part, through the closing reports, Ms. Araujo's wedding invitation, and text messages showing inaccuracies in Ms. Zuniga's calendar. Such evidence has also illuminated discrepancies in the Department's Wage Transcription Sheet, which require correction as set out

above. However, Appellants have failed to meet their burden of disproving Ms. Zuniga's claim for wages altogether. Appellants are responsible for paying Ms. Zuniga unpaid wages and overtime under Chapters 49.46 and 49.48 RCW, as recalculated by the Department.

#### *Personal Liability of Marta Araujo*

- 5.18. Personal liability for wage claim violations is imposed under RCW 49.52.050. Under that statute, liability is imposed on employers, officers, vice principals or agents of employers for violation of wage payment laws, including the violations at issue here. A vice principal or agent must have the authority to make decisions regarding the payment of wages, and that person must have acted pursuant to that authority in withholding the wages to which the worker is lawfully entitled or individual liability cannot be imposed. *Ellerman v. Centerpoint Prepress Inc.*, 143 Wn.2d 514, 22 P.3d 795 (2001).
- 5.19. Mr. Araujo is a registered owner of San Miguel LLC, and had authority to direct and supervise the work of her employees. She had control over the work performed by Ms. Zuniga, the hours she worked, the pay she received, and when she received it. For purposes of RCW 49.48.010, Ms. Araujo was an employer. The Department may impose personal liability on Ms. Araujo for wages owed to Ms. Zuniga under RCW 49.52.050.

#### *Interest on Unpaid Wages*

- 5.20. Unpaid wages may accrue interest at the rate of 1% of the unpaid wage amount per month until payment is received by the Department, calculated from the first date wages were owed to the employee. RCW 49.48.083(2). The Department's interest calculation set out in the Citation and Notice of Assessment in this matter is currently based on an inaccurate wage assessment, and is thus reversed. The Department may calculate and assess interest based on its corrected wage payment calculation up to the time it issued Citation and Notice of Assessment No. W-208-20 under Chapter 49.48 RCW. Interest will continue to accrue at the same rate until such time as Appellants pay the wages due.

#### *Penalty for Willful Violation*

- 5.21. If the Department determines that the violation of the wage payment requirement was a willful violation, the Department may order the employer to pay the Department a civil penalty of 10% of the total unpaid wages or \$1,000.00, whichever is greater, but not more than \$20,000.00. RCW 49.48.083(3)(a).
- 5.22. Here, Appellants violated the wage laws by failing to pay all wages due to Ms. Zuniga. At issue is whether that failure was willful.

- 5.23. "Willful" means a knowing and intentional action that is neither accidental nor the result of a bona fide dispute. RCW 49.48.082(13). See also *Schilling v. Radio Holdings, Inc.*, 136 Wn.2d 152, 159-60, 961 P.2d 371 (1998) (willful means the result of a knowing and intentional action); *Morgan v. Kingen*, 166 Wn.2d 526, 534, 210 P.3d 995 (2009) (willful means volitional, knowledgeable, intentional).
- 5.24. Appellants did not assert that their failure to pay overtime wages was an error. Appellants' failure to pay wages was neither accidental nor the result of a bona fide dispute. Appellants had reason to know that Ms. Zuniga was working more hours than those formally assigned to her. Yet, Appellants continued to explicitly and implicitly authorize Ms. Zuniga's extra work, without proper payment. Therefore, the Employer's failure to pay overtime wages was willful.
- 5.25. While the Department may assess a penalty of 10% of total unpaid wages or \$20,000.00, whichever is less, under RCW 49.48.083(3), it must do so based on the recalculated wages due to Ms. Zuniga. The current penalty amount of \$3,602.84 is incorrect and thus reversed.

## 6. INITIAL ORDER

IT IS HEREBY ORDERED THAT:

- 6.1. The Department's action is AFFIRMED in part, and REVERSED in part.
- 6.2. Appellants San Miguel LLC and Marta Araujo violated Chapter 49.46 RCW and RCW 49.46.130 by failing to pay overtime wages to Nora Arreguin Zuniga, as alleged in Citation and Notice of Assessment No. W-208-20. The amount of overtime wages owed is REVERSED and REMANDED for recalculation as directed above in Conclusion of Law 5.17.
- 6.3. Appellants are responsible for paying interest in the amount of 1% per month on all unpaid wages in this matter, and a penalty of 10% of the total unpaid wages or \$20,000.00, whichever is less, under Chapter 49.48 RCW. The amount of interest and penalty is REVERSED and REMANDED for recalculation as directed above in Conclusions of Law 5.20 and 5.25.

