COMMONWEALTH OF MASSACHUSETTS
DIVISION OF ADMINISTRATIVE LAW APPEALS

September 21, 2020

Middlesex, ss.

Docket Nos. LB-16-174, LB-16-175

JOHN K. CROTEAU and UNIVERSAL WOOD STRUCTURES, LLC, Petitioners

v.

OFFICE OF THE ATTORNEY GENERAL FAIR LABOR DIVISION, Respondent

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DECISION

Appearance for the Petitioners:

John K. Croteau, *pro se*
4 Jay Court
Raymond, NH 03077

Appearance for Respondent:

Lilian Hirales, Esq.
Assistant Attorney General
Office of the Attorney General
Fair Labor Division
1 Ashburton Place, Rm. 1813
Boston, MA 02108

Administrative Magistrate:

Mark L. Silverstein, Esq.

Summary of Decision

The petitioners appealed two amended citations issued to them by the Massachusetts Attorney General's Fair Labor Division for alleged violations of the Massachusetts Wage and Hours Laws—unintentional failure to pay wages timely to a former employee for work related to the construction of residential sheds at Massachusetts sites, for which the first citation ordered payment of $532 restitution and a $250 civil penalty; and unintentional misclassification of the former employee as an independent contractor, for which the second citation assessed a $500 civil penalty. Following a hearing, a Decision with Tentative Modified Penalty, issued on December 3, 2018, that made the $500 penalty final but tentatively reduced the $250 penalty to $200.66, and the Division's response opposing the penalty reduction, it is held that:

(1) Based upon the independent contractor "test" set out at M.G.L. c. 149, § 148B, the worker in question was an employee, and therefore the Fair Labor Division had jurisdiction to issue the two citations;

(2) The tentative modification of the amended citation for unintentional failure to pay wages timely by reducing its restitution and civil penalty amounts is made final, over the Division's objection. (*See* discussion of the Division's response to the December 3, 2018 Decision below, at 53-61.) Therefore:

> (a) The $532 restitution amount is reduced to $427, after deleting from the work hours at Massachusetts sites the employee reported to the petitioners (i) the time he included for commuting to and from work, which was not part of his compensable wages; and (ii) 30 minutes of unpaid lunch breaks on each day the former employee worked six or more hours, exclusive of the commuting time he included in his work hours, per M.G.L. c. 149, § 100 and 454 C.M.R. § 27.02;
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> (b) The $250 civil penalty amount is reduced from $250 to $200.65, by multiplying the percentage of the restitution amount on which the penalty was based (46.99 percent) by the modified restitution amount ($427).

(3) Left unmodified is the amended citation that assessed a $500 penalty for misclassifying an employee as an independent contractor without specific intent, which the December 3, 2018 Decision made final. That penalty was not based upon a percentage of the restitution amount, and the citation was not shown to have been issued erroneously—the worker was indeed the petitioners' employee during the time in question, the penalty amount was not based upon an intentional violation or a percentage of the maximum penalty the Division could assess for an intentional misclassification, and the penalty amount was not disproportionate in the circumstances.

Background

Petitioners John K. Croteau and Universal Wood Structures, LLC appeal from two amended

citations with civil penalties, dated September 12, 2016, that respondent Office of the Attorney General Fair Labor Division issued to them individually and to Universal Wood Structures, LLC, a limited liability company of which Mr. Croteau is (or was) the sole member, for alleged violations of the Massachusetts wage and hours statutes. Amended Citation No. 14-10-32076-001 (appealed in Docket No. LB-16-174) alleged that the petitioners failed, without specific intent, to pay wages timely to a former employee, Michael J. Gallagher, in violation of M.G.L. c. 149, § 148, and ordered the them to pay $532 in restitution and a $250 civil penalty for this violation. Amended Citation No. 14-10-32076-002 (appealed in Docket No. LB-16-175) alleged that the petitioners misclassified Mr. Gallagher as an independent contractor, also without specific intent, in violation of M.G.L. c. 149, § 148B, and ordered the petitioners to pay a $500 civil penalty for this violation.[1]

On April 4, 2016, Mr. Croteau filed a single appeal on the petitioners' behalf challenging both citations. He claimed that Mr. Gallagher was an independent carpenter and/or laborer who was located via a *craigslist* advertisement, and was brought on in September 2014 as a "set up" man to

[1]/ The Fair Labor Division issued the citations originally, on March 18, 2016, to Mr. Croteau and an LLC with a different name("Structures Unlimited, LLC"), and amended them in September 2016 to show the correct company name. The error was based upon Mr. Gallagher's assertion to the Division that Structures Unlimited had employed him with respect to shed construction work. However, Mr. Croteau had no affiliation with that company, and Structures Unlimited, LLC was not involved in the shed construction jobs in question, did not employ Mr. Gallagher, and was not located at the address listed on the citations (4 Jay Court in Raymond, New Hampshire, Mr. Croteau's residence). I discussed this apparent misnaming of the respondent entity with the parties during the August 22, 2016 prehearing conference in these appeals. Following the conference, the Fair Labor Division re-issued the citations to Mr. Croteau and to Universal Wood Structures, LLC, the entity of which Mr. Croteau was the sole member and that had an address at 4 Jay Court in Raymond, New Hampshire. Other than stating that they were amended on September 12, 2016, the re-issued citations were the same as those the Division issued originally on March 18, 2016. Both were mailed to Mr. Croteau and Universal Wood Structures, LLC at this New Hampshire address.

construct a shed that Mr. Croteau and/or the LLC had sold to a residential landowner. According to Mr. Croteau, Mr. Gallagher started constructing the shed but had difficulty due to "discrepancies in the level of experience he stated he had," and was unable to complete the work, repair what he had built incorrectly, or even report to the work site on account of losing his driver's license, which required that Mr. Croteau find a replacement worker to complete the shed to specifications.

I consolidated these appeals for adjudication, held a prehearing conference on August 22, 2016, and scheduled a hearing, which I held on October 26, 2016. The hearing was recorded digitally. Mr. Gallagher and Fair Labor Division Inspector Jennifer Pak testified on the Division's behalf. Mr. Croteau testified on his own behalf.

I marked nine exhibits in evidence (Exhs. 1-9) during the hearing. There was also a proposed tenth exhibit that I marked in evidence conditionally as Exh. 10— a single-sheet printout of what appeared to be data from a spreadsheet Mr. Croteau had prepared showing what he claimed were the days Mr. Gallagher worked between August 31, 2014 and September 27, 2014, the hours Mr. Gallagher claimed to have worked during that period, and the hours Mr. Croteau deducted for unpaid lunch and travel time, what he paid Mr. Gallagher, and what Mr. Croteau paid to another person for completing or repairing a shed Mr. Gallagher did not complete. However, the printout had not preserved the spreadsheet's formatting, and as a result the data it presented was inscrutable. With the parties' agreement at the end of the October 26, 2016 hearing, I held the record open for filing either the original spreadsheet or a more accurate printout of it, which was due by December 2, 2016; if it was filed, the Division would have until December 23, 2016 to request further cross-examination or a conference regarding this filing.

On December 5, 2016, Mr. Croteau filed what was supposed to have been an explanation of the spreadsheet data shown by Exhibit 10. However, the copy filed with DALA appeared to be a reprint of the data that appeared on the spreadsheet, but this time the data was presented in a single column, which made it even more difficult to decipher. The Fair Labor Division received a copy as well, but, as I would learn later, it was a copy of the actual spreadsheet that resolved most of proposed Exhibit 10's ambiguities. At any rate, the Division moved for leave to cross-examine Mr. Croteau further, and I scheduled a second hearing session for February 8, 2017. Unaware at the time that Mr. Croteau had already given the Division a copy of the spreadsheet that did so, my order also directed him to reorganize the printout information so that it showed clearly the days on which Mr. Gallagher had worked during the period in question, the hours he worked on those days, the hours of work for which he was paid, and what he was paid.

The Fair Labor Division appeared for the second hearing session on February 8, 2017. Mr. Croteau, who had not requested a continuance, did not appear for that session, and no one else appeared on the petitioners' behalf. After waiting for 20 minutes, I began the hearing session without the petitioners being present. (*See Order Following Hearing* (Feb. 8, 2017).)

The Division moved orally to strike the spreadsheet that Mr. Croteau had filed, although it was not yet clear which version of the spreadsheet it was moving to strike. During my discussion with Division counsel, I learned that the copy Mr. Croteau had sent the Division more closely resembled a spreadsheet page, with horizontal and vertical columns (albeit without lines separating them, but in columnar format), than did the document he had filed with DALA on December 5, 2016. The Division made a copy of Mr. Croteau's revised printout available for the record. The

Division advised it had reviewed this document and concluded that it showed the same dates, hours of work, and pay rate ($14 per hour) for which Mr. Gallagher claimed he had not been paid. It also showed the payments to Mr. Gallagher as to which Mr. Croteau had already testified, and as to which he was cross-examined during the first hearing session—$546 paid to Mr. Gallagher after the first two weeks of work (August 31-September 6, 2014, and September 6-13, 2014); and a second payment of $400, allegedly by cash. In testifying during the first hearing session, Mr. Gallagher had denied receiving this cash payment for work he performed during the periods September 14-20, 2014 and September 21-27, 2014. (*Id*.)

