

DIRECTOR OF THE DEPARTMENT OF LABOR & INDUSTRIES
STATE OF WASHINGTON

In re HERNANDEZ LEGACY
ENTERPRISES, LLC and JESUS
HERNANDEZ, as an individual,

Appellants.

Appeal of Citation and Notice of
Assessment No. W-028-19

OAH Docket No. 11-2018-LI-00920

No. 2020-010-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 Thursday, November 14, 2019, having considered the petition for administrative review filed by the Department of Labor & Industries, briefing submitted to the Director's Office, and having reviewed the record created at hearing, 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 Thursday, November 14, 2019. The Initial Order reversed the Department's Citation and Notice of Assessment No. W-028-19.

2. The Department timely petitioned for administrative review.

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

3. The Director adopts and incorporates Findings of Fact No. 4.1, 4.2, 4.3, 4.4, 4.5, 4.6, 4.7, 4.8, 4.9, 4.10, 4.11, 4.12, 4.16, 4.19, 4.20, 4.25, 4.26, 4.28, 4.29, 4.30, 4.31, 4.32, 4.33, 4.35, 4.37, 4.43, 4.45, 4.46, 4.47, 4.48, 4.49, 4.50, 4.51, 4.52, 4.53, 4.54, 4.55, 4.56, 4.57, 4.58, 4.59, 4.61, 4.62, 4.63, and 4.65.

4. Mr. Hernandez' ranch consisted of thirty acres, three cabins, and three separate yards. Mr. Cortes was required to work on all of that property.

5. Mr. Hernandez did not ask Mr. Cortes to keep track of his time and Mr. Hernandez kept no contemporaneous records of the hours worked by Mr. Cortes.

6. Mr. Cortes informed Mr. Hernandez if he was leaving the ranch or if he would be late to work.

7. The pay agreement was \$350 per week. Mr. Hernandez provided inconsistent statements of the number of hours that Mr. Cortes was supposed to work for that pay. In some statements, he said 20 hours per week and others 24 hours per week.

8. Hernandez Legacy is a for-profit business. Mr. Cortes was an employee of Hernandez Legacy.

9. Mr. Cortes regularly worked more than 40 hours per week and worked up to 70 hours per week. He worked six days per week.

10. Mr. Hernandez paid Mr. Cortes \$300 to \$350, weekly. He was paid in cash, always without a receipt or a paystub. Sometimes, he was paid on Saturday or Sunday, sometimes later.

11. Mr. Cortes performed many different tasks at the ranch, including cleaning up the inside of the three cabins, re-roofing and re-siding them, installing and repairing fencing. He also installed flooring, plumbing, and painted. When it snowed, Mr. Cortes plowed the ranch's road. Mr. Cortes performed landscaping work, weeded the yards, reinforced and moved fences. He also poured sand in the yards to get rid of the clay, irrigated the pastures, planted grapes, fixed

pipes that burst, removed all the pipes during harvest season, baled the hay, stacked the hay by hand, took care of 13-14 animals, broke the ice for the animals' water in the winter when it froze, widened the road on the property, built a wooden fence, found and repaired water leaks, vaccinated the cows, fixed the wire and fencing for the gates, broke up concrete to get to the piping, planted grass seed, put rocks and bark into the yard, took care of an orphaned baby cow who required 24-hour care, fixed equipment, and cleaned the stables.

12. Mr. Hernandez statement that Mr. Cortes only worked 20 to 24 hours per week is not credible. Mr. Hernandez and Mr. Cortes collaborated weekly on the tasks that needed to be accomplished that week. Each of those task lists consisted of more than 20 to 24 hours-worth of work. Moreover, Mr. Hernandez was not at the farm on a daily basis to verify the number of hours worked by Mr. Cortes.

13. Mr. Hernandez provided text messages that show for a portion of the day Mr. Cortes was not at work. But the text messages do not show exactly how many hours Mr. Cortes worked on a particular day, even if for some portion he did not work. The bulk of the text messages are not informative on hours worked.

14. Mr. Hernandez is the governing agent and a corporate officer of the business.

15. Mr. Hernandez was the person who paid Mr. Cortes in cash for the work performed.

16. The Director gives full consideration to the Administrative Law Judge's Finding of Fact No. 4.68 about Mr. Cortes' credibility. The five reasons given by the ALJ for not finding Mr. Cortes credible do not convince the Director. First, the ALJ did not find Mr. Cortes credible because he did not complain to Mr. Hernandez about his pay. Mr. Cortes was not required to complain to Mr. Hernandez in order to be paid. Workers are in a vulnerable position and employers sometimes fire them for complaining. And the fact that Mr. Cortes waited nine months to file his claim does not matter as the statute of limitation is three years. Second, the

ALJ did not find Mr. Cortes credible because the ALJ asserts that there was only generic testimony and notes the witnesses only saw brief snapshots of his work. A worker is only required to present an estimate of hours worked and does not have to provide witnesses for the full time period claimed. Third, the ALJ says Mr. Cortes did not quantify times spent on individual tasks. A worker is not required to quantify time spent on each task. Although this information is helpful, all that is required is an estimate of the hours, and the sheer breath and scope of the work he performed supports his estimate. Fourth, the ALJ thought the text messages showed a behavioral pattern of not working full days. A handful of text messages about taking a break from work do not establish a pattern. Instead, it shows Mr. Cortes was conscientious about reporting when he was not working, supporting that he worked the hours he claimed. Fifth, the ALJ pointed to evidence that Mr. Cortes overslept and missed tasks. But the evidence was that Mr. Cortes performed many tasks and worked many long hours; occasionally oversleeping does not change that. An employee does not have to be perfect to be paid.

17. The Director finds Mr. Cortes' testimony credible that he worked more than 24 hours a week. Besides the lengthy list of tasks he performed, supporting his testimony was testimony by Mr. Castro, Mr. Gonzalez, and Mr. Cortes' estranged wife, Ms. Arnold. As discussed below, Mr. Cortes only needs to show that he worked any period of time that is uncompensated for the burden to shift to Mr. Hernandez to disprove.

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 Director adopts and incorporates by reference the following conclusions of law from the initial order: 5.1, 5.2, 5.3, 5.4, 5.7, 5.8, 5.9, 5.10, 5.11, 5.12, 5.13, 5.14, 5.15, 5.16, 5.17, 5.18, 5.19, 5.20, 5.21, 5.22, 5.23, 5.24, 5.25, 5.26, 5.27, 5.28, 5.29, 5.30, 5.31, 5.32, and the first sentence of 5.33.

3. Washington courts follow federal law to provide special burdens of proof when an employer does not keep records. *MacSuga v. Cty. of Spokane*, 97 Wn. App. 435, 445, 983 P.2d 1167 (1999); *Pugh v. Evergreen Hosp. Med. Ctr.*, 177 Wn. App. 363, 368, 312 P.3d 665 (2013); *Anderson*, 328 U.S. at 687. Under this line of cases, which is followed throughout the United States, in its initial 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, though the employee is not denied “recovery on the ground that he is unable to prove the precise extent of uncompensated work.” *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687, 66 S. Ct. 1187, 90 L. Ed. 1515 (1946). 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. The *Anderson* Court developed the burden-shifting standard because lack of evidence is within the control of the employer. 328 U.S. at 687.

4. In a scenario where an employer’s records are absent, unreliable or incomplete, and the employee establishes that he or she performed uncompensated work, the *fact* of damage is certain, and the only uncertainty is the *amount* of damage. *Brock v. Seto*, 790 F.2d 1446, 1448 (9th Cir. 1986). Courts permit estimated damages in such a situation because to do otherwise would “be a perversion of fundamental principles of justice and [would] deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts.” *Id.* (quoting *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 563, 51 S. Ct. 248, 75 L. Ed. 544 (1931)).

