

DIRECTOR OF THE DEPARTMENT OF LABOR & INDUSTRIES
STATE OF WASHINGTON

In re: Five Star Guttering, LLC, and
Oscar Curiel,

Appellants/Employer.

Citation and Notice of Assessment No.
W-003-21

OAH Docket No. 11-2020-LI-01538

No. 2022-022-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 June 18, 2021; having considered the petition for administrative review filed by Five Star Guttering, LLC, and Oscar Curiel (the Appellant), the briefing submitted to the Director's Office, the record created at hearing, and the records and files herein; and having reviewed the Order Remanding Matter to Director, 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 June 18, 2021, which the Appellant timely appealed.

DIRECTOR'S ORDER

RCW 49.48.084(4); RCW 34.05

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OFFICE OF THE DIRECTOR
DEPARTMENT OF LABOR & INDUSTRIES
P.O. BOX 44001
OLYMPIA, WA 98504-4001

2. The Director issued an order adopting and incorporating the June 18, 2021 Initial Order’s findings of fact and conclusions of law on January 18, 2022.

3. The Appellant timely appealed to superior court.

4. On June 13, 2022, on agreement of parties, the superior court issued an Order Remanding Matter to Director, instructing the Director to consider whether the employee, Marcelina Torres, was an exempt worker under WAC 296-128-520, and to issue a final order with findings on all issues raised in the appeal.

5. The Director adopts and incorporates all the June 18, 2021 Initial Order’s findings of fact.

6. The Appellant did not compensate Marcelina Torres on a salary or fee basis.

II. CONCLUSIONS OF LAW

1. Based on the June 13, 2022 Order Remanding Matter to Director, there is authority to review and decide this matter under RCW 49.48 and RCW 34.05.

2. The minimum wage and overtime requirements of RCW 49.48.082(12) and RCW 49.46.020 do not apply to “any individual employed in a bona fide . . . administrative . . . capacity.” RCW 49.46.010(3)(c). Under former WAC 296-128-520(4)(a) (2019), to qualify for this exemption, the employee must be “compensated for his services on a salary or fee basis[.]”¹

3. The burden is on the employer to establish a worker’s exempt status. *Drinkwitz v. Alliant Techsystems, Inc.*, 140 Wn.2d 291, 301, 996 P.2d 582 (2000).

4. The Appellant did not establish that Marcelina Torres was employed in a bona fide administrative capacity within the meaning of former WAC 296-128-520.

¹ This version of the rule was effective throughout the relevant period of Ms. Torres’s employment. The rule’s current version also requires that the employee be “compensated on a salary or fee basis[.]” WAC 296-128-520(1)(c).

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 "initial order" section.

III. DECISION AND ORDER

Consistent with the above Findings of Fact and Conclusion of Law, the Citation and Notice of Assessment is affirmed. The Initial Order of June 18, 2021 is incorporated by reference herein.

DATED at Tumwater this 15 day of November 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, 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 November 2022, via U.S. Mail, postage prepaid, to the following:

Oscar Curiel
6402 Pacific Pines Drive
Pasco, WA 99301

William Edelblute
1030 N Center Parkway
Kennewick, WA 99336

Marcelina Torres
6209 Robert Wayne Drive
Pasco, WA 99301

Kevin Elliott, AAG
Office of the Attorney General
1116 W Riverside Ave, Ste. 100
Spokane, WA 99201
Kevin.Elliott@atg.wa.gov
Bobbi.Ewert@atg.wa.gov
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DATED this 15 day of November 2022, at Tumwater, Washington.



LISA DECK

**WASHINGTON STATE
OFFICE OF ADMINISTRATIVE HEARINGS**

In the matter of:

Five Star Guttering, LLC, and
Oscar Curiel,

Appellants/Employer.

Docket No. 11-2020-LI-01538

INITIAL ORDER

Agency: Department of Labor and
Industries

Program: Wage Payments

Agency No. W-003-21

1. ISSUES:

- 1.1. Whether, from May 29, 2017 to February 8, 2019, Five Star Guttering, LLC, and Oscar Curiel, as an individual, failed to pay agreed and final wages to Marcelina Torres, Wage Claimant, \$98,078.64, in violation of Revised Code of Washington (RCW) 49.52.050 and RCW 49.48.010?
- 1.2. Whether an assessment of penalties, totaling at least \$9,807.86, against Five Star Guttering, LLC, and Oscar Curiel, as an individual, as provided by RCW 49.48.083, is appropriate?
- 1.3. Whether an assessment of interest on the unpaid wages, at a rate of one percent of the unpaid wage amount per month from the date of the Citation and Notice of Assessment until payment is received by the Department, as provided by RCW 49.48.083(2), is appropriate?
- 1.4. Whether the Department of Labor and Industries' 'Citation and Notice of Assessment No. W-003-31', dated July 9, 2020, should be affirmed, modified or set aside?