My discussion with Fair Labor Division counsel clarified additional information shown on the spreadsheet Mr. Croteau had given the Division. One of the handwritten notations at the lower left of this spreadsheet stated "Repair cost to fix Mountain Rd Woburn are $864." This appeared related to the construction of a 12' x 16' shed in Woburn, Massachusetts, as to which both Mr. Gallagher and Mr. Croteau had testified during the hearing. "Repair cost" appeared to refer to what Mr. Croteau testified he paid another person ("Mr. Robi") to finish the Woburn shed job after Mr. Gallagher ceased working on that job in late September 2014. (*Id*.)

Overall, the version of the spreadsheet that Mr. Croteau had given the Division appeared to corroborate each party's hearing testimony regarding Mr. Gallagher's work hours, the time for which the respondents paid him, and the unpaid wages Mr. Gallagher claimed he was owed, an amount the respondents contested. All of this testimony had been subject to cross-examination.

That reduced substantially any hearsay-related risk that Exhibit 10 may have posed. Therefore, rather than striking this exhibit, I marked the version of the spreadsheet Mr. Croteau had

sent the Fair Labor Division as Exhibit 10 in evidence, replacing the versions that Mr. Croteau had filed previously and that I had marked in evidence tentatively. I also allowed the parties to present, in their respective post-hearing memoranda due by March 17, 2017, their arguments as to what weight Exhibit 10 should be given.

Mr. Croteau did not file a post-hearing brief. The Division filed a post-hearing brief on March 10, 2017. It argued that because Mr. Croteau did not appear on February 8, 2017 "for cross -examination specifically related to the spreadsheet," DALA should give "no weight to the spreadsheet serving as evidence of the $400.00 cash payment" that Mr. Croteau allegedly gave Mr. Gallagher on September 23, 2014 (*see* Finding 25 below) "or for the hours Croteau documented Gallagher had already worked." (Respondent's Post-Hearing Brief at 13.)

The record closed fully on March 17, 2017.

On December 3, 2018, I issued a Decision with Tentative Modified Penalty. In it, I determined that, based upon the independent contractor "test" set out at M.G.L. c. 149, § 148B, Mr. Gallagher was an employee of the petitioners when he built sheds for them in September 2014, as a result of which the Fair Labor Division had jurisdiction to issue the two citations they appealed. I sustained the $500 civil penalty assessed against the petitioners for unintentionally misclassifying Mr. Gallagher as an independent contractor. It was not based upon the unpaid wages the petitioners owed Mr. Gallagher, and the petitioners did not show that it was unreasonable in amount or otherwise issued "erroneously." However, I reduced the amount of wages owed Mr. Gallagher from $532 to $427. From the work time Mr. Gallagher reported to Mr. Croteau, I deducted (1) the time he included for commuting to and from work, which was not part of his compensable wages; and

(2) 30 minutes of unpaid lunch breaks on each of two days Mr. Gallagher worked six or more hours (exclusive of the commuting time he had included in his work hours), as this, too, was not part of his compensable wages as a matter of law. *See* M.G.L. c. 149, § 100 and 454 C.M.R. § 27.02. Because the $250 civil penalty the Division assessed was based upon a specific percentage of the restitution amount (46.99 percent), I multiplied this percentage by the reduced restitution amount ($427), which resulted in a reduction of the $250 penalty to $200.66.

The penalty modification was tentative, and the parties were given time to comment on it. The petitioners filed no comments.

The Fair Labor Division filed comments on December 21, 2018. The Division requested that the $250 penalty not be reduced, arguing that (1) while the penalty amount "may have been" related to the restitution amount, this was only one factor the Division considered in assessing it, and the penalty amount was reasonable; (2) DALA reduced the restitution amount based upon Mr. Croteau's spreadsheet (Exhibit 10), but this document contained information that was not presented during the hearing, and Mr. Croteau did not appear for cross-examination related to the spreadsheet; (3) in deducting 30 minutes of work time on those days on which Mr. Gallagher worked more than six hours, DALA assumed that he took meal breaks, but it was equally possible that he took none; and (4) DALA's deduction of travel time from the hours Mr. Gallagher worked should not have affected the penalty amount, because the Division complied fully with M.G.L. c. 149, § 27C(b)(2) in computing the $250 penalty.

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Findings of Fact

a. Nature of Respondents' Business and Mr. Gallagher's Trade

1. In 2014, Kevin J. Croteau was the sole manager of Universal Wood Structures, LLC, a New Hampshire limited liability company that no longer exists.[2] Universal's business was selling and installing wooden sheds of various sizes at mostly residential sites. (Appeal dated April 4, 2016; Croteau direct testimony.)

2. Mr. Croteau made all decisions regarding shed design, choice of shed materials and hardware components, and method of shed assembly, and with few exceptions, he made all of the arrangements for procuring materials and hardware and having them delivered to a work site. (Croteau direct testimony.)

(a) Each shed's wooden components, including joists, rafters, flooring, side panels and roofing structural components, were cut and/or assembled at a facility that Mr. Croteau leased in New Hampshire, by inmates participating a correctional facility work program. The components were delivered by truck to the work sites where sheds were being constructed. Because the shed's wooden components were pre-cut, it was unnecessary to calculate their dimensions in the field; in addition, because the shed wall sections were pre-assembled, they did not have to be squared-up and were ready to be joined together. Hardware, mostly hinges, screws and hurricane clips for attaching

[2]/ Per the New Hampshire Secretary of State's online database, the LLC filed no annual report after June 2015 and was "administratively dissolved." *See:* https://quickstart.sos.nh.gov/online/BusinessInquire/BusinessInformation?businessID=540388.

roof rafters to the shed walls, as well as shed windows, were purchased in bulk from a supply company in Pennsylvania for much less than they would cost if purchased from a chain building supply store, and were also delivered to the work site. (*Id*.)

(b) The method used to build sheds did not vary significantly from site to site. Construction began with digging 40- inch deep holes and filling each of them with 6 or 7 stacked concrete blocks measuring 8 inches x 16 inches apiece, to provide support for the shed. Shed framing followed, which included constructing the floor, walls and roof, and then performing finish work—installing vinyl siding and windows, and the roof covering. (*Id*.)

3. The person who built the shed had, as a result, practically no control over the design of the shed, or over the choice and procurement of materials and hardware used to build a shed. (*Id*.)

4. Mr. Croteau hired "outside workers" to construct the sheds. He considered them to be independent contractors. It was his practice to issue to each of them an Internal Revenue Service Form W9 (request for taxpayer identification number) and, after the tax year ended, an IRS Form 1099-MISC (non-employee compensation form for reporting, for income tax purposes, payments of $600 or more). These workers were expected to know how to build the shed foundation and frame the shed, a job that was expected generally to be completed in two days. Typically, however, Mr. Croteau reviewed proper nail gun use and safety awareness with a worker building a shed, particularly because families and children were nearby. He also directed the worker to follow the BOCA (Building Officials and Code Administrators) National Building Code in building a shed, particularly the provisions requiring the use of ring nails for more secure fastening of wood components, and raftering structures to resist wind and bear snow loads, even though most towns

in Massachusetts and New Hampshire did not apply BOCA code standards to sheds. Mr. Croteau also visited job sites daily and gave advice to the worker constructing a shed, such as how to complete construction faster. (*Id*.)

5. Michael J. Gallagher was born in March 1988. After graduating from high school in 2006, he took courses at Middlesex Community College in Lowell, Massachusetts. He enlisted in the United States Marine Corps in 2007 and was discharged honorably with the rank of corporal in 2011 after four years of service. There is no evidence in the record that as of the end of August 2014, Mr. Gallagher had completed any apprenticeship programs in carpentry or held a contractor's license from any jurisdiction, or was working toward doing so when he began working for the petitioners in late 2014. As of late October, 2016, when he was no longer working for the petitioners, Mr. Gallagher was taking what he described as "pre-engineering classes" at Northern Essex Community College. (Gallagher direct testimony.)

b. Mr. Croteau Hires Mr. Gallagher

6. On Saturday, August 30, 2014, Mr. Gallagher replied by email to Mr. Croteau's *craigslist* posting for a "laborer position." He stated that he had "around 3.5 years of experience doing various construction/trades," and that he was a Marine Corps veteran. In an email he sent shortly afterward, on Monday, September 1, 2014, Mr. Gallagher stated that he had his own hand and power tools. (Exh. 3: emails.)