5. An employee’s own recollection about hours worked is enough to shift the burden to the employer. *Kuebel v. Black & Decker, Inc.*, 643 F.3d 352, 362 (2nd Cir. 2011) (“It is well settled among the district courts of this Circuit, and we agree, that it is possible for a plaintiff to meet this burden through estimates based on his own recollection”); *see also Garner v. Chevron*

Phillips Chem. Co., L.P., 834 F. Supp. 2d 528, 547 (S.D. Tex. 2011) (evidence can include plaintiff's statements in his or her affidavit as to when and how many overtime hours were worked); *England v. Advance Stores Co. Inc.*, 263 F.R.D. 423, 450 (W.D. Ky. 2009) (evidence as to the uncompensated work the employee performed can consist solely of the plaintiff's own testimony).

6. If the employer's records are inaccurate or inadequate, "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 a just and reasonable inference." *Anderson*, 328 U.S. at 687. "The burden then shifts to the employer to show the precise number of hours worked or to present evidence sufficient to negate the reasonableness of the inference to be drawn from the employee's evidence." *Id.* If the employer fails to make such a showing, the Court "may then award damages to the employee, even though the result be only approximate." *Id.* "[A]n award of back wages will not be barred for imprecision where it arises from the employer's failure to keep records as required by the FLSA." *Sillah v. Command Int'l Sec. Svcs.*, 154 F.Supp3d 891 (N.D. Cal. 2015).

7. The Department carried the burden by proving that Mr. Cortes has in fact performed work that he was improperly compensated. He detailed many tasks that he performed and that this was more than 24 hours of work a week. In support of his testimony that he worked more than 24 hours a week was testimony by Mr. Castro, Mr. Gonzalez, and Mr. Cortes' estranged wife, Ms. Arnold.

8. With the Department meeting its burden, the burden then shifts to Mr. Hernandez. Mr. Hernandez needed to produce more than general assertions and speculation, he needed evidence of "the precise number of hours worked or to present evidence sufficient to negate the reasonableness of the inference to be drawn from the employee's evidence." *Anderson*, 328 U.S. at 688. Mr. Hernandez was required to have records of the hours worked by Mr. Cortes. He did

not track, keep and preserve hours and wages as required by law. The burden shifting principles of *Anderson*, 328 U.S. at 688 apply in this case even when an employer believes an employee is an independent contractor. The economic realities of the situation show that Mr. Cortes was an employee and not an independent contractor. Therefore, when Mr. Hernandez did not keep track of the hours worked by Mr. Cortes, he was in violation of the law.

9. Mr. Cortes produced a reasonable estimate of his hours worked. Mr. Cortes presented his own testimony and testimony of other witnesses to show the amount of hours he worked and the large scope of work he performed. He was not required to prove the precise hours that he worked; just that he worked additional time and was uncompensated. To contest Mr. Cortes' estimate of hours worked, Mr. Hernandez was required to provide the precise number of hours that Mr. Cortes worked or produce evidence to negate the reasonableness of Mr. Cortes' hours. He did neither. Mr. Hernandez has no independent recollection of the hours worked each day. He was not at the farm each day to witness the number of hours worked. He did not have any other witnesses testify about the hours worked by Mr. Cortes. Mr. Hernandez seeks to rely on text messages to argue that the estimate of Mr. Cortes is not reasonable. But these text messages do not show start times and end times, and do not satisfy Mr. Hernandez's duty to keep records. The records that Mr. Hernandez produced showed that he gave Mr. Cortes weekly tasks that took well over 25 hours to complete each week. Mr. Cortes has met his initial burden of proving hours worked that were uncompensated and Mr. Hernandez did not refute those.

10. Mr. Cortes worked more than 20-24 hours per week for Mr. Hernandez and was not compensated for all hours worked.

11. The Director adopts the estimate of hours worked provided by Mr. Cortes and affirms the Department's Citation and Notice of Assessment that found Mr. Cortes is owed

wages in the amount of \$36,394.64 for 3,383 hours worked from April 1, 2016 to June 30, 2017 at the rate of \$14.58 per hour. Mr. Cortes is not entitled to overtime as he was working on a farm. Mr. Cortes is owed 1% interest on his wages and interest continues to accrue until all wages are paid in full, except for the period between December 5, 2020, to the date of service of this order.

12. Washington courts have long recognized imposition of personal liability for wage claim violations under RCW 49.52.050. RCW 49.52.050 imposes liability on “[a]ny employer or officer, vice principal or agent of any employer, whether said employer be in private business or an elected public official, who” violates standards relating to the rebate of wages, payment of wages, and accurate records. Under this statute, liability is not just applied to employers, it is also applied to an “officer, vice principal or agent of any employer.”

13. Courts look to a variety of indicia to qualify an individual who may be held liable for a corporation’s violation of FLSA (in addition to corporate leadership, if that qualification is used). And while courts do not always describe them the same way, it is practical to group them under the requirement that the individual must possess some threshold of control of day-to-day operations of the employer corporation or control over whether or not employees are paid. Courts describe this requirement in different ways. *See Baystate Alternative Staffing, Inc. v. Herman*, 163 F.3d 668, 678 (1st Cir. 1998) (referring to “operational control of significant aspects of the corporation’s day to day functions...”); *Reich v. Circle C. Investments, Inc.*, 998 F.2d 324, 329 (5th Cir. 1993) (“exercised control over the work situation . . .”); *Patel v. Wargo*, 803 F.2d 632, 638 (11th Cir. 1983) (holding that the defendant-appellant “lacked the operational control necessary for the imposition of liability as an ‘employer’ under FLSA.”); *Agnew*, 712 F.2d at 1511 (“ . . . actively engaged in the management, supervision and oversight of [employer corporation’s] affairs . . .”).

14. To determine if an employer is personally liable for the wages of a worker the courts may look at some of the following criteria: hiring and firing of employees (*see Circle C.*

Investments, 998 F.2d at 329; *Baystate Alternative Staffing*, 163 F.3d at 678; *Alvarez Perez v. Sanford-Orlando Kennel Club, Inc.*, 515 F.3d 1150, 1161 (11th Cir. 2008); control over compensation and benefits (*See Agnew*, 712 F.3d at 1511; *Sabine Irrigation*, 695 F.2d at 195); purchase of insurance (*see Baystate*, 163 F.3d at 678; *Donovan v. Sabine*, 695 F.2d at 195); handling of taxes (*id.*); setting salaries for employees (*see Elliott Travel & Tours*, 942 F.2d at 966); control over whether or not employees are paid, or responsibility for chain of events that led to financial situation that precluded payment (*see Agnew*, 712 F.2d at 1511; *Baystate Alternative Staffing*, 163 F.3d at 678; *Sabine Irrigation*, 695 F.2d at 195; *Elliott Travel & Tours*, 942 F.2d at 966).

15. Mr. Hernandez is personally liable for the wages owed to Mr. Cortes. Hernandez Legacy Enterprises, LLC, is also liable.

16. An employer who willfully violates a wage payment requirement may be ordered to pay a civil penalty. RCW 49.48.083(3) states: “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 . . . 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.”

17. An employer acts willfully in depriving a worker 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). Such a lack of effort constitutes “more than mere carelessness,” and is therefore a willful and intentional deprivation of wages. *Id.* at 681. Here, Mr. Hernandez

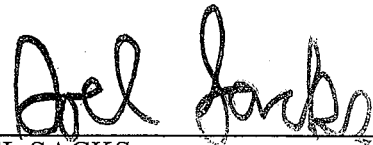
made no effort to keep records, showing willfulness and was correctly assessed \$3,639.46 as a civil penalty.

III. DECISION AND ORDER

Consistent with the above Findings of Fact and Conclusion of Law, the Citation and Notice of Assessment No. W-028-19 is affirmed with modification. The Initial Order of November 14, 2019 is incorporated by reference herein.