2. INITIAL ORDER SUMMARY:

- 2.1. From May 29, 2017 to February 8, 2019, Five Star Guttering, LLC, and Oscar Curiel, as an individual, failed to pay agreed and final wages to Marcelina Torres, Wage Claimant, \$98,078.64, in violation of RCW 49.52.050 and RCW 49.48.010.
- 2.2. An assessment of penalties, totaling at least \$9,807.86, against Five Star Guttering, LLC, and Oscar Curiel, as an individual, as provided by RCW 49.48.083, is **APPROPRIATE**.
- 2.3. An assessment of interest on the unpaid wages, currently at \$17,291.72, at a rate of one percent of the unpaid wage amount per month from the date of the Citation and Notice of Assessment until payment is received by the Department, as provided by RCW 49.48.083(2), is **APPROPRIATE**.

2.4. The Department of Labor and Industries' 'Citation and Notice of Assessment No. W-003-31', dated July 9, 2020, is **AFFIRMED**.

3. EVIDENTIARY HEARING:

- 3.1. Hearing Date: March 29, 2021
- 3.2. Closing Arguments: April 12, 2021
- 3.3. Admin. Law Judge: TJ Martin
- 3.4. Appellants: Five Star Guttering, LLC, and Oscar Curiel
 - 3.4.1. Representative: William Edelblute, Attorney
 - 3.4.2. Witnesses: Michale Horibe, Five Star Guttering Employee
Scott Alan Williams, Employer's Accountant
Oscar Curiel, Appellant and Employer Owner
- 3.5. Agency: Department of Labor and Industries
 - 3.5.1. Representative: Kevin Clarke Elliott, Assistant Attorney General
 - 3.5.2. Witnesses: Cheryl Diana Crawford, Business Networking Associate of Five Star Guttering and Marcelina Torres
Eric Glasgow, Former Five Star Guttering Accountant
Marcelina Torres, Wage Claimant
Yocelin Martinez, Department Industrial Relations Agent
- 3.6. Court Reporter: Lisa Trancoso, Central Court Reporting
- 3.7. Exhibits: Department Exhibits 1 through 11-48 were admitted at the hearing. Exhibit 10 was taken under advisement at the hearing and later admitted since it may have probative value.

Appellant's Exhibits A-F, M-Y were admitted at the hearing. Exhibits G-L were taken under advisement at the hearing, since they were not provided to the Department during its investigation. Appellant's Exhibits G-L were taken under advisement and later admitted since they may have probative value.

[Continued]

4. FINDINGS OF FACT:

The following facts are found by a 'preponderance of the evidence':

Jurisdiction-

- 4.1. On July 9, 2020, the Department of Labor and Industries (Department) issued 'Citation and Notice of Assessment No. W-003-21' to Five Star Guttering, LLC, and Oscar Curiel, as an individual, (Appellants/Employer), finding they owed Marcelina Torres (Wage Claimant) agreed and final wages of \$98,078.64, interest of \$17,291.72 and a penalty of \$9,807.86, for a total of \$125,178.22. *Department Exhibit (Dept. Ex.) 40.*
- 4.2. On August 5, 2020, William D. Edelblute, Attorney, on behalf of the Appellants, Five Star Guttering, LLC, and Oscar Curiel, appealed the Department's 'Citation and Notice of Assessment No. W-003-21'. *Dept. Ex. 41.*
- 4.3. On August 31, 2020, the Department forwarded the Appellant's appeal to the Office of Administrative Hearings. *Dept. Ex. 42.*

Marcelina Torres' Employment with Five Star Guttering, LLC-

- 4.4. The Appellants, Five Star Guttering, LLC, (Five Star Guttering) and Oscar Curiel (Curiel), and the Wage Claimant, Marcelina Torres (Torres), differed on material facts. In particular, Torres asserted she had helped Curiel start up his business in May 2017 and worked there until February 2019. She asserted Curiel verbally agreed to pay her \$16.00 per hour, plus a ten percent commission on all sales. *Dept. Ex. 2; Pg. 1-2.* However, Curiel originally denied Torres worked for the business, was ever an employee or ever paid by commission. Rather, Curiel asserted he paid her \$2,000 every month. *Dept. Ex. 2; Pgs. 9 & 15.* Later, Curiel claimed Torres was an 'exempt', salaried employee. *Dept. Ex. 2; Pg. 25.* Based on this difference of material facts, a credibility finding is warranted.
- 4.5. Based on the evidence, including the documented evidence and testimony of third-parties, who collaborated Torres' version of events, the undersigned administrative law judge finds Torres' evidence more convincing.
- 4.6. Based on this credibility finding, the following facts are established by a 'preponderance of the evidence', more likely than not, having occurred:
- 4.7. Five Star Guttering, LLC, is a construction contractor, located in Pasco, Washington. Oscar Curiel owns, operates and is the registered agent and sole partner/member and governing individual of Five Star Guttering, LLC. *Dept. Ex. 3.*
- 4.8. On May 29, 2017, Marcelina Torres began working for Five Star Guttering, LLC. She helped Oscar Curiel to start up the business. She filed its incorporation documentation and obtained its contractor license, insurance and bonding with the

State of Washington. *Testimony of Marcelina Torres (Testimony of Torres) and Dept. Exs. 3 & 34.*