7. At some point prior to Tuesday, September 2, 2014, Mr. Croteau told Mr. Gallagher that he would start work on that date at a residential property in Exeter, New Hampshire where Mr.

Croteau was building a shed, and that he would pay Mr. Gallagher $14 per hour for this work. There was no written agreement regarding this work, the number of hours Mr. Gallagher was expected to work and when the work day started or ended, whether the hourly rate Mr. Croteau was paying would be only for Mr. Gallagher's actual work hours at a job site, or whether paid hours would also include the time Mr. Gallagher spent traveling to and from a job site. Mr. Gallagher assumed that he was to include his travel time to and from a work site in the hours he reported to Mr. Croteau weekly by email. Mr. Croteau's opinion, which he may or may not have shared with Mr. Gallagher before hiring him, was that travel time was not hours spent working, although he would pay travel time to some workers whose travel time was one hour or more to and from a work site. If there was any email correspondence between Mr. Gallagher and Mr. Croteau in which these competing opinions regarding payment for travel time was raised and discussed, it is not in the record. (Gallagher direct testimony; Croteau cross-examination.)

8. Mr. Croteau told Mr. Gallagher that he could start work each day whenever he wanted, but he needed to keep in mind that the shed jobs required eight hours of work each day in order for them to be completed in two days, and that local noise ordinances specified when work could begin, typically no earlier than 7:30 a.m., and how late one could work at the site, often no later than 45 minutes after sunset. He recalled giving Mr. Gallagher an IRS Form 1099 to complete and return to him, and that Mr. Gallagher did not do so. Mr. Gallagher did not recall being given this form or being told to return it. (Gallagher direct testimony; Croteau direct testimony and cross-examination.)

9. There was also no written agreement as to whether Mr. Gallagher was hired by Mr.

Croteau or his business as an employee, or whether he was to perform shed construction-related work as an independent contractor. During his hearing testimony, Mr. Gallagher denied knowing what an independent contractor was. (Gallagher direct testimony.) However, in the non-payment of wages complaint that he filed in late 2014 with the Office of the Attorney General's Fair Labor Division, Mr. Gallagher stated that he "started working for Kevin J. Croteau on 9/2/2014 as an independent contractor providing my services as a laborer for his company building sheds." (Exh. 1: Fair Labor Div. Non-Payment of Wage and Workplace Complaint prepared by Mr. Gallagher, dated October 1, 2014, at 2.)

10. Mr. Gallagher had approximately one year of carpentry experience before he applied for the job Mr. Croteau had posted. He did not know how to build sheds and needed Mr. Croteau to teach him. (Gallagher direct testimony.) Mr. Croteau knew that Mr. Gallagher did not have enough experience to build sheds on his own, and for this reason he was present at the job sites where Mr. Gallagher was working for about 50 percent of the time that Mr. Gallagher worked. (Croteau direct testimony.)

c. Work Hours Reported for August 31-September 6, 2014

11. The week of August 31-September 6, 2014 was Mr. Gallagher's first work week with the petitioners.[3] By informal arrangement, Mr. Gallagher submitted his hours to Mr. Croteau by

[3]/ All of the hours Mr. Gallagher worked during the first week were at sites in New Hampshire. Although the Fair Labor Division seeks restitution only for unpaid work hours at Massachusetts sites, how Mr. Gallagher reported his work hours during the first work week, and how Mr. Croteau adjusted the hours reported to determine what he owed Mr. Gallagher, set a pattern that was followed for the most part over the weeks that followed. It allows for a comparison of the hours Mr. Gallagher worked during

email after the end of each work week. He first did so by email to Mr. Croteau on Monday, September 8, 2014, in which he reported having worked 45.25 hours at 3 Hilton Avenue in Exeter, New Hampshire between Tuesday, September 2 and Sunday, September 7, 2014.[4] His email did not state whether these hours included lunch and/or travel time. Mr. Gallagher subsequently reported his work for a week beginning on Sunday and ending the following Saturday, starting with Sunday, September 7, 2014. As a result of this format change, Mr. Gallagher reported his work hours to Mr. Croteau for Sunday, September 7, 2014 twice, giving a higher work hours figure for that day in his email for the week of September 7-14, 2014 (6.5 hours, instead of the 5 hours he reported in his September 8, 2014 email to Mr. Croteau). Conforming the hours reported to a work week beginning Sunday and ending the following Saturday, the hours Mr. Gallagher reported for his work during the week of August 31, 2014-September 6, 2014 were as follows:

[Table begins on the following page]

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the first week with what he worked in the weeks that followed, a factor I consider in determining, relative to his employment status, whether he was actually pursuing an independent trade. It is also relevant to whether Mr. Croteau's first payment to Mr. Gallagher by check was more likely for work at the New Hampshire sites only, as Mr. Gallagher asserted, than for any work at Massachusetts sites.

[4]/ Mr. Gallagher reported his work hours beginning Monday, September 1, 2014 (Labor Day) and ending Sunday, September 7, 2014 thus:

Mon., Sept. 1, 2014: Labor Day (0 Hours)
Tues., Sept. 2, 2014: 9:00 a.m.- 1:30 p.m. - *4.5 Hours*;
Wed., Sept. 3, 2014: 8:00 a.m. - 5:30 p.m. - *9.5 Hours*;
Thurs., Sept. 4, 2014: 8:00 a.m.- 5:30 p.m. - *9.5 Hours*;
Fri., Sept. 5, 2014: 8:00 a.m. - 4:30 p.m. - *8.5 Hours*;
Sat., Sept. 6, 2014: 8:45 a.m. - 5:00 p.m. - *8.25 Hours*; and
Sun., Sept. 7, 2014: 8:00 a.m. - 1:00 p.m. - *5 Hours.*

Week of August 31-September 6, 2014

Date Worked	**Location/Work Site**	**Work Hours Reported**	**Travel to and from Work Sites Added**	**Total Time Reported**
Tuesday 09/02/2014	3 Hilton Ave. Exeter NH	9:00 a.m. - 1:30 p.m. 4.5 Hours	- 0 -	4.5 Hours
Wednesday 09/03/2014	3 Hilton Ave. Exeter NH	8:00 a.m. - 5:30 p.m. 9.5 Hours	- 0 -	9.5 Hours
Thursday 09/04/2014	3 Hilton Ave. Exeter NH	8:00 a.m. - 5:30 p.m. 9.5 Hours	- 0 -	9.5 Hours
Friday 09/05/2014	3 Hilton Ave. Exeter NH	8:00 a.m. - 4:30 p.m. 8.5 Hours	- 0 -	8.5 Hours
Saturday 09/06/2014	3 Hilton Ave. Exeter NH	8:45 a.m. - 5:00 p.m. 8.25 Hours	- 0 -	8.25 Hours
TOTAL	/ / / / / / / / / / / / / / / / / /	**40.25 Hours**	**0 Hours**	**40.25 Hours**

(Exh. 3: Email, Michael Gallagher to Kevin Croteau dated Sept. 8, 2014.)

12. Because he counted the five hours Mr. Gallagher reported having worked on Sunday, September 7, 2014 as hours worked during the week that followed, Mr. Croteau did not include them when he computed the hours Mr. Gallagher worked during the week of September 1-6, 2014. As a result, the time that Mr. Gallagher reported for that week totaled 40.25 hours. From that figure, Mr. Croteau deducted four hours—an hour of unpaid lunch time on each of the four days that Mr. Gallagher had worked eight hours or more (September 2, 3, 4 and 5, 2014). This left 36.25 hours of work time to be paid at the rate of $14 per hour, for a total of $507.50 that Croteau computed he owed Mr. Gallagher for September 1-6, 2014. (Exh. 10: Mr. Croteau's spreadsheet printout.)

d. Work Hours Reported for September 7-13, 2014

13. By email dated Sunday, September 14, 2014, Mr. Gallagher reported having worked 22 hours from Sunday, September 7, 2014 to Saturday, September 13, 2014 at two New Hampshire work sites. He reported his days of work and hours worked as follows:

Week of September 7-13, 2014

Date Worked	**Location/Work Site**	**Work Hours Reported**	**Travel to and from Work Sites Added**	**Total Time Reported**
Sunday 09/07/2014	3 Hilton Ave. Exeter NH	8:00 a.m. -2:30 p.m. 6.5 Hours	- 0 -	6.5 Hours
Thursday 09/11/2014	24 Hartwell Brook Dr., Nashua, NH	9:00 a.m. - 11:00 a.m. 2 Hours	- 0 -	2 Hours
Friday 09/12/2014	24 Hartwell Brook Dr., Nashua, NH	8:00 a.m. -6:30 p.m. 10.5 Hours	0 added	10.5 Hours
Saturday 09/13/2014	24 Hartwell Brook Dr., Nashua, NH	7:00 a.m. - 11:00 a.m. 4 Hours	0 added	4 Hours
TOTAL	/ / / / / / / / / / / / / / / / / /	**23 Hours**	**0 Hours**	**23 Hours**

(Exh. 3: Email, Michael Gallagher to Kevin Croteau dated Sept. 14, 2014.) Mr. Gallagher's email did not state whether these hours included lunch and/or travel time. The daily hours reported in this email totaled 23, rather than 22 hours as Mr. Gallagher had stated in his email.