Mr. Hernandez and Hernandez Legacy Enterprises, LLC., is ordered to pay wages to Mr. Cortes in the amount of \$36,394.64. Mr. Hernandez and Hernandez Legacy Enterprises, LLC., is also ordered to pay interest in the amount of one percent per month under RCW 49.48.083(2) for these wages. Mr. Hernandez and Hernandez Legacy Enterprises, LLC., is also order to pay a penalty in the amount of \$3,639.46. They are ordered to make these payments within 30 days of the date of service of this final Director's Order. See the Citation and Notice of Assessment for payment information and the effect of the failure to pay wages and interest.

DATED at Tumwater this 15 day of September 2020.



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 15 day of September 2020 via U.S. Mail, postage prepaid, and email, to the following:

Hernandez Legacy Enterprises, LLC
c/o Jesus Hernandez
902 Wildwood Avenue
Omak, WA 98840
jvh2451@gmail.com

Hernandez Legacy Enterprises, LLC
c/o Jesus Hernandez
902 Wildwood Avenue
Omak, WA 98840
jvh2451@gmail.com

Salvador Cortes
504 Cottage Avenue
Cashmere, WA 98815

Heather Leibowitz
Assistant Attorney General
Attorney General's Office
800 Fifth Ave., Ste. 2000
Seattle, WA 98104
heather.leibowitz@atg.wa.gov

DATED this 15 day of September 2020 at Tumwater, Washington.



Lisa Deck

**WASHINGTON STATE
OFFICE OF ADMINISTRATIVE HEARINGS**

In the matter of the assessment of
Wage Payment and/or Minimum
Wage Act violations against:

Hernandez Legacy Enterprises, LLC
dba
Hernandez Legacy Enterprises, LLC;
and
Jesus Hernandez, as an individual,

Appellants.

Docket No. 11-2018-LI-00920

INITIAL ORDER

Agency: Dept. of Labor and Industries
Program: Wage Payments
Agency No. W-028-19

Language Access Notice

English

This document has important information about your hearing. If you do not appear or take other action, you could lose important rights. Please call 1-800-845-8830 if you need help understanding this document.

Spanish

Este documento contiene información importante sobre su audiencia. Si usted no se presenta o no toma otra acción, usted podría perder derechos importantes. Por favor llame al 1-800-845-8830 si usted necesita ayuda para entender este documento.

1. ISSUES

- 1.1. Did the Appellants violate RCW 49.52.050 by failing to pay agreed wages to Salvador Cortes for 3383 hours at the regular rate of pay of \$14.58 per hour?
- 1.2. Did the Appellants violate RCW 49.48.010 by failing to pay final wages to Salvador Cortes for 225 hours at the regular rate of pay of \$14.58 per hour?
- 1.3. If so, what wages are owed?
- 1.4. If so, what interest is owed?
- 1.5. If so, what is the appropriate penalty?

2. ORDER SUMMARY

- 2.1. No. The Appellants did not violate RCW 49.52.050 because the evidence does not establish that the Appellants failed to pay wages for 3383 hours at the regular rate of pay of \$14.58 per hour.

- 2.2. No. The Appellants did not violate RCW 49.48.010 because the evidence does not establish that the Appellants failed to pay final wages to Salvador Cortes for 225 hours at the regular rate of pay of \$14.58 per hour.
- 2.3. Accordingly, no wages are owed.
- 2.4. Therefore, no interest is owed.
- 2.5. Thus, no penalty applies.

3. HEARING

- 3.1. Hearing Date: September 9 through 11, 2019
- 3.2. Administrative Law Judge: Terry A. Schuh
- 3.3. Appellants: Hernandez Legacy Enterprises, LLC dba Hernandez Legacy Enterprises and Jesus Hernandez
 - 3.3.1. Representative: Jesus Hernandez
 - 3.3.2. Witness: Jesus Hernandez
- 3.4. Agency: Department of Labor and Industries
 - 3.4.1. Representative: Heather Leibowitz, Assistant Attorney General
 - 3.4.2. Witnesses:
 - 3.4.2.1. Salvador Cortes-Hernandez (Salvador Cortes), Wage Claimant
 - 3.4.2.2. Sergio Castro Cruz (Sergio Castro)
 - 3.4.2.3. Francisco Sanchez
 - 3.4.2.4. Emmanuel Alvarez Gonzalez (Emmanuel Alvarez)
 - 3.4.2.5. Sarah Arnold
 - 3.4.2.6. Irene Davis, Industrial Relations Agent, Department of Labor and Industries
- 3.5. Exhibits: The Department of Labor and Industries offered Exhibits 1 through 22 for admission into the record as evidence. The Appellants did not object. All 22 exhibits were admitted into the record. The Appellants offered Exhibits 1 through 7 and 9 through 10 into the record as evidence. I renamed them A through G and I through J, for easy distinction from the Exhibits filed by the Department of Labor and Industries. I did not admit into the record Exhibits A and J. Accordingly, Exhibits B through G and Exhibit I were admitted into the record.

3.6. Court Reporter: RhiAnnon Wilken served as court reporter on September 9 and 10, 2019. C. Kay Romine served as court reporter on September 11, 2019. Both of them are from Central Court Reporting.

3.7. Interpreter: Martha Kullman, from FourCorners Translation, LLC, served as the Spanish interpreter as needed throughout the three-day Hearing.

4. FINDINGS OF FACT

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

Jurisdiction

4.1. The Department of Labor and Industries (“the Department”) served the Citation and Notice of Assessment No. W-028-19 on Hernandez Legacy Enterprises, LLC dba Hernandez Legacy Enterprises and Jesus Hernandez¹ on July 20, 2018. Ex. 1; *see esp.*, Ex. 1, p. 12.

4.2. Mr. Hernandez filed the appeal on August 17, 2018. Ex. 2.

Salvador Cortes’s Worker Rights Complaint

4.3. Salvador Cortes (“Mr. Cortes” or “Cortes”) filed a Worker Rights Complaint on April 2, 2018. Irene Davis (“Ms. Davis” or “Davis”) Testimony; Ex. 4, pp. 4-6. A bilingual Department employee translated it into English. Davis Testimony; Ex. 4, pp. 1-3.

4.4. Mr. Cortes claimed unpaid wages from April 1, 2016, through June 30, 2017. Cortes Testimony; Davis Testimony; Ex. 4, p. 2.

The Department investigated Mr. Cortes’s Worker Rights Complaint

4.5. Ms. Davis investigated Mr. Cortes’s claim. Davis Testimony.

4.6. On April 16, 2018, Mr. Cortes told Ms. Davis that Mr. Hernandez paid him \$200-\$300 cash weekly. Davis Testimony; Ex. 3, p. 1. He also told her the kinds of work he performed for Mr. Hernandez. Davis Testimony; *see* Ex. 3, p. 2. Mr. Cortes told her that he started at 8:00 or 9:00 a.m. and worked until 10:00 p.m. Davis Testimony. Mr. Cortes told Ms. Davis that he tracked his hours in a notebook but that the notebook was burned with the rest of his stuff by Mr. Hernandez when Mr. Cortes did not pick up his belongings. Davis Testimony.

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¹ There are no circumstances relevant here where conduct attributed to Hernandez Legacy Enterprises, LLC is not equally attributed to Jesus Hernandez, and vice versa. For the purposes of this decision, the entity and the individual are indivisible. If a distinction must be made, I will employ the full name of the entity or of the individual. Otherwise, I will reference the appellants collectively as either “Mr. Hernandez” or “Hernandez”.