- 4.9. In addition to filing documentation with the State, Torres, after quitting her employment with State Farm Insurance, helped to design the business' logo, ordered marketing materials, called customers and completed invoices. *Testimony of Torres & Dept. Exs. 35 & 36.*
- 4.10. Five Star Guttering's office was in Curiel's home, where all business records and documentation were kept. *Testimony of Torres.*
- 4.11. In 2017, while the business was getting started up, Curiel paid Torres in cash. No discussion ever occurred about Curiel putting Torres on salary or hourly rate. *Testimony of Torres.*
- 4.12. No agreed hourly wage or commission agreement was ever reached between Curiel, on behalf of Five Star Guttering, and Torres. *Testimony of Curiel.*
- 4.13. No formal contract evidenced Torres work to set up Five Star Guttering. Torres was never put on Five Star's payroll and never completed a W-2 or 1099 form. *Testimony of Torres.*
- 4.14. Curiel never requested Torres file out any W-2 or other tax form or withheld taxes from any pay he gave her. *Testimony of Curiel.*
- 4.15. In 2017, as the business picked up, Curiel hired four or five installers and paid cash to them, similar to Torres. *Testimony of Torres.*
- 4.16. Torres used an electronic application on her phone to track her hours. *Testimony of Torres and Dept. Ex. 9.*
- 4.17. Torres helped prepare bids to send to customers and was really good at marketing. *Testimony of Oscar Curiel (Testimony of Curiel).*
- 4.18. In late 2017/early 2018, Curiel and Torres used Torres' credit cards for initial business start-up expenses. *Testimony of Eric Glasgow (Testimony of Glasgow).*
- 4.19. Torres also allowed Curiel to put business start-up tools, materials and the gutter-shaping machine on her credit cards. Since that time, Torres has used \$20,000 from her saving account to pay down the credit card debt. Those credit cards are now closed down and the account are now in 'collections'. *Testimony of Torres and (Appellant Exhibit) App. Ex. N & R.*
- 4.20. Torres put the gutter-shaping machine on her credit card, but Curiel repaid her for it, as well as any other expenses she put on her credit card on behalf of the business. *Testimony of Curiel and Dept. Ex. 29.*
- 4.21. In the beginning, Torres attended business network meetings, met with prospective customers, conducted estimates on projects, schedule installations and sent out

invoices. *Testimony of Torres, Testimony of Curiel, Dept. Exs. 10, 11, 35, 36, 43 & 44 and App. Exs. T, U & X.*

- 4.22. In 2017, Cheryl Diane Crawford (Crawford) met Marcelina Torres at a business networking group. At the time, Torres was promoting Five Star Guttering, including handing out its business cards. Crawford's husband owns an upholstery business and was one of Five Star Guttering's first customers. *Testimony of Cheryl Diane Crawford (Testimony of Crawford).*
- 4.23. In February 2018, Five Star Guttering hosted the business network meeting. At the meeting, both Torres and Oscar Curiel were there. Crawford assumed Torres and Curiel were co-owners of Five Star Guttering. *Testimony of Crawford.*
- 4.24. In 2017, Eric Glasgow (Glasgow), an accountant at Insight Accounting, was also in the same business networking group as Torres. *Testimony of Glasgow.*
- 4.25. Initially, in 2017, Torres did the business' bookkeeping, including quarterly accounting. However, as the business took off, Insight Accounting, with Eric Glasgow, was hired to do the business' bookkeeping and accounting work. *Testimony of Torres.*
- 4.26. From late 2017/early 2018 to 2019, Torres was the main point of contact for Glasgow anytime he had bookkeeping and accounting questions regarding the business. *Testimony of Glasgow and Dept. Ex. 31.*
- 4.27. Part of Torres' duties for Five Star Guttering included marketing, both in-person as well as via social media. *Testimony of Torres and Dept. Exs. 8, 36 & 37.*
- 4.28. Torres was the 'face of Five Star Guttering'. Due to her knowledge of advertising, she posted routinely on social media, including Facebook, at least once a week, if not, once a day. *Testimony of Glasgow.*
- 4.29. In late 2017/early 2018, Five Star Guttering did not do payroll, so no W-2's were ever processed through the accounting firm. *Testimony of Glasgow.*
- 4.30. Torres should have been on the payroll since she was involved in the business. Glasgow never told Curiel to pay Torres in cash for her work. *Testimony of Glasgow.*
- 4.31. Curiel, on behalf of Five Star Guttering, never kept track of Torres' work hours nor had Torres sign a receipt for any cash payments made to her. *Ex. 2; Pg. 15.*
- 4.32. Torres never provided Curiel with her timecards. The first time he saw Torres' timecards was as a part of her wage complaint. *Testimony of Curiel.*
- 4.33. After Glasgow left Insight Accounting in 2019, Scott Alan Williams (Williams) took accounting duties for the business. *Testimony of Scott Alan Williams (Testimony of Williams).*