14. Mr. Gallagher's email showed different hours worked on Sunday, September 7, 2014 (6.5) than Mr. Gallagher had reported for that date in his September 8, 2014 email to Mr. Croteau (5 hours; *see* Finding 11.) Mr. Croteau used that earlier figure for Mr. Gallagher's September 7,

2014 work hours, which brought the total hours that Mr. Gallagher reported for the week of September 7-13, 2014 to 21.5 hours. From that figure, Mr. Croteau deducted two hours—an hour of unpaid lunch time for September 7, 2014, on which Mr. Gallagher reported having worked 6.5 hours, and September 12, 2014, on which he reported having worked 10.5 hours (September 7 and 12, respectively). This left 19.5 hours of work time to be paid at the rate of $14 per hour, for a total of $273.50 that Mr. Croteau computed he owed Mr. Gallagher for the week of September 7-13, 2014. (Exh. 10.)

e. Payment by Mr. Croteau to Mr. Gallagher by Check on September 12, 2014

15. On September 12, 2014, Mr. Croteau paid Mr. Gallagher $546 by personal check. The check did not show the work, work days, work hours or job sites to which the payment related. Neither did Mr. Croteau's spreadsheet printout. Instead, the printout appears to show the $546 payment as an offset to the $781 that Mr. Croteau computed he owed Mr. Gallagher for hours worked during the weeks of September 1-6, 2014 ($507.50) and September 7-13, 2014 ($273.50). All of those hours were for work Mr. Gallagher had performed at the New Hampshire work sites. The Division is not seeking restitution with respect to those hours or, thus, for the difference between what Mr. Croteau calculated as the pay he owed Mr Gallagher for the hours worked at the New Hampshire sites between September 1 and 13, 2014, and the $546 he paid Mr. Gallagher on September 12, 2014. (Croteau direct testimony; Pak direct testimony; Exh. 2: copy of Mr. Croteau's personal check No. 112 (front, and back with endorsement), dated Sept. 12, 2014; Exh. 10.)

16. Mr. Gallagher was concerned at the time that no taxes were being withheld from his

earnings by Mr. Croteau or his business, and he asked Mr. Mr. Croteau how he was supposed to pay taxes on his earnings. Whether Mr. Croteau told him to do so or he made the decision on his own, Mr. Gallagher paid the taxes on his 2014 earnings with Mr. Croteau. He used a popular tax software program to prepare his federal tax return for 2014, inputting what Mr. Croteau had paid him as "wages and salaries," and the software computed his income tax based in part upon this information.[5] (Gallagher direct testimony.)

f. Work Hours and Travel Time Reported for September 14-20, 2014

17. In an email he sent to Mr. Croteau on September 25, 2014, Mr. Gallagher reported having worked 28.25 hours during the week of September 14-20, 2014, including 17.25 hours at Massachusetts work sites. The time reported for each of the three days he worked at a Massachusetts site included one hour of travel time for driving to and from the site where he was working. Mr. Gallagher's email did not state whether the daily hours he reported included time for lunch. The email reported his hours as follows:

[Table begins on the following page]

[5]/ Although Mr. Croteau testified that his standard practice was to issue IRS Form W9s and Form 1099 MISCs to the workers who assembled sheds (*see* Findings 2-4), and that he did so in Mr. Gallagher's case, Mr. Croteau did not offer a copy of any such forms he issued to Mr. Gallagher, and the Division did not offer a copy of Mr. Gallagher's 2014 federal tax return. Consequently, none of these documents is in the record.

Week of September 14-20, 2014

Date Worked	**Location/Work Site**	**Work Hours Reported**	**Travel Time to and from Work Sites Added**	**Total Time Reported**
Sunday 09/14/2014	24 Hartwell Brook Rd., Nashua, NH	8:00 a.m. -7:00 p.m. 11 Hours	- 0 -	11 Hours
Wednesday 09/17/2014	Unspecified site in Salem MA	11:15 a.m. - 3:00 p.m. 3.75 Hours	1 Hour	4.75 Hours
Thursday 09/18/2014	Unspecified site in Salem, MA	9:00 a.m. -3:00 p.m. 6 Hours	1 Hour	7 Hours
Friday 09/19/2014	50 Mountain St. Woburn, MA	10:00 a.m. - 2:30PM 4.5 Hours	1 Hour	5.5 Hours
TOTAL	/ / / / / / / / / / / / / / / / / /	**25.25 Hours**	**3 Hours**	**28.25 Hours**

(Exh. 3: Email, Michael Gallagher to Kevin Croteau dated Sept. 25, 2014.)

18. Mr. Croteau adjusted the hours Mr. Gallagher reported to him for work during the week of September 14-20, 2014 as follows:

(a) For Sunday, September 14, 2014, he credited Mr. Gallagher with 6 hours of work, rather than 11 hours, at the Nashua, New Hampshire site. The reasons for adjusting the reported time by five hours is unclear. Mr. Gallagher did not add in time for traveling to and from the Nashua work site on September 14, 2014. Mr. Croteau's spreadsheet printout shows neither an adjustment for this travel time or for unpaid lunch time.

(b) For Wednesday, September 17, 2014, Mr. Croteau deducted the one hour of travel time that Mr. Gallagher had reported for that day, as a result of which he credited Mr. Gallagher with 3.75 work hours on that day rather than 4.75 hours.

(c) For Thursday, September 18, 2014, Mr. Croteau credited Mr. Gallagher with 6 rather than 8 work hours. The two-hour difference reflects a deduction by Mr. Croteau of the one hour of travel time Mr. Gallagher added for that day, and of one hour of unpaid lunch.

(d) For Friday, September 19, 2014, Mr. Croteau credited Mr. Gallagher with 3.5 rather than

5.5 hours on Friday, September 18, 2014. This reflects a deduction by Croteau of the one hour of travel time Mr. Gallagher added for that day, and for one hour of unpaid lunch.

As a result, Mr. Croteau computed that Mr. Gallagher had worked a total of 19.25 hours during the week of September 14-20, 2014 to be paid at the rate of $14 per hour, for a total of $269.50 that he computed owing Mr. Gallagher for his work during that week. (Exh. 10.)

g. Work Hours and Travel Time Reported for September 21-27, 2014

19. Mr. Gallagher did not show up for work at the Woburn site, or at any other site where Mr. Croteau was building a shed, on Sunday, September 21, 2014, on Monday, September 22, 2014, or on Tuesday, September 23, 2014. (Exh. 10: Mr. Croteau's spreadsheet printout.)

20. At 6:16 a.m. on Tuesday, September 22, 2014, Mr. Croteau sent Mr. Gallagher an email that read, in its entirety: "Michael . . . . . what happened?" (Exh. 3)(ellipses in original).

21. At 7:56 a.m. on Tuesday, September 23, 2014, Mr. Gallagher sent Mr. Croteau an email stating that his "cell phone broke over the weekend," and that he also "got into some trouble" after he left his girlfriend's house the preceding Saturday night and was "going to lose his [driver's] license because of events that transpired." He asked that Mr. Croteau call him so they could "talk about what happened." (Exh. 3.)

22. The "events" in question to which Mr. Gallager referred in his September 23, 2014 email included a speeding ticket, and may also have included an arrest for driving while intoxicated, which is what Mr. Croteau recalled Mr. Gallagher telling him during a later conversation. Mr. Gallagher denied that he was arrested for driving while intoxicated, but admitted that he was

concerned that he was going to lose his driver's license and, as a result, would not be able to get to a work site. (Croteau direct testimony; Gallagher cross-examination.)[6]

23. Despite this concern, Mr. Gallagher showed up for work on September 24, 25 and 26, 2014 at a residential work site at 50 Mountain Street in Woburn, Massachusetts. On September 29, 2014, Mr. Gallagher sent Mr. Croteau an email reporting his time for those days as follows:

Week of September 21-27, 2014

Date Worked	**Location/Work Site**	**Work Hours Reported**	**Travel Time to and from Work Sites Added**	**Total Time Reported**
Wednesday 09/24/2014	50 Mountain St. Woburn, MA	9:00 a.m. - 2:45p.m. 5.75 Hours	1 Hour	6.75 Hours
Thursday 09/25/2014	50 Mountain St. Woburn, MA	9:15 a.m. - 2:45 p.m. 5.50 Hours	1 Hour	6.5 Hours[7]
Friday 09/26/2014	50 Mountain St. Woburn, MA	9:00 a.m. - 3:00 p.m. 6 Hours	1 Hour	7 Hours
TOTAL	/ / / / / / / / / / / / / / / / /	**17.25 Hours**	**3 Hours**	**20.25 Hours**

(Gallagher cross-examination; Exh. 3: Email, Michael Gallagher to Kevin Croteau dated Sept. 29, 2014.)