- 4.7. Ms. Davis asked Mr. Cortes to re-create his estimated hours of work from memory. Davis Testimony. Mr. Cortes did so. Davis Testimony; see Ex. 7, pp. 8-16. Ms. Davis received Mr. Cortes's estimated hours on April 24, 2018. Davis Testimony.
- 4.8. Ms. Davis applied the Economic Reality Test and determined that Mr. Cortes was an employee and not an independent contractor. Davis Testimony; Ex. 3, pp. 5-7.
- 4.9. As an employer, Mr. Hernandez was obliged to track hours, rate of pay, and pay, but he did not do so. Davis Testimony.
- 4.10. Relying on Mr. Cortes's estimated hours worked, Ms. Davis calculated what his gross pay would have been by multiplying those hours by \$14.58 per hour. Davis Testimony. Ms. Davis arrived at the hourly rate of \$14.58 by dividing \$350 by 24 hours. Davis Testimony. She deducted from that total the \$350 per week that Mr. Hernandez said he paid and because that was what Mr. Cortes reported with his estimated hours. Davis Testimony. Ms. Davis calculated all hours as straight time, with no overtime rate, because she characterized Mr. Cortes as a farm worker. Davis Testimony.
- 4.11. Using the foregoing method, Ms. Davis calculated Mr. Cortes's total earnings for April 1, 2016, through June 30, 2017, as \$52,604.64, less \$16,210 for wages paid, for a balance owing of \$36,394.64. Davis Testimony; Ex. 17, pp. 2-6.

Mr. Cortes worked for Mr. Hernandez

- 4.12. In the Spring of 2016, Mr. Cortes approached Mr. Hernandez and asked for work on his ranch. Hernandez Testimony. Mr. Hernandez did not have a job posted. Hernandez Testimony.
- 4.13. The parties did not use time sheets because they were not relevant. Hernandez Testimony.
- 4.14. Mr. Cortes was the one who terminated the working relationship. Hernandez Testimony.
- 4.15. The relationship terminated because Mr. Cortes and Mr. Hernandez failed to meet one another's expectations. Hernandez Testimony.

The degree of control that Mr. Hernandez exercised over Mr. Cortes

- 4.16. Mr. Hernandez told Mr. Cortes what needed to be done. Cortes Testimony; Ex. 3, p. 1. He provided Mr. Cortes with work lists verbally, by text or written list, or by message through Mr. Hernandez's uncle. Cortes Testimony; Ex. 3, p. 1. The lists were usually weekly. Cortes Testimony.

- 4.17. The parties did not discuss what needed to be done every week. Hernandez Testimony. When there was no such discussion, Mr. Cortes did what he thought was best. Hernandez Testimony.
- 4.18. The work lists were generated by the two of them. Hernandez Testimony. However, the vision for what the ranch would become was Mr. Cortes's. Hernandez Testimony. Mr. Cortes's vision was to manage the property and install horse stables to improve his income. Hernandez Testimony.
- 4.19. Mr. Hernandez's uncle would check of Mr. Cortes's progress and report to Mr. Hernandez, particularly if he felt Mr. Cortes was not working as expected. Cortes Testimony, Ex. 3, p. 1.
- 4.20. Mr. Hernandez was at the ranch almost every Friday and Saturday, and sometimes more often. Cortes Testimony; Ex. 3, p. 1.
- 4.21. Mr. Hernandez characterized his involvement as checking in, rather than supervising Mr. Cortes's work. Hernandez Testimony.
- 4.22. Mr. Cortes did not need permission to leave the ranch. Cortes Testimony. However, if Mr. Cortes was going to be gone for more than an hour, he texted Mr. Hernandez. Cortes Testimony. Mr. Cortes was not required to do so, but he wanted Mr. Hernandez to know. Cortes Testimony.
- 4.23. Mr. Cortes suggested that he should live on the ranch in order to take charge of the ranch, and Mr. Hernandez allowed him to do so. Cortes Testimony. Mr. Cortes moved onto the ranch in May 2016. Cortes Testimony. Mr. Hernandez wanted someone there to care for the yards, level the yards, help with the alfalfa, and help with irrigation. Cortes Testimony.
- 4.24. Mr. Hernandez believed and believes that he hired Mr. Cortes as an independent contractor. Hernandez Testimony; Ex. 10, p. 5. Mr. Hernandez asked Mr. Cortes to sign an independent contractor agreement but Mr. Cortes refused to do so. Ex. 10, p. 5.
- 4.25. Mr. Cortes directed Mr. Hernandez when they worked together. Hernandez Testimony.

Mr. Cortes's opportunity for profit or loss depending upon his managerial skill

- 4.26. Mr. Cortes did not work for anyone else when he worked for Mr. Hernandez. Cortes Testimony.
- 4.27. Mr. Cortes agreed to work for a fixed amount of earnings but he could earn much more if his vision was successful. Hernandez Testimony.
- 4.28. Mr. Cortes had no ownership interest in the ranch. Hernandez Testimony.

Mr. Cortes's investment in equipment or material

- 4.29. Mr. Hernandez supplied all materials and all tools. Cortes Testimony; Ex. 3, p. 2.
- 4.30. Mr. Hernandez supplied all materials. Hernandez Testimony.
- 4.31. Mr. Cortes did not invest in the ranch or in his work at the ranch. See Ex. 3, p. 2.

The degree of skill required for Mr. Cortes's performance

- 4.32. Mr. Cortes had no prior experience working on a farm or ranch. Cortes Testimony.
- 4.33. Mr. Cortes had prior experience in landscaping. Cortes Testimony.
- 4.34. Mr. Cortes told Mr. Hernandez that he had landscaping and property management experience. Hernandez Testimony.

The degree of permanence of the working relationship between Mr. Cortes and Mr. Hernandez

- 4.35. The duration of Mr. Cortes's tenure with Mr. Hernandez was open-ended. It was not dependent upon completion of certain tasks or the specific passage of time. See generally below for a description of the work Mr. Cortes performed.

The degree to which the services rendered by Mr. Cortes were an integral part of Mr. Hernandez's business

- 4.36. The entirety of Mr. Cortes's work was to restore and improve the ranch and support its daily operations. See generally below for a description of the work Mr. Cortes performed.

What hours did Mr. Cortes work for Mr. Hernandez?

- 4.37. Mr. Hernandez believed and believes that he hired Mr. Cortes as an independent contractor. Hernandez Testimony; Ex. 10, p. 5.
- 4.38. The parties dispute what weekly wage they agreed to. Mr. Cortes said that they agreed to \$500 per week and 40 hours work. Cortes Testimony; Ex. 3, p. 8. Mr. Hernandez said that they agreed to \$350 per week and 24 hours work. Ex. 10, p. 2. I need not resolve that dispute because Ms. Davis determined to accept the figure of \$350 a week.
- 4.39. Mr. Cortes never complained to Mr. Hernandez about his hours or his pay. Hernandez Testimony; Cortes Testimony.