- 4.34. Williams did not have any firsthand knowledge of Torres' hours worked, how or when she was paid by Curiel. All information came from Curiel, including that he had reimbursed Torres for all credit card purchases, but never provided verification of such claims. *Testimony of Williams.*
- 4.35. Williams acknowledged he had never seen any written salary agreement between Curiel, on behalf of Five Star Guttering, and Torres. *Testimony of Williams.*
- 4.36. Williams never received any timecards from Torres regarding her hours worked. *Testimony of Williams.*
- 4.37. Torres should have been put in payroll, rather than paid in cash, as alleged by Curiel. *Testimony of Williams.*
- 4.38. Curiel denied Torres routinely or ever worked 80 hours per week since even Curiel didn't worked more than 40 hours per week. *Testimony of Curiel.*
- 4.39. Curiel disputes Torres worked 12 hours on Thanksgiving or on Black Friday, due to shopping, or 10 hours on Christmas, or 12 hours on Memorial Day or while on vacation together in California. *Testimony of Curiel and Appellant Exhibit (App. Ex.) C.*
- 4.40. The Employer provided a copy of pay to Torres, with an end date of September 15, 2017. Torres' rate of pay was listed as \$17.87 for 16 hours worked. *App. Ex. Y.*
- 4.41. In the beginning, Curiel paid cash to Torres every 3-4 months. Often, Curiel's cash payments to Torres were for her work and child support, but the funds were never specified for which one. *Testimony of Torres.*
- 4.42. When Curiel paid Torres, \$250.00 was intended for child support with the remaining going towards Torres' wages. *Testimony of Curiel.*
- 4.43. On December 1, 2018, Torres notified Curiel of her intent to quit working for Five Star Guttering. She left on February 8, 2019. *Testimony of Torres, Testimony of Curiel and App. Ex. A & M.*
- 4.44. On February 8, 2019, Marcelina Torres resigned from Five Star Guttering due to not being compensated adequately. *Dept. Ex. 19 (Same as App. Ex. A).*
- 4.45. Torres now owns and operates her own guttering company, with three installers and two staff members. All of her employees are on payroll. *Testimony of Torres.*
- 4.46. In April 2019, Michael Horibe began working, on a part-time basis, at a rate of \$15.00 per hour, to assist in sending out invoices and providing administrative support. *Testimony of Michael Horibe (Testimony of Horibe).*
- 4.47. Horibe had no firsthand knowledge of Torres' work for Five Star Guttering, since he was hired after Torres left Five Star Guttering. *Testimony of Horibe.*

Relationship Between Marcelina Torres and Five Star Guttering Owner, Oscar Curiel-

- 4.48. Torres and Curiel began dating in 2007. In 2010, Torres gave birth to their son. *Dept. Ex. 26.*
- 4.49. Curiel paid Torres \$250.00 in child support each month. *Testimony of Torres.*
- 4.50. In 2019, the romantic relationship between Torres and Curiel ended. *Testimony of Curiel.*
- 4.51. Child support and custody issues relating to Curiel's and Torres's son are still pending in Franklin County, Washington. *Dept. Ex. 26.*

Department Investigation of Marcelina Torres' Wage Complaint-

- 4.52. On March 30, 2019, Marcelina Torres filed a 'Worker Rights Complaint' with the Department of Labor and Industries, alleging unpaid wages from her previous employer, Five Star Guttering, LLC, for the period of May 29, 2017 to February 8, 2019. *Testimony of Yocelin Martinez (Testimony of Martinez) and Dept. Ex. 4.*
- 4.53. From March 30, 2020 to June 2, 2020, Department Industrial Relations Agent Yocelin Martinez (Agent Martinez) conducted an investigation of Marcelina Torres' wage claimant. Agent Martinez gathered relevant information from Torres and Five Star Guttering, LLC, and other parties with relevant information. *Dept. Exs. 2-37 and App. Ex. N.*
- 4.54. While Torres listed \$11,703 in unpaid wages in her 'Worker Right Complaint', the Department is not bound by that calculation, if the investigation reveals other or additional wages are owed. *Testimony of Martinez and Dept. Ex. 7.*
- 4.55. Torres provided the Department with social media posts of various activities Torres engaged in on behalf of the Five Star Guttering as well as copies of various estimates, with 10% commission listed, Torres created for prospective Five Star Guttering customers. *Dept. Exs. 8, 10, 11, 27, 28 and 35-37.*
- 4.56. Torres provided Agent Martinez with her timecards, kept via 'Time Card Calculator Geek', from May 29, 2017 to February 10, 2019. *Testimony of Martinez, Dept. Ex. 9 and App. Ex. P-S, V-W (in part).*
- 4.57. During the Department's investigation, Torres told Agent Martinez that she was an hourly employee, at \$16.00 per hour, plus a ten (10%) percent commission. *Testimony of Martinez.*
- 4.58. On April 22, 2020, Department Agent Martinez drafted an 'Hours Worked and Wage Computation Sheet', based on the hours of work submitted by Torres, via her timecards. Based on the Department's calculations, \$129,357.04 was owed to

Torres for her work performed, at a rate of Minimum Wage, from May 29, 2017 to February 8, 2019. *Dept. Ex. 12.*