24. Mr. Croteau adjusted the hours Mr. Gallagher reported to him for work at the Woburn, Massachusetts site during the week of September 21-27, 2014 as follows:

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[6]/ There are no documents in the record regarding either the alleged speeding ticket or the alleged driving while intoxicated arrest. Whatever the details were, the "trouble" Mr. Gallagher "got into" was why Mr. Gallagher did not show up for work on September 20, 21 or 22, 2014.

[7]/ Mr. Gallagher reported this total as 6 hours, rather than 6.5 hours. This appears to have been a miscomputation on his part. As a result, the work hours reported totaled 17.25 hours rather than 16.75 hours, and the total time reported (including travel time) was 20.25 hours rather than 19.75 hours.

(a) For Wednesday, September 24, 2014, he credited Mr. Gallagher with 5.5 hours of work, rather than 6.75 hours. He deducted the one hour of travel time Mr. Gallagher included for that day, but that left 5.75, rather than 5.5, hours. The additional 0.25 hours Mr. Croteau deducted from the hours Mr. Gallagher reported for September 24, 2014 was not explained on the spreadsheet printout or in during Mr. Croteau's testimony.

(b) For Thursday, September 25, 2014, Mr. Croteau deducted the one hour of travel time that Mr. Gallagher had reported for that day, as a result of which he credited Mr. Gallagher with 3.75 work hours on that day rather than 4.75 hours.

(c) For Friday, September 26, 2014, Mr. Croteau deducted the one hour of travel time that Mr. Gallagher had reported for that day, as a result of which he credited Mr. Gallagher with 6 work hours on that day rather than 7 hours.

As a result, the number of work hours Mr. Croteau credited was 16.5 hours, rather than 20.25 hours. The difference resulted from disallowing the three hours of time for travel to and from the work site that Mr. Gallagher had included in his total hours, and the additional, unexplained, 0.25 hour adjustment. Mr. Croteau's spreadsheet printout states that 2 hours were deducted further as unpaid lunch hours, but that would have reduced the paid hours he computed to 14.50, which the printout does not show. Instead, the printout shows that Mr. Gallagher had worked a total of 16.5 hours during the week of September 21-27, 2014 to be paid at the rate of $14 per hour, for a total of $231 that Mr. Croteau computed he owed Mr. Gallagher for his work during that week. (Exh. 10.)

h. Alleged Payment by Cash on September 23, 2014

25. Mr. Croteau recalled paying Mr. Gallagher $400 in cash (three $100 bills and five $20 bills) on September 23, 2014. His spreadsheet printout shows a $400 cash payment to Mr. Gallagher This entry appears in the last column on the right, following the hours Mr. Gallagher reported for the week of September 21-27, 2014, but without the date of payment. It is unclear when the

spreadsheet was created or when the data regarding the $400 cash payment was inputted into whatever program was used to create the spreadsheet. Mr. Croteau did not obtain a receipt for this payment from Mr. Gallagher, and did not send an email to Mr. Gallagher confirming that the payment was made. Mr. Gallagher denied receiving this $400 cash payment, and did not send Mr. Croteau anything acknowledging that he had received it. (Gallagher cross-examination; Croteau direct testimony and cross-examination; Exh. 10.)

26. Mr. Croteau did not pay Mr. Gallagher anything further.

27. Mr. Gallagher last worked for Mr. Croteau on September 26, 2018. There was no formal termination—Mr. Gallagher simply stopped showing up for work. (Gallagher cross-examination.)

28. Mr. Gallagher's work had been "good" overall, in Mr. Croteau's opinion. However, he did not complete construction of the shed at the Woburn site. Through September 26, 2014, Mr. Gallagher had placed the footings and had installed the flooring, walls and roof rafters, but the shed still needed a roof, windows and siding. Because Mr. Gallagher did not return to complete this work, Mr. Croteau had to pay another person $864 to complete the shed. For these reasons, Mr. Croteau declined to pay Mr. Gallagher for his work at the Woburn site on September 24, 25 and 26, 2014. (Croteau direct testimony; Exh. 10.)

I. Massachusetts and New Hampshire Non-Payment of Wages Claims

29. On October 1, 2014, Mr. Gallagher filed, with the Office of the Attorney General's Fair Labor Division, a "Non-Payment of Wage and Workplace Complaint" in which he claimed that

Mr. Croteau and "Structures Unlimited" owed him $686 in unpaid wages for work he performed from September 14, 2014 to September 27, 2014. Mr. Gallagher wrote out this complaint on a form the Division provided. He stated in the complaint that he had worked "as an independent contractor providing my services as a laborer for [Mr. Croteau's] company building sheds." (Gallagher direct testimony; Exh. 1.)

30. At about the same time, Mr. Gallagher filed a complaint with the New Hampshire Department of Labor (NHDOL) against Mr. Croteau and "Structures Unlimited, LLC" for failing to pay him wages allegedly due for work he performed as an employee on September 14, 2014 at a residential property in Nashua, New Hampshire. In his answer, Mr. Croteau claimed that (1) Mr. Gallagher had represented himself to be an independent contractor, was hired as such, and had more recently stated that he was an independent contractor in the complaint he filed against Mr. Croteau and his business with the Massachusetts Attorney General's Fair Labor Division; and (2) Mr. Gallagher improperly included travel time in the eleven hours he claimed to have worked on September 14, 2014. On February 15, 2015, following a hearing, a NHDOL hearing officer issued a decision awarding Mr. Gallagher $154 for eleven hours of work he performed on January 14, 2014 at the Nashua site at the rate of $14 per hour. *See New Hampshire Dep't of Labor v. Structures Unlimited, LLC*, Case No. 49561, Decision of the Hearing Officer (Feb. 19, 2015).[8] The hearing

[8]/ An electronic version of the New Hampshire Department of Labor decision may be found at the Department's web site, https://www.nh.gov/labor/decisions/wage-claim/. In the "Search This Site" box at the upper right, enter "Structures Unlimited, LLC, Case No. 49561," (without the quotation marks; in addition, delete the words "search this site" from the search box if they are automatically added, which can occur), and then click on the small magnifying glass to the right of this box. This should bring up a highlighted link to a file ending in .pdf . Clicking on this link should download the decision in pdf format, which may be opened in a pdf document browser or program.

officer found it "more likely than not" that the relationship between Mr. Gallagher and Mr. Croteau and Structures Unlimited, LLC was that of a subcontractor and a prime contractor, and that Mr. Gallagher had represented himself to Mr. Croteau as an independent contractor. However, Mr. Gallagher did not meet all of the criteria needed to be exempt from New Hampshire's statutory definition of "employee"—in particular, the parties had agreed that Mr. Gallagher was not "responsible for satisfactory completion of work" and could not "be held contractually responsible for failure to complete the work." (*See* New Hampshire Rev. Stat. Ann. § 275:42 II (f).) The NHDOL hearing officer concluded, as a result, that Mr. Gallagher had been an employee of Mr. Croteau and Structures Unlimited, LLC on September 14, 2014. As to the hours he worked that day, the hearing officer found that (1) Mr. Gallagher had notified Mr. Croteau by email that he had worked eleven hours at the Nashua property (from 8:00 a.m. to 7:00 p.m.); and (2) Mr. Croteau and Structures Unlimited, LLC could not offset travel time from the hours Mr. Gallagher reported because they had no written agreement with Mr. Gallagher allowing them to withhold any overpayments from wages owed, *citing* New Hampshire Rev. Statutes Ann. § 275:48.[9]

j. Fair Labor Division Citations

31. On March 18, 2016, the Fair Labor Division issued two Citations to Mr. Croteau and Structures Unlimited. Citation No. 14-10-32076-001 alleged failure to make timely payment of

[9]/ The NHDOL hearing officer identified Mr. Gallagher's co-employer, and the entity with which Mr. Croteau was affiliated as Structures Unlimited, LLC. The entity of which Mr. Croteau was a member during the time in question was actuallyUniversal Wood Structures, LLC. (*See* Finding 36 below.)

wages to Mr. Gallagher, without specific intent, between September 17, 2014 and September 27, 2014, in violation of M.G.L. c. 149, § 148. It ordered payment of $532 in restitution, and a $250 civil penalty for the alleged violation. Citation No. 14-10-32076-002 alleged misclassification of Mr. Gallagher as an independent contractor, without specific intent, from September 2, 2014 to September 27, 2014, in violation of M.G.L. c. 149, § 148B. It ordered payment of a $500 civil penalty for the alleged violation.