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- 4.40. Although there were several instances when Mr. Cortes asked Mr. Hernandez when he would receive his weekly pay, at no time did Mr. Cortes ask why he was being underpaid. Cortes Testimony; *see, e.g.*, Ex. G, pp. 12 (July 25), 13 (Aug 7), 14, 17, and 27. Mr. Cortes never discussed the issue in his text messages because Mr. Hernandez promised to pay later what he owed and it was not a subject to discuss by text message. Cortes Testimony.
- 4.41. Mr. Hernandez paid Mr. Cortes \$300 or \$350, weekly. Cortes Testimony; Ex. 3, p. 8. He was always paid, always in cash, always without a receipt or pay stub. Cortes Testimony. Sometimes he was paid on Saturday or Sunday, sometimes later. Cortes Testimony. However, when reporting his hours and wages to the Department, Mr. Cortes reported weekly pay ranging from \$0 to \$400, although primarily \$350. Ex. 7, pp. 8-16. The record does not reflect how Mr. Cortes determined in April 2018, what his weekly pay was for each week ranging from April 2016 through June 2017, when he reported that information to the Department along with his estimated hours worked.
- 4.42. Mr. Hernandez offered to pay Mr. Cortes in a manner other than cash if he wanted. Hernandez Testimony; Ex. 2, p. 51.
- 4.43. Mr. Cortes did not pay rent for living in one of the cabins and rent was not deducted from his wages. Cortes Testimony.
- 4.44. Mr. Hernandez did not ask Mr. Cortes to track hours. Cortes Testimony. *Sometimes* Mr. Cortes wrote down the hours. Cortes Testimony. Those records were subsequently burned by Mr. Hernandez when Mr. Cortes did not timely collect his personal property from the ranch. Cortes Testimony. However, Mr. Hernandez did not destroy Mr. Cortes's property abandoned at the ranch. Hernandez Testimony. Mr. Hernandez struggled to get Mr. Cortes to claim any of his property, including a trailer and motorcycle. Hernandez Testimony. Moreover, Mr. Cortes does not know how to read. Deposition of Cortes, Ex. D, p. 4. Accordingly, I find that Mr. Cortes did not track his hours.
- 4.45. Mr. Cortes re-created his daily and weekly hours in April 2018 at the direction of Ms. Davis. Cortes Testimony. This re-creation is by necessity an estimate. Cortes Testimony.
- 4.46. Mr. Cortes reported to the Department for April and May 2016, that he worked 9 hours a day on Mondays, Tuesdays, Wednesdays, and Thursdays, and 12, 13, or 14 hours a day on Fridays and Saturdays. Cortes Testimony; Ex. 7, p. 8.
- 4.47. In April 2016, Mr. Cortes spent two or three weeks building a retaining wall on the ranch. Cortes Testimony; Ex. 3, p. 8. In April and May 2016, he picked up garbage, trash, and weeds in the yards in anticipation of a family event on Mother's Day. Cortes Testimony; Ex. 8, p. 8.

- 4.48. Mr. Cortes reported to the Department for June, July, and August 2016, that he worked 10 hours a day on Mondays, Tuesdays, Wednesdays, and Thursdays, and 12 hours a day on Fridays and Saturdays, except for August 5 and 6, when he worked 13 hours each day. Cortes Testimony; Ex. 7, pp. 9-10.
- 4.49. Mr. Cortes reported to the Department for September 2016, that he worked nine hours a day on Mondays, Tuesdays, Wednesdays, and Thursdays, and 12 hours a day on Fridays and Saturdays, except for September 9 and 10 when he worked 11 hours each day. Cortes Testimony; Ex. 7, p. 10.
- 4.50. Mr. Cortes reported to the Department for October, November, and December 2016, that he worked nine hours a day, six days a week. Cortes Testimony; Ex. 7, pp. 11-12.
- 4.51. Mr. Cortes reported to the Department for January and February 2017, that he worked eight hours a day, six days a week. Cortes Testimony; Ex. 7, p. 13.
- 4.52. Mr. Cortes reported to the Department for March, April, and May 2017, that he worked nine hours a day Monday through Friday, and 10 hours a day on Saturdays. Cortes Testimony; Ex. 7, p. 14.
- 4.53. Mr. Cortes reported to the Department for June 2017, a varied amount of hours as follows: Nine hours on June 1 and June 2, 10 hours on June 3 and 5-8, 13 hours on June 9, 14 hours on June 10, 10 hours on June 12-15, 12 hours on June 16, 13 hours on June 17, eight hours on June 19-23, and five hours on June 26-30. Cortes Testimony; Ex. 7, p. 15.
- 4.54. Mr. Hernandez grew alfalfa on the ranch. Cortes Testimony. There were three harvests annually. Hernandez Testimony; Cortes Testimony. Mr. Hernandez hoped for four harvests, but they never achieved a fourth. Hernandez Testimony. Mr. Cortes assisted with growing the alfalfa and harvesting it, although the parties dispute the degree and nature of Mr. Cortes's help at harvest. Hernandez Testimony; Cortes Testimony. Each harvest took one or two weeks. Cortes Testimony.
- 4.55. Mr. Cortes also managed and maintained the irrigation system that served the alfalfa crop. Cortes Testimony. That included repairs as needed, and removal of the pipes at harvest times. Cortes Testimony.
- 4.56. Mr. Cortes helped feed and care for livestock on the ranch. Cortes Testimony. The parties dispute how much livestock the ranch housed. The livestock were fed twice daily and watered every two hours. Cortes Testimony; Ex. 3, p. 9. Mr. Hernandez's uncle shared with feeding, watering, and caring for the livestock. Hernandez Testimony.

- 4.57. Other work Mr. Cortes performed included cleaning up the inside of the three cabins, re-roofing and re-siding them, and installing or repairing fencing. Cortes Testimony. Mr. Hernandez testified that Mr. Hernandez's uncle did the fencing, although Mr. Cortes might have helped. Hernandez Testimony. He installed flooring and plumbing and painted. Cortes Testimony; Ex. 3, p. 9.
- 4.58. When it snowed, Mr. Cortes plowed the ranch's road. Cortes Testimony. The parties dispute how often Mr. Cortes plowed and to what effect.
- 4.59. There was a large hole on the property that Mr. Cortes filled with material from elsewhere on the property. Ex. 8, p. 9. It took approximately 400 truckloads to do so. Ex. 8, p. 9.
- 4.60. The record contains text messages between Mr. Hernandez and Mr. Cortes, some of which reference activity by Mr. Cortes that appears to be inconsistent with the number of hours he reported to the Department that he worked that day. See, generally, Ex. G and Ex. 2, pp. 43-123.² See especially, Ex. G, p. 2 (April 23); Ex. G, p. 2 (May 7 at 10:21); Ex. G, p. 2 (May 7 at 3:13); Ex. G, p. 4 (May 28 at 10:02); ex. G, p. 5 (June 6 and 9:59); Ex. G, p. 6 (June 18 at 6:15 compared with 12 work hours reported on Ex. 7, p. 9); Ex. G, p. 11 (July 23 at 3:00 compared with the hours reported on Ex. 7, p. 9); Ex. G, p. 12 (July 26 at 8:01 compared with the hours reported on Ex 7, p. 9);³ Ex. G, p. 18 (Nov 4 at 6:15 compared with the hours reported on Ex. 7, p. 11); Ex. G, p. 20 (Nov 30 at 2:23); Ex. G, p. 22 (Dec 27 at 5:17 p.m. compared with the hours reported on Ex. 7, p. 12); Ex. G, p. 23 (Jan 20 at 7:24 p.m. compared with the hours reported on Ex. 7, p. 13); Ex. G, p. 24 (March 8 at 2:30 compared with the hours reported on Ex. 7, p. 13); Ex. G, p. 27 (April 3 at 11:50 a.m. compared with the hours reported on Ex. 7, p. 14); Ex. G, p. 28 (May 26 at 3:25); and Ex. G, p. 31 (June 5 at 3:25 compared with the hours reported on Ex. 7, p. 15).
- 4.61. Sergio Castro Cruz ("Mr. Castro" or "Castro") often visited his friend Mr. Cortes at the ranch. Castro Testimony. He observed him working both in the morning and in the afternoon. Castro Testimony. Mr. Castro twice helped Mr. Cortes and others with a harvest of the alfalfa when they worked after dark, using vehicle headlights for light. Castro Testimony. Mr. Castro was never paid for his labor. Castro Testimony. He returned for the second harvest despite not being paid for the first because he thought that he might get paid for both by doing so. Castro Testimony.

² Ex. G is entirely in Spanish. An English translation provided by bilingual employees of the Office of Administrative Hearings is included in the file. The pagination differs but the texts reflect dates and times that allow the reader to locate the translation. Further, most, if not all, of the texts included in Ex. G also appear in Ex. 2. Ex. 2, has English on the odd numbered pages followed by the Spanish version on the even numbered pages.

³ The reference in this and other text messages to "lic" is to Mr. Hernandez. Cortes Testimony.