- 4.59. The following day, Torres submitted back to the Department her revised 'Hours Worked and Wage Computation Sheet' with several days and weeks of time worked. According to Torres' calculation, \$145,916.64 was owed. *Dept. Ex. 13.*
- 4.60. Torres also provided the Department with a 'Commission Breakdown' of her commissions earned between July 17, 2017 and November 23, 2020. *Dept. Ex. 16.*
- 4.61. On April 23, 2020, Department Agent Martinez sent an email to Five Star Guttering, requesting 'response' to Torres' wage complaint, followed by a letter requesting the Employer's records and information. *Dept. Exs. 14 & 15.*
- 4.62. On May 6, 2020, Department Agent Martinez sent a 'Notice of Extension' letter to both Five Star Guttering and Torres, requesting additional time needed to complete the Department's investigation. *Dept. Ex. 17.*
- 4.63. On May 13, 2020, Five Star Guttering provided a written response to Torres' wage complaint. The Employer asserted Torres worked some as the Office Manager but was never an official employee or ever employed by Five Star Guttering. *Testimony of Martinez, Dept. Ex. 18 and App. Exs. C & E.*
- 4.64. At the hearing, the Employer provided its bank statements, showing credit card payments for various expenses. However, these documents were not provided to the Department during its investigation. *App. Exs. G-L.*
- 4.65. The Employer provided the pay statement for Torres for the pay period of July 16, 2017 to July 31, 2017. The Employer paid Torres \$13.50 per hour for 40 hours of work, equaling \$540.00 in pay. Also was the 'Payroll Summary for 2017, in which Torres received \$15,514.77 in gross pay. *App. Ex. D.*
- 4.66. On May 20, 2020, Department Agent Martinez sent a letter to Five Star Guttering, informing the Employer that the Department had concluded its investigation and determined the Employer owes Torres \$96,911.43 for May 29, 2017 to February 8, 2019. A similar letter was also sent to Torres, informing her of the Department's request to the Employer. *Dept. Exs. 20 & 21.*
- 4.67. On May 29, 2020, Torres provided a statement to the Department, regarding the work she performed for Five Star Guttering. *Ex. 30.*
- 4.68. Curiel provided his Numerica credit card statements, showing various withdrawals. However, these withdrawals did not specifically show these withdrawals went to Torres or that she signed receipts for such money. *Dept. Ex. 18.*

- 4.69. Neither Torres nor Curiel, on behalf of Five Star Guttering, ever provided Agent Martinez with a written employment contract or written salary agreement. *Testimony of Martinez.*
- 4.70. Agent Martinez determined the Department did not have jurisdiction to address any credit card debt Torres assumed from the use of her own personal credit card to assist in the start-up of Five Star Guttering. *Testimony of Martinez.*
- 4.71. Curiel, on behalf of Five Star Guttering, never provided paystubs or any records of Torres' employment or work for the business. *Testimony of Martinez.*
- 4.72. Agent Martinez requested Curiel to provide records to show Torres was not an employee or that no wages were owed. However, Curiel never provided such records. *Testimony of Martinez.*
- 4.73. For holidays and vacations Torres asserted she worked, Agent Martinez reduced such hours, unless Torres provided proof of work during such times. *Testimony of Martinez.*
- 4.74. Curiel, on behalf of Five Star Guttering, alleged he paid Torres in cash for all work. However, neither he nor Five Star Guttering's accounting firm ever provided receipts or verification of such cash payment.
- 4.75. The Employer tracked \$29,300.00 paid to Torres from April 2, 2018 to December 31, 2018, with a weekly pay calculated at \$412.68. *App. Ex. B.*
- 4.76. On June 2, 2020, Agent Martinez issued an 'Agent Summary' regarding Marcelina Torres' wage complaint, recommending a 'Citation and Notice of Assessment' be issued to Torres' previous employer, Five Star Guttering, for unpaid wages, for the period of May 29, 2017 to February 8, 2019. *Testimony of Martinez and Dept. Ex. 1.*
- 4.77. Agent Martinez determined an Employer/Employee relationship existed between Five Star Guttering and Torres, with no record showing Torres was compensated. *Testimony of Martinez.*
- 4.78. Agent Martinez determined no agreed wage agreement existed between Curiel, on behalf of Five Star Guttering and Torres. By default, Agent Martinez calculated Torres' work based on Minimum Wage. *Testimony of Martinez.*
- 4.79. After gathering all relevant information, Agent Martinez drafted an 'Final Wage Transcription Sheet' and 'Interest Calculation Spreadsheet'. *Testimony of Martinez and Dept. Exs. 38 & 39.*
- 4.80. On July 9, 2020, the Department of Labor and Industries (Department) issued 'Citation and Notice of Assessment No. W-003-21' to Five Star Guttering, LLC, and Oscar Curiel (Appellants/Employer), finding it owed Marcelina Torres

(Wage Claimant) earnings of \$98,078.64, interest of \$17,291.72 and a penalty of \$9,807.86 for a total of \$125,178.22. *Dept. Ex. 40 and App. Ex. O.*

4.81. On August 5, 2020, Fiver Star Guttering appeal the Department's 'Citation and Notice of Assessment No. W-003-21'. *Dept. Ex. 41.*

5. CONCLUSIONS OF LAW:

Based upon the above 'Findings of Fact', the following 'Conclusions of Law' are made:

Jurisdiction-

5.1. The undersigned administrative law judge has jurisdiction over the persons and subject matter of the present case based on Revised Code of Washington (RCW) 49.48.084(3) and Chapters 34.05 and 34.12 RCW.