32. The Fair Labor Division investigator assigned originally to this matter (Joseph Hyacinthe, who did not testify) determined that Mr. Gallagher was not paid by Mr. Croteau and the business entity of which he was a member for 38 hours of work at Massachusetts work sites between September 2 and 27, 2014 and that, based upon the $14 per hour rate at which he was paid, he was therefore owed $532. His successor, Investigator Jennifer Pak, agreed. (Pak direct testimony.)

33. Mr. Hyacinthe computed the civil penalty amounts based upon the following penalty factors:

(a) The amount of restitution Mr. Gallagher was owed ($532);

(b) There had been no prior Wage and Hours complaints against the respondents;

(c) There was no intent to commit the violations alleged (failure to pay wages timely to Mr. Gallagher, and his misclassification as an independent contractor rather than as an employee); and

(d) The violations alleged involved a single employee.

(*Id*.; *see* M.G.L. c. 149, § 27C(b)(2) as to factors that must be taken into account in determining the amount of a civil penalty under the Wage and Hours laws). Ms. Pak agreed that these factors were material to determining the civil penalty amounts assessed. (Pak direct testimony.)

34. Ms. Pak also testified that the penalties assessed here ($250 for failure to pay wages timely, and $500 for misclassification as an independent contractor) were both within the range of the civil penalties the Attorney General could assess for these violations under Wage and Hours Law, and in the lower range of penalties the Fair Labor Division assessed for them in other cases. Based upon her investigative experience at the Fair Labor Division, including four years as a supervising investigator, a civil penalty assessed by the Division for unpaid wages was generally not lower than 30 percent of the unpaid wage amount; here, the $250 civil penalty assessed was just below 50 percent of the $532 restitution amount, and 50 percent was the "normal" penalty assessed for this amount of unpaid wages when, as here, there were no prior violations and the violation was unintentional. The $500 civil penalty amount was not based upon a percentage of the restitution amount, however. Instead, this penalty amount was based upon the nature of the Wage and Hours Law violation the citation alleged (unintentionally misclassifying an employee as an independent contractor), and it was within the lower range of penalties the Division applied to this violation in other cases. (Pak cross-examination.)

k. Appeal

35. Mr. Croteau filed a single appeal challenging both of the original citations with the Division of Administrative Law Appeals (DALA) on April 4, 2016. He did so individually and as a member of Universal Wood Structures, LLC. Mr. Croteau claimed in the appeal that (1) Mr. Gallagher was "brought into the Company to work for a brief time period [n]ot as an employee, but as an independent contractor as a set up person," meaning a person who constructed outbuildings

"the company" sold to customers; (2) he worked "without specific hours as long as he worked," was "held accountable for what he did, or did not, complete," and was given directions as to how to complete the job; (3) he and Mr. Gallagher "had a meeting of the minds" regarding Mr. Gallagher's position, tasks and what was expected of him; (4) Mr. Gallagher started constructing outbuildings but "due to discrepancies in the level of experience he stated he had, and getting arrested and losing his ability to drive due to drunk driving, was unable to repair what he did wrong or get to the work place to complete the project," as a result of which Mr. Croteau had to find a replacement for him. (Appeal, dated Apr. 4, 2016, at 1-2.)

36. The Division amended both citations on September 12, 2016 by substituting Universal Wood Structures, LLC for Structures Unlimited, LLC, to reflect the correct entity of which Mr. Croteau was a member during the time period identified by both citations. The amended citations did not change the violations alleged or the amounts of restitution and/or civil penalties the citations recited. (*See Order Following Prehearing Conference* (Aug. 24, 2016) at 3-4 (regarding need to confirm which entity should have received the citation, and whether the Division would be amending or reissuing the citations to name a different entity); and Division's response, dated Sept. 13, 2016, confirming change of entity named in citations to Structures Unlimited, LLC and filing amended citations.)[10]

[10]/ Mr. Croteau did not object to service of the amended citations in this matter, or to proceeding with a hearing on the amended citations. I treated his original answer, therefore, as an answer to the amended citations as well.

Discussion

I address, first, the petitioners' claim that Mr. Gallagher was an independent contractor rather than an employee, and their argument that, as a result, the Wage and Hours Law does not apply here and the Fair Labor Division had no jurisdiction to enforce its provisions by issuing the appealed citations. Applying M.G.L. c. 149, § 148B's independent contractor "test," I conclude that Mr. Gallagher was the petitioners' employee, and not an independent contractor, between September 2 and 26, 2014. With enforcement jurisdiction thus confirmed, I then determine whether the citations were erroneously issued, focusing first upon the amount of restitution the petitioners owe Mr. Gallagher—what wages they did not pay him for work at Massachusetts sites during this time period, and whether this unpaid wage amount includes travel time Mr. Gallagher reported and lunch breaks. I conclude that the travel time was noncompensable commuting time, and I deduct it from the hours worked on the work days Mr. Gallagher added it to his hours. I also conclude that because Mr. Gallagher was entitled as a matter of law to an unpaid 30 minutes of lunch time when he worked six hours or more, and there is no evidence that he was required to work through lunch, I deduct 30 minutes of unpaid lunch time from the work hours Mr. Gallagher reported on days he worked six hours or more, exclusive of any travel time I deducted for those days. The restitution amount is reduced, as a result, from $532 to $427. Multiplying this amount by the percentage the Division applied to the restitution amount it had computed (46.99 percent) in order to compute the penalty amount, I reduce the penalty from $250 to $200.66. However, I sustain the $500 civil penalty assessed for unintentional misclassification of Mr. Gallagher as an independent contractor because

the violation occurred, and the penalty was not based upon a specific percentage of restitution, was at the low range of penalties the Division assessed for this type of violation, and was not excessive in the circumstances.

1. Fair Labor Division Citation Appeals, Generally

A person aggrieved by a citation may appeal it to DALA. M.G.L. c. 149, § 27C(b)(4). On appeal, DALA "may affirm or if the aggrieved person demonstrates by a preponderance of evidence that the citation or order was erroneously issued, vacate, or modify the citation or order." *Id*.

M.G.L. c. 149, § 27C does not define "erroneously issued" or specify the evidence needed to show that an appealed citation was, or was not, issued erroneously. As the phrase does not appear be a technical one or one that has "acquired a peculiar and appropriate meaning in law," it is "construed according to the common and approved usage of language . . . ." *See* M.G.L. c. 4, § 6, third para. "Erroneously issued" therefore encompasses issuance based upon a mistake as to what the operative facts are, or a failure to determine or consider the operative facts. *Briggs v. Fair Labor Div*., Docket No. LB-09-1022/1074, Decision at 22-23 (Mass. Div. of Admin. Law App., Feb. 26, 2013); *see also Doyle v. Commonwealth*, 444 Mass. 686, 830 N.E.2d 1074 (2005) (phrases "erroneously issued" and "issued in error" treated as interchangeable in context of land title transfer).

Therefore, as to each of the citations they appeal here, the petitioners needed to show, by a preponderance of the evidence, that the citation was "erroneously issued," *see* M.G.L. c. 149, § 27C(4)—meaning that (1) they did not misclassify Mr. Gallagher as an independent contractor between September 2, 2014 and September 27, 2014; (2) they did not fail to make timely payment

of wages to Mr. Gallagher from September 17, 2014 to September 27, 2014; and (3) the civil penalties the Division assessed against them ($500 for misclassifying Mr. Gallagher as an independent contractor, without specific intent, and $250 for failure to make timely payment of wages to him, without specific intent) were excessive.

Although the ultimate burden of proof as to the citation's erroneous issuance was upon the petitioners, the initial burden of going forward was placed appropriately on the Division as to the amount of unpaid wages for which it demanded restitution payment, and the civil penalty amounts it assessed. The Division was in the best position to explain the facts on which it relied in computing the restitution amount it seeks here, and, as to the penalty amounts, the statutory penalty factors or other factors it took into account and how it weighed them. The Standard Adjudicatory Rules of Practice and Procedure governing this appeal provide that "[t]he presiding officer may, when the evidence is peculiarly within the knowledge of one Party . . . or when he or she otherwise determines appropriate, direct who shall open and may otherwise determine the order of presentation." 801 C.M.R. § 1.01(10)(e)4. For this reason, I directed the Division to present its direct case first at the hearing.

2. Enforcement Jurisdiction Issue: Independent Contractor or Petitioners' Employee?

Mr. Croteau and Universal Wood Structures, LLC claimed that Mr. Gallagher was an independent subcontractor who supplied services to Mr. Croteau, the general contractor hired by the residential shed customer, rather than an employee who built sheds for them between September 2 and 26, 2014. Because Mr. Gallagher was not their employee, the petitioners argued, there was no

violation here of wage payment obligations they owed employees under M.G.L. c. 149, § 148B or that the Fair Labor Division could sanction. I address this jurisdictional claim first.