- 4.62. Emmanuel Alvarez Gonzalez ("Mr. Gonzalez" or "Gonzalez") visited Mr. Cortes at the ranch and lived with him there for a week or two in early October 2016. Gonzalez Testimony. Mr. Gonzalez observed Mr. Cortes working there from as early as 7:00 or 8:00 a.m. until as late as 7:00 p.m. or so. Gonzalez Testimony. Mr. Cortes worked more than four hours a day. Gonzalez Testimony. Mr. Cortes complained about not getting fully paid. Gonzalez Testimony. Mr. Gonzalez did not visit Mr. Cortes after he stayed there briefly in October 2016. Gonzalez Testimony.
- 4.63. Sarah Arnold ("Ms. Arnold" or "Arnold") is married to Ms. Cortes, although they have been separated for six years. Arnold Testimony. She visited Mr. Cortes at the ranch with their sons every week, if possible. Arnold Testimony. She usually came on Saturday nights, sometimes on Saturday afternoon. Arnold Testimony. They talked by phone at least every other day. Arnold Testimony. It was her understanding that Mr. Cortes worked seven days a week, eight to ten hours a day. Arnold Testimony. Mr. Cortes never worked only four hours a day. Arnold Testimony. Mr. Cortes told her that he was getting a couple of hundred dollars here and there. Arnold Testimony.
- 4.64. Laureano Hernandez Perez kept several sheep at Mr. Hernandez's ranch and so spent six to eight hours a day there caring for his sheep. Ex. C. He never saw Mr. Cortes work full time, more than 20 hours a week, or 10 to 12 hours per day. Ex. C. Routinely, Mr. Cortes would be missing from the ranch for days. Ex. C.
- 4.65. After Mr. Cortes separated from Mr. Hernandez's employ at the end of June 2017, he stayed at the ranch because he had no money and no place to go. Cortes Testimony. By August, Mr. Cortes was no longer living at the ranch, but he left his personal property there until he found a new place to live. Cortes Testimony.
- 4.66. On September 1, and again on September 9, 2017, Mr. Hernandez reminded Mr. Cortes to remove his personal belongings or they would be thrown out. Hernandez Testimony; Ex. 2, p. 111.
- 4.67. The parties dispute how many hours a week Mr. Cortes worked. Mr. Cortes asserted that he worked 60 or 70 hours a week. Mr. Hernandez asserted that Mr. Cortes worked 24 hours a week. Neither party presented contemporaneous records. The parties generally agreed to the nature of the work that Mr. Cortes performed. Their disagreement was regarding how many hours that work represented. Neither party provided evidence of how long given tasks took, especially the more significant tasks involving landscaping and cabin restoration, leaving nothing from which to extrapolate to evaluate the significantly differing assertions regarding hours worked.

4.68. I do not find to be credible Mr. Cortes's assertion that he worked 60 or 70 hours per week – for five reasons. One, Mr. Cortes never complained to Mr. Hernandez about his hours or pay. Two, Mr. Cortes offered his generic testimony, hours records that he re-created 10 months after his employment ended, and witness testimony that addressed only brief snapshots in time. Three, Mr. Cortez did not quantify the amount of time he took to accomplish any of the various daily and/or long-term tasks he work on. Four, Mr. Cortes's *estimated* hours clashed with text messages that put him at a location removed from the ranch for part of the day. One could observe that those were only a handful of the total days worked. One could observe that they implied a pattern of behavior that impacted many more days. Five, there was evidence that suggested that Mr. Cortes was oversleeping and missing tasks, such as timely feeding the animals. Accordingly, I decline to find as a matter of fact that Mr. Cortes worked the unpaid hours which he alleges. However, that issue is a mixed matter of fact and law, the latter of which will discussed below.

5. CONCLUSIONS OF LAW

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

Jurisdiction

5.1. I have jurisdiction to hear and decide this matter under Revised Code of Washington ("RCW") 49.48.084 and Chapter 34.05 RCW.

Worker Rights Complaint ("Wage Complaint")

5.2. If an individual files a wage complaint, the Department must investigate. RCW 49.48.083(1). Here, Mr. Cortes filed a wage complaint. Accordingly, the Department was required to investigate that wage complaint.

5.3. However, the Department has authority only over a wage complaint filed by an employee against an employer. See RCW 49.48.083. Washington State wage payment law applies only to employees, not to independent contractors. Here, the Department held that Mr. Cortes was an employee and Mr. Hernandez argued that Mr. Cortes was an independent contractor.

5.4. The wage complaint process is attributed to the Wage Payment Act. See, generally, Chapter 49.48 RCW; RCW 49.48.084.

5.5. In defining employee and employer, RCW 49.48.082 refers to RCW 49.12.005 for wage requirements expressed in RCW 49.48.010, RCW 49.52.050, and RCW 49.52.060, as is the case here. The definition of employee in RCW 49.12.005 is circular: an employee means an employee employed by the employee's employer. Oddly, RCW 49.48.082 refers to RCW 49.46.010 for the very same wage requirements. The definition of employer in RCW 49.46.010 is

also circular: an employer is one who acts in the interests of an employer in relation to an employee. The definition in RCW 49.46.010 of an employee is no better: an individual employed by an employer. None of these statutory definitions pretends to address the dichotomy at issue here: employee vs. independent contractor. Since the statutes are not helpful, I turn to case law for guidance.

- 5.6. Case law distinguishing an employee from an independent contractor generally addresses the issue within the context of the Minimum Wage Act whereas the case here, regarding Mr. Cortes's relationship with Mr. Hernandez, operates within the context of the Wage Payment Act. However, the Minimum Wage Act and the Wage Payment Act are integral and interrelated parts of Washington State wage payment law. Moreover, the Department relies upon the same test regardless of which of the Acts applies to the particular wage claim. In matters where the Department's expertise is in play, a tribunal relies upon that expertise. Given the Department's expertise, given that the Minimum Wage Act and the Wage Payment Act are effectively integrated generally into Washington State wage payment law, given that the statutory definitions are valueless as to resolution of the employee / independent contractor dichotomy, I choose to rely upon the only available source of guidance, which is case law, even though much of it operates in the context of the Minimum Wage Act. Moreover, given that the Minimum Wage Act is based on the federal Fair Labor Standards Act of 1938, I can consider relevant federal case law as well as Washington State case law. *Anfinson v. FedEx Ground Package System, Inc.*, 174 Wn.2d 851, 868, 281 P.3d 289 (2012).

The Economic Realities Test

- 5.7. The U.S. Supreme Court and all of the federal circuits apply the economic realities test. *Anfinson v. FedEx Ground Package System, Inc.*, 159 Wn.App. 35, 37, 244 P.3d 32 (Div. 1 2010), *aff'd*, *Anfinson v. FedEx Ground Package System, Inc.*, 174 Wn.2d 851, 281 P.3d 289 (2012) (citing *Bartels v. Birmingham*, 332 U.S. 136, 67 S.Ct. 1547, 91 L.Ed 1947 (1947)).
- 5.8. When determining whether a worker is an employee, the "relevant inquiry is 'whether as a matter of economic reality, the worker is economically dependent upon the alleged employer or is instead in business for himself.' *Hopkins*, 545 F.3d at 343; *see also*, *Schultz*, 466 F.3d at 304; *Brock v. Superior Care, Inc.*, 840 F.2d 1054, 1059 (2d Cir. 1988)." *Anfinson v. FedEx Ground Package System, Inc.*, 174 Wn.2d 851, 871, 281 P.3d 289 (2012).