Issued from Tacoma, Washington on the date of mailing.



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Lisa Dublin  
Administrative Law Judge  
Office of Administrative Hearings

## CERTIFICATE OF SERVICE ATTACHED



## PETITION FOR REVIEW

Any party that disputes this Initial Order may file a Petition for Administrative Review with the Director of the Department of Labor and Industries.<sup>3</sup> You may e-mail your Petition for Administrative Review to the Director at [directorappeal@lni.wa.gov](mailto:directorappeal@lni.wa.gov). You may also mail or deliver your Petition for Administrative Review to the Director at the Department's physical address listed below.

Mailing Address:

Director  
Department of Labor and Industries  
PO Box 44001  
Olympia, WA 98504-4001

Physical Address:

7273 Linderson Way SW  
Tumwater, WA 98501

If you e-mail your Petition for Administrative Review, please do not mail or deliver a paper copy to the Director.

Whether you e-mail, mail or deliver the Petition for Administrative Review, the Director *must actually receive* the Petition for Administrative Review during office hours at the Director's office within 30 days of the date this Initial Order was mailed to the parties. You must also provide a copy of your Petition for Administrative Review to the other parties at the same time.

If the Director does not receive a Petition for Administrative Review within 30 days from the date of the Initial Order, the Initial Order shall become final with no further right to appeal.<sup>4</sup>

If you timely file a Petition for Administrative Review, the Director will conduct an administrative review under chapter 34.05 RCW.

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<sup>3</sup> RCW 49.48.084 and RCW 34.05.464.

<sup>4</sup> RCW 49.48.084 and Chapter 34.05 RCW.

**CERTIFICATE OF SERVICE FOR OAH DOCKET NO. 03-2020-LI-01339**

I certify that true copies of this document were served from Tacoma, Washington via Consolidated Mail Services upon the following as indicated:

<p>San Miguel, LLC  c/o Marta Araujo  5412 76th Ave. E. #L  Puyallup, WA 98371  <b><i>Appellant/Employer</i></b></p>	<p><input checked="" type="checkbox"/> First Class Mail  <input checked="" type="checkbox"/> Certified Mail, Return Receipt  9489 0090 0027 6101 6150 33  <input type="checkbox"/> Campus Mail  <input checked="" type="checkbox"/> E-mail:  <u><a href="mailto:olicontla@gmail.com">olicontla@gmail.com</a></u></p>
<p>Lisa Roth, AAG  Office of the Attorney General  MS: TB-14  800 Fifth Ave Suite 2000  Seattle, WA 98104  <b><i>Respondent Representative</i></b></p>	<p><input type="checkbox"/> First Class Mail  <input type="checkbox"/> Certified Mail, Return Receipt  <input type="checkbox"/> Campus Mail  <input checked="" type="checkbox"/> E-mail:  <u><a href="mailto:lisam.roth@atg.wa.gov">lisam.roth@atg.wa.gov</a></u>  <u><a href="mailto:rachel.thornton@atg.wa.gov">rachel.thornton@atg.wa.gov</a></u>  <u><a href="mailto:lniseaeservice@atg.wa.gov">lniseaeservice@atg.wa.gov</a></u></p>
<p>Nora Arreguin Zuniga  210 37th Street SE, Unit 13  Auburn, WA 98002  <b><i>Wage Claimant</i></b></p>	<p><input checked="" type="checkbox"/> First Class Mail  <input type="checkbox"/> Certified Mail, Return Receipt  <input type="checkbox"/> Campus Mail  <input type="checkbox"/> E-mail</p>
<p>Donna Mack  Emerald Law Group PLLC  811 First Avenue, Suite 510  Seattle, WA, 98104  <b><i>Claimant Representative</i></b></p>	<p><input checked="" type="checkbox"/> First Class Mail  <input type="checkbox"/> Certified Mail, Return Receipt  <input type="checkbox"/> Campus Mail  <input checked="" type="checkbox"/> E-mail:  <u><a href="mailto:donna@emeraldgroup.com">donna@emeraldgroup.com</a></u></p>

Date: Friday, July 09, 2021

OFFICE OF ADMINISTRATIVE HEARINGS



Mallory Jordan  
Legal Assistant 2