Standard and Burden of Proof Challenging a 'Citation and Notice of Assessment'

5.2. In contesting a Citation and Notice of Assessment, the appealing party has the burden of proof, to establish by a 'preponderance of the evidence', the Department's Citation and Notice of Assessment is in error.

5.3. In the present case, the Appellants/Employer, Five Star Guttering, LLC, and Oscar Curiel, as an individual, have the burden of proof to establish, by a 'preponderance of the evidence', the Department's 'Determination of Compliance No. W-003-21' is in error.

Marcelina Torres' Worker's Rights Complaint-

5.4. The Department of Labor & Industries (Department) is responsible for implementing and enforcing the provisions of Chapters 49.46, 49.48 and 49.52 of the RCW and Title 296 Washington Administrative Code (WAC), pertaining to wages, for the purpose of protecting the immediate and future health, safety, and welfare of the people of the State of Washington.

5.5. The Department's authority includes enforcing wage payments such as: (a) Payment of minimum wages (RCW 49.46.020 and Chapter 296-128 WAC); (b) Payment of overtime wages in excess of more than 40 hours of work in a week (RCW 49.46.13); (c) Payment of final wages (RCW 49.48.010); and (d) Withholding of lawful deductions from wages (RCW 49.52.060); and (e) Enforcement of any wages as authorized by statute, ordinance, and/or contract (RCW 49.52.050).

5.6. If an employee files a wage complaint, the Department is required to investigate. RCW 49.48.083(1) and WAC 296-128-820.

5.7. In the present case, on March 27, 2020, Marcelina Torres filed a 'Worker's Rights Complaint', alleging unpaid wages from Five Star Guttering, LLC. Therefore, the Department was required to investigate, based on RCW 49.48.083(1) and WAC 296-128-820.

Record-Keeping Requirement-

- 5.8. In the State of Washington, employers are subject to the State's Minimum Wage Act (MWA) and are required to keep and preserve records of employees, including the rate of pay, amount paid per pay period and hours worked. Employers must track employee hours even if they are considered 'exempt', salaried employees, for purposes of sick leave and other covered absences. RCW 49.46.040(3), RCW 49.46.070 and WAC 296-128-010.
- 5.9. Under the Federal Fair Labor Standards ACT (FLSA) 29 U.S.C. Sec. 211(c), employers are required to keep record of employee wages and hours worked.
- 5.10. In a wage complaint, the employee must provide records of pay and the number of hours worked. After providing such documentation, the burden shifts to the employer to refute such records. *MacSuga v. City of Spokane*, 97 Wn. App 435 (1999).
- 5.11. In the present case, the Employer, Five Star Guttering, LLC, and Oscar Curiel, claims to have paid Marcelina Torres \$2,000, in cash, each month. While the Employer provided its bank statements showing numerous outgoing expenses, it was unable to provide documented evidence of payments made to and received by Torres.

Wage Claimant worked as an Employee, not an Independent Contractor-

- 5.12. In the present case, the Employer, Five Guttering, LLC, and Oscar Curiel, contends the Wage Claimant, Marcelina Torres, worked as an independent contractor, not an employee, and was therefore not subject to the State's wage and hour laws and regulations.
- 5.13. In order to establish a worker is an independent contractor, the burden is on the employer to establish the worker's independent contractor status. *Bothell v. Phase Metrics, Inc.*, 299 F.3d 1120 (2002).
- 5.14. In order to establish a worker's independent contractor status, under the 'economic means test', the employer must show: (1) Degree of control exerted by the employer; (2) Worker's opportunity for profit or loss depending on the worker's managerial skill; (3) Worker's investment in equipment or materials required for the task; (4) Whether the services rendered by the worker requires special skill; (5) Degree of permanence of the working relationship; and (6) Whether services rendered is an integral part of the employer's business. *Anfinson v. Fedex*, 174 Wn. 2d 851 (2012) and *Real v. Discoll*, 603 F. 2d 748 (1979).
- 5.15. In the present case, the Employer has failed to meet its burden of establishing Torres was an independent contractor: First, Torres' work was overseen by Curiel, as the business' owner and sole liability member. All work and actions Torres took were on behalf of and in furtherance of the Employer's business; Second, Torres did not share in the Employer's opportunity for profit or loss. Rather, all money earned went

to the business, with Torres earning a set amount and percentage of commissions; Third, the Employer's equipment and materials were located in Curiel's home and all equipment and materials were provided for by the business; Fourth, Torres' work involved contacting prospective customers, drafting bids and organizing the work of the various projects. Torres did not have any specialized education or training for such work; Finally, from May 2017 to February 2019, Torres worked solely for the Employer in a full-time capacity. She did not work for any other employers. Based on these facts, the Department correctly determined Marcelina Torres worked as an employee, not an independent contractor.