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5.9. "DLI [the Department of Labor and Industries] has substantially adopted the six factor economic realities test used by the majority of federal circuits as the interpretive rubric through which to distinguish employees from independent contractors. DLI is the state agency charged with interpreting and carrying out Washington's minimum wage laws. We give great weight to an agency's interpretation of a statute absent a compelling indication that its interpretation conflicts with the legislative intent. The six factors that DLI identifies are:

1. The degree of control that the business has over the worker,
2. The worker's opportunity for profit or loss depending upon the worker's managerial skill,
3. The worker's investment in equipment or material,
4. The degree of skill required for the job,
5. The degree of permanence of the working relationship,
6. The degree to which the services rendered by the worker are an integral part of the business."

Anfinson v. FedEx Ground Package System, Inc., 159 Wn.App. 35, 41-42, 244 P.2d 32 (Div. 1 2010), *aff'd*, *Anfinson v. FedEx Ground Package System, Inc.*, 174 Wn.2d 851, 281 P.3d 289 (2012). Accordingly, I apply these six factors, commonly called the Economic Realities Test, to the case here.

The degree of control that the business has over the worker

5.10. "The first factor considers the nature and degree of the alleged employer's control as to the manner in which the work is to be performed. 'Control is only significant when it shows an individual exerts such a control over a meaningful part of the business that she stands as a separate economic entity.'" *Scantland v. Jeffrey Knight, Inc.*, 721 F.3d 1308, 1317 (11th Cir. 2013) (citation omitted).

5.11. The *Scantland* court found the putative employer to exercise control over the workers such that, as to that factor, the workers were not independent contractors because the putative employer controlled what jobs the workers did, how much they were paid, the hours and days worked, the daily work schedule, whether they could work for others, and whether they could earn additional income from customers, and the putative employer monitored the quality of their work. *Scantland* at 1315. That court observed that this level of control suggested that the workers were economically dependent upon the putative employer. *Id.* The *Scantland* court held that the workers in that case were employees, not independent contractors.

- 5.12. Another court found that the bandleader, rather than operators of the venues where the band played, was the employer of the band members because the bandleader organized and trained the members, the bandleader selected the members, the bandleader's showmanship determined the success or failure of the band, the bandleader's relationship with the members was permanent whereas the operator's relationship was transient, and the bandleader paid the members wages and other expenses. *Bartels v. Birmingham*, 332 U.S. 126, 132, 67 S.Ct. 1547, 91 L.Ed 1947 (1947).
- 5.13. Another court found that a nursing referral service exercised control over nurses it referred to clients and observed that "an employer does not need to look over his workers' shoulders every day in order to exercise control", where the nursing referral service made infrequent supervisory visits to the field but, nevertheless, "unequivocally expressed their right to supervise the nurses work". *Brock v. Superior Care*, 840 F.2d 1054, 1060 (2d Cir. 1988). The *Brock* court held that the nurses were employees, not independent contractors.
- 5.14. Here, Mr. Hernandez controlled the work that was done by creating lists of tasks to be accomplished. He apparently solicited feedback from Mr. Cortes, and even depended upon Mr. Cortes's judgment from time to time. Nevertheless, it was Mr. Hernandez's ranch and he ultimately decided what work needed attention. Further, Mr. Hernandez appeared at the ranch nearly every weekend, and occasionally during the middle of the week. Moreover, he was in touch with Mr. Cortes by voice and text. Finally, Mr. Hernandez's uncle was present at the ranch nearly every day and observed Mr. Cortes. Accordingly, Mr. Hernandez's supervision over Mr. Cortes was clear and established. Therefore, Mr. Hernandez exercised control over Mr. Cortes. Thus, the first factor suggests that Mr. Cortes was an employee, not an independent contractor.

The worker's opportunity for profit or loss depending on the worker's managerial skill

- 5.15. "An individual's ability to earn more by being more technically proficient is unrelated to an individual's ability to earn or lose profit via his managerial skill, and it does not indicate that he operates his own business." *Scantland v. Jeffry Knight, Inc.*, 721 F.3d 1308, 1817 (11th Cir. 2013).
- 5.16. That court found that the workers were not independent contractors in part because they could sell only the services offered by their employer, and they could not accept other work because of either a flat prohibition or because their schedule (as demanded by the putative employer) prevented such an opportunity. *See, Scantland v. Jeffry Knight, Inc.*, 721 F.3d 1308, 1317 (11th Cir. 2013).

5.17. Another court found that nurses paid hourly by a nursing referral service had no opportunity to control their profit or loss and that this factor favored characterizing their position as an employee. *Brock v. Superior Care*, 840 F.2d 1054, 1059-60 (2nd Cir. 1988).

5.18. Here, Mr. Cortes was paid \$350 per week, regardless of what he accomplished and regardless of how many hours he worked. The record suggests that, had Mr. Cortes and Mr. Hernandez developed other sources of revenue for the ranch, such as boarding horses, Mr. Cortes might have benefitted economically. However, the *Scantland* and *Brock* courts focused on current profit or loss from current conduct, not the possibility of future growth. Accordingly, Mr. Cortes did not have an opportunity for profit or loss depending upon his managerial skill. Therefore, the second factor suggests that Mr. Cortes was an employee, not an independent contractor.

The worker's investment in equipment or material

5.19. The *Real* court found that the workers' investment in equipment – hoes, shovels, picking carts – was minimal compared to the putative employer's investment in land, heavy machinery, and supplies, particularly since the workers provided primarily physical services, and so the workers appeared to be an integral part of the putative employer's business rather than being in business for themselves. *Real v. Strawberry Associates, Inc.*, 603 F.2d 748, 755 (9th Cir. 1979).

5.20. Here, Mr. Cortes provided a couple of hand tools and himself. Mr. Hernandez owned the ranch and provided all of the materials and the heavy machinery used, for example, for landscaping and for harvesting the alfalfa. Thus, the third factor suggests that Mr. Cortes was an employee, and not an independent contractor.

The degree of skill required for the job

5.21. One court acknowledged the technical skills of the workers but observed that the putative employer provided the training and developed most of those skills, which suggested that the workers were employees more so than independent contractors. See, *Scantland v. Jeffrey Knight, Inc.*, 721 F.3d 1308, 1318 (11th Cir. 2013).

5.22. Another court observed that merely being a skilled worker does not imply that one is an independent contractor if he or she does “not exercise significant initiative in locating work opportunities.” *Brock v. Superior Care*, 840 F.2d 1054, 1060 (2nd Cir. 1988). That court observed that the nurses in its case had significant technical skills but relied entirely on the nursing referral service to find work, meaning they were employees rather than independent contractors. *Id.*

5.23. Here, Mr. Cortes worked exclusively for Mr. Hernandez. He apparently assisted in searching for horse owners who might be persuaded to board their horses at the ranch. He may have taken the initiative in that regard, and he may have done so with the intention of improving his economic circumstances. However, that was not an exercise of technical skill or training. Mr. Cortes apparently has developed some general skills in remodeling or improving small buildings, making simple mechanical repairs, and doing landscaping. That may have been the basis for his employment with Mr. Hernandez. However, there is no evidence in the record that he marketed those skills and earned his living by them. Accordingly, I hold that the fourth factor suggests that Mr. Cortes was an employee, and not an independent contractor.

The degree of permanence of the working relationship

5.24. Where the workers had annual contracts that were renewed automatically and the average duration of employment with the putative employer by active workers at the time of the lawsuit was five years, the workers were economically dependent upon the putative employer, and thus in part for this reason the workers were employees rather than independent contractors. *Scantland v. Jeffry Knight, Inc.*, 721 F.3d 1308, 1318-19 (11th Cir. 2013).

5.25. Here, Mr. Cortes was not hired for a specific project or set of projects. Rather, he was hired to manage the ranch's operations and to improve its property. Moreover, he was not hired on a temporary basis but for an indefinite period of time, i.e. permanently. Therefore, I hold that the fifth factor suggests that Mr. Cortes was an employee, and not an independent contractor.