In determining a person's employment status and, thus, whether that person was an employee entitled to benefits and protections under the Massachusetts Wage and Hours Law, a person performing services for another is "considered" (meaning "presumed)" by law to be an employee, rather than an independent contractor, unless the following three "prongs" are met:

> (1) the individual is free from control and direction in connection with the performance of the service, both under his contract for the performance of service and in fact; and
>
> (2) the service is performed outside the usual course of the business of the employer; and,
>
> (3) the individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed.

M.G.L. c. 149, § 148B(a); as to the *presumptive* classification as an employee that results when any of the three statutory prongs for independent contractor status are not met, *see Camargo's Case*, 479 Mass. 492, 503, 96 N.E.3d 673, 683 (2018).[11]

Per the plain language of M.G.L. c. 149. § 148B(a), all three prongs of this independent contractor "test" must be met for a person to overcome the statute's employee status presumption and be classified properly as an independent contractor for wage and hours purposes. Moreover, in applying these prongs and determining whether an individual was an independent contractor or an

[11]/ The General Laws provide a different definition of "employee" for the purpose of determining employment status in the worker's compensation context. *See* M.G.L. c. 152, § 1(4); *Camargo*, 479 Mass. at 501, 96 N.E.3d at 680.

employee under M.G.L. c. 149, § 148B, "[t]he failure to withhold federal or state income taxes or to pay unemployment compensation contributions or workers compensation premiums with respect to an individual's wages shall not be considered . . . ." M.G.L. c. 149, § 148B(b). Here, as a result, the fact that the petitioners made no such withholdings did not make Mr. Gallagher an independent contractor or divest the Fair Labor Division of enforcement jurisdiction.

All of the shed-related work that Mr. Gallagher performed between September 2 and 26, 2014 was at residential work sites where Mr. Croteau and/or Universal Wood Structures, LLC had been hired by the owner to construct a shed. Relative to this fact, it is worth noting that the 2004 amendment of M.G.L. c. 149, § 148B changed the wording of the second prong needed to establish independent contractor status, from "such service is performed either outside the usual course of the business for which the service is performed *or is performed outside of all places of business of the enterprise*" to "the service is performed outside the usual course of the business of the employer." (Emphasis in original). By deleting the italicized language, the legislature removed the possibility of showing that although the work performed was not outside the employer's usual course of business, it was not performed at any place where the employer did business. That had sufficed, in some instances, to meet the second prong of M.G.L. c. 149, § 148B(a)(2), and show that the work in question was that of an independent contractor. With the deletion of the "place of business" clause, the second prong is met by showing that the work performed was outside the employer's usual course of business, regardless of where the work was performed. With the 2004 amendment, the legislature "made it easier for some individuals to be deemed employees and, thus, enjoy the rights attendant to that status," such as the recovery of unpaid wages. *Oliveira v. ICLB, Inc*., 2010

Mass. App. Div. 96, 2010 WL 2102992, *2 (2010).

Here, prong 2 is met, and presumed employee status is rebutted, only if the shed construction work Mr. Gallagher performed was outside the usual course of business that Mr. Croteau and Universal Wood Structures, LLC conducted, regardless of where Mr. Gallagher performed this work. The fact that this work was performed entirely at residential sites where the petitioners had contracted with the owner to build a shed is not relevant to prong 2. However, it is relevant to whether Mr. Gallagher was "free from control and direction" by the petitioners in performing his work—in other words, to "prong 1" of the independent contractor test recited by M.G.L. c. 149, § 148B(a)(1).

a. Prong 1: Control and Direction of Work Performance

In determining whether Mr. Gallagher was "free from control and direction," by Mr. Croteau and/or Universal Wood Structures, LLC, it is not necessary to show that his shed construction work was entirely free from any direction and control by the petitioners; instead, the focus is on whether they "had the right to control the details of performance, including the means and method used to achieve the performance of the work." *Aydamouni v. Fair Labor Div.*, Docket No. LB-09-581, Decision at 7 (Mass. Div. of Admin. Law App., Aug. 8, 2010), *citing Athol Daily News v. Bd. of Review of Div. of Employment and Training*, 439 Mass. 171, 178, 786 N.E.2d 365, 371 (2003)(test for determining degree of control is "not so narrow as to require that a worker be entirely free from direction and control of outside forces.").

Here, the facts relevant to control and direction are these. Mr. Croteau was in the business

of building residential sheds. (Finding 1.) He arranged the sale and installation of the sheds and decided what the dimensions of the shed would be. (*Id*.) He made all the arrangements for the fabrication of shed components and their delivery to the residential job sites, and the components that were delivered to the work site were pre-cut and measured. Mr. Croteau ordered nearly all of the necessary hardware and the shed windows and arranged for their delivery to each job site. (Finding 2.) He elected to follow the BOCA National Building Code in building sheds, and instructed workers to do so as well. (Finding 4.) As a result, very little (if any) decisionmaking as to shed design and component part ordering and delivery was left to the worker who installed a shed. Mr. Croteau also told Mr. Gallagher where he would be working. Mr. Gallagher did not have an established trade, and had approximately one year of carpentry-related experience, when Mr. Croteau hired him in late August or early September 2014; he did not know how to build sheds, and needed Mr. Croteau to teach him. (Findings 5 and 10.) Knowing this, Mr. Croteau was aware that Mr. Gallagher did not have enough experience to build sheds on his own, and so he was present at the job sites 50 percent of the time when Mr. Gallagher was working. (Finding 10.) The level at which Mr. Gallagher worked during this time suggests strongly that he did not yet have the skills needed to successfully build sheds to completion, or to successfully perform construction work generally, as an independent contractor. Although Mr. Croteau rated Mr. Gallagher's work as good overall (Finding 28), Mr. Gallagher did not regularly work the eight hours per day needed to complete shed construction in two days, as Mr. Croteau expected. (*See* Finding 8, as to his expressed expectation that Mr. Croteau would work eight hours each day, and Findings 11-12, 13-14, 16-17, and 23-24, as to the hours Mr. Gallagher actually worked at each site in September 2014). Mr. Gallagher also

did not complete construction of the shed at the Woburn, Massachusetts site, even though he had put in more than the expected two days needed to complete this work. Although this may have been related to the status of his driver's license or not being paid, what the record shows is that he simply ceased showing up for work without notice. After working six hours on October 26, 2018 (seven hours less one hour of commuting time reported; *see* Finding 23), Mr. Gallagher sent no letter or email to Mr. Croteau stating that he had worked his last day and would not perform any further work. (*See* Findings 27, 28.)

Based upon these facts, Mr. Gallagher worked more as an apprentice—an entry-level worker who needed the equivalent of classroom or on-the-job training with supervision—than as a journeyman (a skilled worker who had completed an apprenticeship), or as a master craftsman who had acquired sufficient skills to work independently. He had not yet acquired skills needed to work commercially as a carpenter or even as a laborer without supervision. Unquestionably, he needed Mr. Croteau to teach him and supervise him, not necessarily every moment he was at the job site, but regularly until he had completed the ground support work for a shed and then worked on building the shed. He made no decisions as to shed design or component materials, including hardware. Although the record does not reveal the details of Mr. Croteau's supervision, the need for this supervision was apparent. Mr. Gallagher conceded that he needed it, and Mr. Croteau was present for approximately 50 percent of the time at the job sites where Mr. Gallagher worked. Bearing in mind that Mr. Gallagher worked less than a month at what was his first job constructing sheds, I conclude that Mr. Gallagher was certainly not "free" from control and direction by Mr. Croteau, and that Mr. Croteau exercised control and direction over his work, and had no choice but to do so in

order to deliver a completed shed in a timely manner to his customers. Mr. Gallagher did not meet, thus, the first prong of the independent contractor "test" prescribed by M.G.L. c. 149, § 148B(a)(1).

b. Prong 2: Service Performed Outside the Usual Course of the Employer's Business

Without question, the work Mr. Gallagher performed for Mr. Croteau was well within the course of the business that Mr. Croteau and Universal wood Structures performed, which was the sale and installation of wooden sheds at mostly residential sites. (Finding 1.) Mr. Gallagher's work was the installation of the sheds that Mr. Croteau and the LLC sold. He did not fabricate or design any of the component parts of the sheds on which he worked. The service he performed was fully within the usual course of the petitioners' business. For these reasons, Mr Gallagher did not meet the second prong of the independent contractor test prescribed by M.G.L. c. 149, § 148B(a)(2).

c. Prong 3: Existence of Independent Trade

The third prong of the statute's independent contractor test is that "the individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed." There is no evidence that Mr. Gallagher was customarily engaged in an independently-established trade, occupation, profession or business of the same nature as that involved in the service he performed for Mr. Croteau and/or Universal Wood Structures, LLC, or even that he could have done so. He testified that he was not operating a business when Mr. Croteau hired him. There is no evidence that while Mr. Gallagher was building sheds for the petitioners between September 2 and 26, 2014, he was also performing shed-related construction (or any construction) for others, or that he made himself available for hire to perform

this work for others. There was no testimony, and there is no other evidence in the record, that Mr. Gallagher had performed carpentry, or construction work generally, for others before he began work with Mr. Croteau. As I have already noted with respect to prong 1 of the statute's independent contractor "test," Mr. Gallagher did not have, at the time, the experience or the skills necessary to successfully build sheds to completion, or to successfully perform construction work generally, as an independent contractor. (*See* above at 32-34.) Finally, there is no evidence that Mr. Gallagher was free to work for others while he worked for Mr. Croteau.