Torres' Imputed Wages and Earnings-

5.16. In the present case, the Employer, Five Star Guttering and Oscar Curiel and the Wage Claimant, Marcelina Torres did not have a written employment contract. Torres asserted a verbal agreement existed between the parties that she was to be paid \$16.00 per hour plus a ten percent commission on all sales. However, Curiel denied such a verbal agreement or the amount of \$16.00 per hour.

5.17. Since a dispute exists between the Employer and the Wage Claimant, as to the agreed rate of pay, Department imputed Torres' hourly rate of pay to be Minimum Wage, beginning at \$11.00 per hour in 2017, \$11.50 per hour in 2018 and \$12.00 per hour in 2019. RCW 49.46.020.

\$2,000 payments to Wage Claimant-

5.18. Curiel claimed he paid Torres \$2,000 per month for her work. However, based on the evidence provided by the Employer and the Wage Claimant, the following facts were established: (1) No employment contract existed between the Employer and the Wage Claimant; (2) The \$2,000 payments were neither monthly nor directly demonstrated to be for Torres' employment; (3) Five Star Guttering did not process these payments through its payroll nor provide proof of receipt by Torres; and (4) Finally, Curiel claimed these \$2,000 payments were for child support, as he declared in official Superior Court documents. *Ex. 25; Pg. 19.* Therefore, the Department did not offset or reduce Torres' wages and earnings for these payments, based on these factors. *Ex. 2; Pg. 31.*

Department's Lack of Jurisdiction on Business Expense Reimbursements-

5.19. As a part of her wage complaint, Torres also requested reimbursement from the Employer for use of her credit card to purchase the Employer's start-up equipment and expenses. In addition, she also requested reimbursement for travel expenses, mileage, and 'wear-and-tear' to her own personal vehicle while conducting the Employer's business.

- 5.20. However, the Department is only authorized to investigate wage payment violations. As a result, the Department lacks jurisdiction to pursue or order reimbursement of expenses outside of wages and earnings. RCW 49.48.083.

Employer's Dispute of Wage Claimant's 'Hours Worked'-

- 5.21. Five Star Guttering and Oscar Curiel disputed Torres' hours worked. However, the Employer did not keep or provide timecards nor payroll records, refuting such hours worked. *Ex. 18; Pgs. 1 & -5.*
- 5.22. Since the Employer was unable to refute Torres' hours worked with timecards, payroll records or any other documented evidence, the Department adopted Torres' documented 'hours worked'.

Five Star Guttering, LLC's Failure to Pay Marcelina Torres Agreed and Final Wages-

- 5.23. Any employer who pays an employee less than wages to which such employee is entitled shall be liable to such employee for the full amount of such wages. RCW 49.46.090(1).
- 5.24. It is a violation to pay an employee a lower wage than the wage an employer is obligated to pay by any statute, ordinance, or contract. RCW 49.52.050(2).
- 5.25. RCW 49.48.010 requires employers to pay employees for work performed at the end of the established pay period.
- 5.26. RCW 49.48.083(2) also establishes the Department may order an employer to pay all wages owed, if the employer has violated any wage payment requirement.
- 5.27. In the present case, from May 29, 2017 to February 8, 2019, Five Star Guttering, LLC, and Oscar Curiel, as an individual, failed to pay agreed and final wages to Marcelina Torres, Wage Claimant, \$98,078.64, in violation of RCW 49.52.050 and RCW 49.48.010.

Personal Liability-

- 5.28. Under the Wage Payment Act and 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).
- 5.29. Employers are liable for wage payment violations, including final wages. RCW 49.48.082(6) and RCW 49.48.083(2).
- 5.30. RCW 49.52.050 imposes personal liability for wage claim violations. Under the statute, liability is imposed on employers, officers, vice principals or agents of any employer for violation of wage payment laws. 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).

- 5.31. In determining whether Oscar Curiel is personally liable for the wages owed to Marcelina Torres, it must be determined if he meets the definition of “employer, officer, vice principal or agent”, as defined RCW 49.52.050.
- 5.32. In the evidentiary hearing, the Department presented evidence, which Oscar Curiel did not refute, that he was the sole owner, member/partner and ‘governing member’ of Five Star Guttering, LLC, and were responsible for hiring, firing and paying employees during Marcelina Torres’ employment from May 2017 to February 2019.
- 5.33. As a result of these facts, Oscar Curiel, as an individual, had authority to make decisions regarding the payment of wages under RCW 49.52.050. Therefore, he is personally liable for the wages, penalties and interest owed to Marcelina Torres.

Penalty for Willful Violation-

- 5.34. RCW 49.52.050(2) makes it a penalty to:

Willfully and with intent to deprive the employee of any part of his or her wages, shall pay any employee a lower wage than the wage such employer is obligated to pay such employee by any statute, ordinance, or contract.