The degree to which the services rendered by the worker were an integral part of the business

5.26. One court found that nurses working for a nursing referral service performed services that were "the most integral part" of the nursing referral service's business and that this factor weighed in favor of finding the nurses to be employees rather than independent contractors. *Brock v. Superior Care*, 840 F.2d 1054, 1059-60 (2nd Cir. 1988).

5.27. Here, Mr. Cortes managed and restored the condition of the ranch. In other words, his work was integral to business of the ranch, on a daily basis. Thus, I hold that the sixth factor suggests that Mr. Cortes was an employee, and not an independent contractor.

Mr. Cortes was an employee working for Mr. Hernandez

5.28. Here, all six factors of the Economic Realities Test suggest that Mr. Cortes was an employee. Accordingly, I hold that Mr. Cortes was Mr. Hernandez's employee.

5.29. Therefore, Washington wage payment law applies to this relationship.

Mr. Cortes has not produced evidence sufficient to imply a reasonable inference that he worked the hours that are basis for his wage complaint.

5.30. All employers subject to the provisions of Chapter 49.46 (formerly known as the Minimum Wage Act) must make, keep, and preserve records regarding its employees, including but not limited to hours worked and wages paid. RCW 49.46.040(3); RCW 49.46.070.

5.31. Under the Fair Labor and Standards Act ("FLSA"), the employee "has the burden of proving that he performed work for which he was not properly compensated. *Anderson v. Mt. Clemons Pottery Co.*, 328 U.S. 680, 686-687, 66 S.Ct. 1187, 90 L.Ed.1515 (1946). However, given that the FLSA requires employers to keep records wages and hours, and given that employees seldom keep such records, much less trustworthy ones, "a proper and fair standard must be erected for the employee to meet in carrying out his burden of proof." *Id.* at 687. Accordingly, "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." *Id.*

5.32. More than 40 years later, an appellate court employed the concept of just and reasonable inference in another FLSA case. *See, McLaughlin v. Ho Fat Seto*, 850 F.2d 586 (9th Cir. 1988). The employer kept records of hours and wages, but the trial court found them to be false. *Id.* The appellate court upheld the trial court's decision to rely on testimony from five of the 28 effected employees as sufficiently representative. *Id.* at 588. It found those five witnesses to be more credible than the four witnesses offered by the employer as to hours worked. *Id.* Even though those five witnesses were "inconsistent in terms of exact days and hours or overtime worked, [they] established 'as a matter of just and reasonable inference,' that all of the employees regularly worked over eight hours on weekdays and over six hours on many Saturdays." *Id.* at 589 (citation omitted).

5.33. The Minimum Wage Act ("MWA") is based on the FLSA, and so decisions under the FLSA "often provide helpful guidance. However, the MWA and FLSA are not identical and we are not bound by such authority." *Drinkwitz v. Alliant Techsystems, Inc.*, 140 Wn.2d 291, 298, 996 P.2d 582 (2000).

- 5.34. “[I]f the employer fails to keep records, the burden is on the employer to prove the claimed hours were not worked. However, the employee must first show by reasonable inference the number of hours worked to shift the burden onto the employer to prove otherwise. The worker can shift the burden of proof to the employer by proving some quantum of work actually performed. The employer must then rebut the inference that the employee worked the number of hours required to accomplish this amount of work.” *MacSuga v. County of Spokane*, 97 Wn.App. 435, 445-446, 983 P.2d 1167 (1999) (citing *Anderson v. Mt. Clemons*).
- 5.35. Here, Mr. Hernandez did not track, keep, and preserve hours and wages as required. However, he reasonably believed that Mr. Cortes was not his employee and so reasonably believed he had no obligation to keep such records. None of the foregoing cases evaluated the employer’s responsibility in such a circumstance. Those employers knew they were employers. One of them kept false records. The relaxation of an employee’s burden of proof is predicated upon irresponsible or dishonest employers who knowingly, even purposefully, fail to keep records. Nothing in the evidentiary record suggests that Mr. Hernandez was such an employer. I am mindful of that as I consider Mr. Cortes’s relaxed burden of proof.
- 5.36. The *MacSuga* court held that an employee must show the work performed associated with the hours claimed in order to shift the burden to the employer. Here, Mr. Cortes estimated in April 2018, the hours he worked from April 2016 through June 2017. The Department produced witnesses that testified generally consistent with the estimated hours, but only as to a few days at most. Mr. Hernandez produced text messages between him and Mr. Cortes that demonstrated, that for a number of days, Mr. Cortes’s estimated hours were likely significantly overstated. All told, Mr. Cortes asserted that he was paid for approximately 1500 hours and is owed for more than 3500 additional hours. Mr. Cortes testified to the various tasks he performed during his employ. That testimony for the most part was not disputed. However, there is no evidence in the record from which to extrapolate hours worked from these tasks performed. There is no evidence in the record of what amount of time it took to complete any of those tasks, regardless of whether they were ongoing and daily, or were significant tasks that lasted days or weeks. In other words, there is nothing in the record defining the quantum of work that Mr. Cortes accomplished. Therefore, there is nothing in the record from which I may draw a reasonable inference that the hours claimed were worked. Thus, I do not. I am also mindful that Mr. Cortes did not ever complain to Mr. Hernandez that he was not being fully paid.

- 5.37. Accordingly, I hold as a matter of law that the Department has failed to establish that Mr. Cortes worked 225 hours that were not paid as final wages and the Department has failed to establish that Mr. Cortes worked an additional 3383 hours that were not paid. Therefore, the Department has not established that Mr. Hernandez failed to pay wages owed to Mr. Cortes.
- 5.38. Thus, Citation and Notice of Assessment No. W-028-19 should be set aside.

6. INITIAL ORDER

IT IS HEREBY ORDERED THAT:

- 6.1. The Department of Labor and Industries action is SET ASIDE.
- 6.2. Citation and Notice of Assessment Number W-028-19 is SET ASIDE.
- 6.3. Hernandez Legacy Enterprises, LLC dba Hernandez Legacy Enterprises and Jesus Hernandez, as an individual, Appellants, are not liable for unpaid wages, interest, or penalties.

Issued from Tacoma, Washington on the date of mailing.



Terry A. Schuh
Administrative Law Judge
Office of Administrative Hearings

CERTIFICATE OF SERVICE ATTACHED

APPEAL RIGHTS
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.⁴ 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.⁵

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

⁴ RCW 49.48.084 and RCW 34.05.464.

⁵ RCW 49.48.084 and Chapter 34.05 RCW.

CERTIFICATE OF SERVICE FOR OAH DOCKET NO. 11-2018-LI-00920

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

Hernandez Legacy Enterprises, LLC c/o Jesus Hernandez 902 Wildwood Avenue Omak, WA 98840 <i>Appellant/Employer</i>	<input checked="" type="checkbox"/> First Class Mail <input checked="" type="checkbox"/> Certified Mail, Return Receipt 9489 0090 0027 6081 4137 97 <input type="checkbox"/> Hand Delivery via Messenger <input type="checkbox"/> Campus Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> E-mail
Heather Leibowitz, AAG Office of the Attorney General MS: TB-14, 800 Fifth Ave., Ste. 2000 Seattle, WA 98104 <i>Respondent Representative</i>	<input type="checkbox"/> First Class Mail <input type="checkbox"/> Certified Mail, Return Receipt <input type="checkbox"/> Hand Delivery via Messenger <input checked="" type="checkbox"/> Campus Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> E-mail
Salvador Cortes 504 Cottage Avenue Cashmere, WA 98815 <i>Intervenor/Wage Claimant</i>	<input checked="" type="checkbox"/> First Class Mail <input type="checkbox"/> Certified Mail, Return Receipt <input type="checkbox"/> Hand Delivery via Messenger <input type="checkbox"/> Campus Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> E-mail

Date: Thursday, November 14, 2019

OFFICE OF ADMINISTRATIVE HEARINGS

Carla Sullivan

Carla Sullivan
 Legal Assistant 2