RCW 49.52.050(2).

- 5.35. Further, RCW 49.48.083(3) establishes:

(3) If the department determines that the violation of the wage payment requirement was a willful violation, the department also may order the employer to pay the department a civil penalty as specified in (a) of this subsection.

(a) A civil penalty for a willful violation of a wage payment requirement shall be not less than one thousand dollars or an amount equal to ten percent of the total amount of unpaid wages, whichever is greater. The maximum civil penalty for a willful violation of a wage payment requirement shall be twenty thousand dollars.

RCW 49.48.083(3).

- 5.36. RCW 49.48.082(13) defines “willful” as a “[K]nowing and intentional action that is neither accidental nor the result of a bona fide dispute, as evaluated under the standards applicable to wage payment violations under RCW 49.52.050(2).”
- 5.37. Further, an employer acts ‘willfully’ in depriving a worker of earned wages when the employer 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 wages owed to the employee”. *Brandt v. Impero*, 1 Wn. App. 678, 463 P.2d 197 (1969).
- 5.38. The evidence must establish the failure to pay by the employer was ‘willful’ in that it was ‘knowing and intentional’ and not the result of a bona fide dispute regarding the contested wages. *Pope v. University of Wash.*, 121 Wn.2d 479 (1993).

5.39. In the present case, the Employer, Five Star Guttering, LLC, and Oscar Curiel, as an individual, failed to pay agreed and final wages to Marcelina Torres for the period of May 29, 2017 to February 8, 2019, in violation of RCW 49.52.050. Such a failure to pay was 'willful' since it did not involve a bone fide dispute regarding such wages.

5.40. An assessment of penalties totaling at least \$9,807.86, as provided by RCW 49.48.083, is **APPROPRIATE**.

Interest on Unpaid Wages-

5.41. Unpaid wages may accrue interest at the rate of 1% of the unpaid wage amount until payment is received by the Department, calculated from the first date wages were owed to the employee. RCW 49.48.083(2).

5.42. In the present matter, interest of \$17,291.72, will continue to accrue at the same rate of one percent (1%) until such time Five Star Guttering, LLC, and Oscar Curiel, as an individual, have satisfied all unpaid wages due and owing to Marcelina Torres. Therefore, the assessment on interest, at a rate of one percent (1%) on the unpaid wages, as provided by RCW 49.48.083(2), is **APPROPRIATE**.

5.43. The Department of Labor and Industries' 'Citation and Notice of Assessment No. W-003-21', dated July 9, 2020, is **AFFIRMED**.

6. INITIAL ORDER:

THIS ADMINISTRATIVE COURT ORDERS;

6.1. From May 29, 2017 to February 8, 2019, Five Star Guttering, LLC, and Oscar Curiel, as an individual, failed to pay agreed and final wages to Marcelina Torres, Wage Claimant, \$98,078.64, in violation of RCW 49.52.050 and RCW 49.48.010.

6.2. An assessment of penalties totaling at least \$9,807.86 against Five Star Guttering, LLC, and Oscar Curiel, as an individual, as provided by RCW 49.48.083, is **APPROPRIATE**.

[Continued]

6.3. An assessment of interest on the unpaid wages, currently at \$17,291.72, at a rate of one percent of the unpaid wage amount per month from the date of the Citation and Notice of Assessment until payment is received by the Department, as provided by RCW 49.48.083(2), is **APPROPRIATE**.

6.4. The Department of Labor and Industries' 'Citation and Notice of Assessment No. W-003-31', dated July 9, 2020, is **AFFIRMED**.

Issued from Tacoma, Washington on the date of mailing.



TJ Martin
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.¹ You may e-mail your Petition for Administrative Review to the Director at 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.²

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

¹ RCW 49.48.084 and RCW 34.05.464.

² RCW 49.48.084 and Chapter 34.05 RCW.

CERTIFICATE OF SERVICE FOR OAH DOCKET NO. 11-2020-LI-01538

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

<p>Oscar Curiel 6402 Pacific Pines Drive Pasco, WA 99301 Appellant</p>	<p><input checked="" type="checkbox"/> First Class Mail <input checked="" type="checkbox"/> Certified Mail, Return Receipt 9489 0090 0027 6102 1671 04 <input type="checkbox"/> Campus Mail <input type="checkbox"/> E-mail</p>
<p>Kevin Clarke Elliott, AAG Office of the Attorney General 1116 W Riverside Ave Ste 100 Spokane, WA 99201 Agency Representative</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 Kevin.Elliott@atg.wa.gov Bobbi.Ewert@atg.wa.gov Inispofax@ATG.WA.GOV shaun.reeser@atg.wa.gov</p>
<p>William Edelblute 1030 N Center Parkway Kennewick, WA 99336 Appellant Representative</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>Marcelina Torres 6209 Robert Wayne Drive Pasco, WA 99301 Intervenor/Wage Claimant</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>

Date: Friday, June 18, 2021

OFFICE OF ADMINISTRATIVE HEARINGS

Ashleigh A. Vandeyacht

Ashleigh Vandeyacht
Legal Assistant 4