For these reasons, Mr. Gallagher's work for the petitioners cannot be viewed as having been rendered in the context of an independent trade or business he operated. Instead, Mr. Gallagher was, during the time in question, dependent "on a single employer for the continuation of the services" he was rendering. *See Aydamouni*, Decision at 8, *citing Athol,* 439 Mass. at 181, 786 N.E.2d at 373. I conclude, therefore, that the third prong of M.G.L. c. 149, § 148B(a)'s independent contractor test did not apply to Mr. Gallagher's work. As a result, the petitioners did not establish any of the prerequisites for rebutting Mr. Gallagher's presumptive employee status under the statute while he was working for them. Under the statute, Mr. Gallagher was the petitioners' employee between September 2 and 26, 2014. He was entitled to be paid wages for the hours he worked during that time, as the statute directs, and the Division had jurisdiction to issue the citations appealed here.

3. Restitution Amount Owed—Uncompensated Hours Worked, and Whether They Include Travel Time and/or Lunch Breaks

The Division determined that the petitioners did not pay Mr. Gallagher for 38 hours he

worked at Massachusetts sites between September 2 and 16, 2014, and that, based upon the $14 per hour rate at which he was paid, he was owed $532 for this unpaid work time. (Finding 32.) Inspector Pak did not state whether these unpaid hours included travel time or lunch break time. Mr. Croteau had deducted an hour of unpaid lunch for each of the two days Mr. Gallagher worked six hours or more at both Massachusetts and New Hampshire sites during the week of September 14-20, 2014, and for two of the three days Mr. Gallagher worked at Massachusetts sites during the week of September 21-27, 2014, even though he reported having worked more than six hours on each of those days (Finding 23.)

I determine next (1) whether the travel time Mr. Gallagher added to his work hours during the weeks of September 14-20, 2014 (three hours*: see* Finding 17) and September 21-27, 2014 (three hours: *see* Finding 23) should be included in, or deducted from, his unpaid work hours for those weeks;[12] and (2) whether those unpaid hours need to be adjusted to reflect paid or unpaid lunch time during those weeks.

a. Travel Time

Travel time is work time payable as wages if it is required during work hours, but is not work time payable as wages if it is commuting time. *See* 454 C.M.R. § 27.04(4).[13] The regulation provides in pertinent part that:

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[12]/ Mr. Gallagher's work hours were at New Hampshire sites only during the weeks of August 31-September 6, 2014 (*see* Finding 11) and September 7-13, 2014 (*see* Finding13.)

[13]/ 454 C.M.R. § 27.04 is a section of the Department of Labor Standards's "Minimum Wage Regulations," whose stated purpose is "[t]o clarify practices and policies in the administration and enforcement of the Minimum Fair Wages Act."

> (a) Ordinary travel between home and work is not compensable working time.
>
> (b) If an employee who regularly works at a fixed location is required to report to a location other than his or her regular work site, the employee shall be compensated for all travel time in excess of his or her ordinary travel time between home and work and shall be reimbursed for associated transportation expenses.
>
> (c) If an employer requires an employee to report to a location other than the work site or to report to a specified location to take transportation, compensable work time begins at the reporting time and includes subsequent travel to and from the work site.
>
> (d) An employee required or directed to travel from one place to another after the beginning of or before the close of the work day shall be compensated for all travel time and shall be reimbursed for all transportation expenses.

The travel time that Mr. Gallagher claimed for the days he worked at Massachusetts sites during the weeks of September 14-20 and 21-17, 2014 was ordinary travel time between home and work, and therefore it was not compensable working time, per 454 C.M.R. § 27.04(4). Several factors support this conclusion. First, Mr. Gallagher lived in Londonderry, New Hampshire at the time (Gallagher direct testimony), which is in the southeastern part of the state just north of Massachusetts, and he added one hour of travel time only for the days he worked out-of-state at Massachusetts sites. (*See* Finding 17: no travel time added to hours worked on September 14, 2014, when Mr. Gallagher worked at the Nashua, New Hampshire site, but one hour of travel time added on September 17, 18 and 19, when he worked at Massachusetts sites; and Finding 23: one hour of travel time added on each of the three days (September 24, 25 and 26, 2014) that Mr. Gallagher worked at Massachusetts sites.) Second, there was no testimony that Mr. Gallagher was required or directed to travel from one site to another after the beginning of, or before the close of, any of the work days for which he added travel time to his work hours.

Because it was ordinary travel time, Mr. Croteau was legally justified in deducting the travel time Mr. Gallagher added, and it should not be included in his work hours at Massachusetts sites. I make the following adjustments to Mr. Gallagher's compensable work time as a result:

For the week of September 14-20, 2014, Mr. Gallagher reported 28.25 work hours, of which 17.25 hours were worked at Massachusetts sites, including three hours of travel time. (Finding 17.) Because this three hours of travel was ordinary travel time, I deduct it from the 17.25 hours of work at Massachusetts sites Mr. Gallagher reported for this week. Subject to a further adjustment related to lunch breaks, Mr. Gallagher's compensable work time at Massachusetts sites during this week was therefore ***14.25 hours***—3.75 hours (rather than the 4.75 hours Mr. Gallagher reported) on for September 17, 2014; 6 hours (rather than the 7 hours Mr. Gallagher reported) on September 18, 2014; and 4.5 hours (rather than the 5.5 hours Mr. Gallagher reported) on September 19, 2014, for a total of 14.25 hours of work at Massachusetts sites between September 14 and 20, 2014.

For the week of September 21-27, 2014, Mr. Gallagher reported 20.25 work hours at Massachusetts work sites, which included three hours of travel time, one on each of the three days he worked during that week. (Finding 23.) This, too, was ordinary travel time and was not compensable working time, and I deduct it from the 20.25 hours of work at Massachusetts sites Mr. Gallagher reported for the week of September 21-27, 2014. Subject to a further adjustment related to lunch breaks, Mr. Gallagher's compensable work time at Massachusetts sites during this week was therefore ***17.25 hours***—5.75 hours (rather than the 6.75 hours Mr. Gallagher reported) on September 24, 2014; 5.5 hours (rather than the 6.5 hours Mr. Gallagher reported) on September 25 2014; and 6 hours (rather than the 7 hours Mr. Gallagher reported) on September 26, 2014, for a total of 17.25

hours of work at Massachusetts work sites between September 21 and 24, 2014.

I have deducted a total of six hours of non-compensable ordinary travel time included in the hours Mr. Gallagher reported to Mr. Croteau for his last two weeks of work. Subject to a further adjustment I make below related to lunch breaks, he worked a total of **31.5** compensable hours at Massachusetts work sites during the last two weeks he worked in September 2014 (17.25 hours between September 14 and 20, 2014, plus 17.25 hours between September 21 and 27, 2014), rather than the 37.5 hours he reported to Mr. Croteau, or the 38 compensable hours the Division determined that he worked during these two weeks.

b. Lunch Breaks

M.G.L. c. 149, § 100 provides that:

> No person shall be required to work for more than six hours during a calendar day without an interval of at least thirty minutes for a meal. Any employer, superintendent, overseer or agent who violates this section shall be punished by a fine of not less than three hundred nor more than six hundred dollars.[14]

454 C.M.R. § 27.02, a section of the Massachusetts Department of Labor and Standards' minimum wage regulations, provides in pertinent part that "working time":

> Includes time during which an employee is required to be on the employer's premises or on duty, or at the prescribed work site, or any other place, and any time worked before or after the end of the normal shift to complete the work. Working time does not include meal times during which an employee is relieved of all work-related duties.

Based upon the above statutory and regulatory requirements:

[14]/ The statute provides exceptions to this requirement for specific types of factories, workshops and mechanical establishments, and allows the Attorney General to exempt others for the reasons the statute specifies. None of these exemptions applies here.

(1) An employee is entitled to, and the employer must provide, a half hour unpaid lunch break if the employee works six or more consecutive hours;

(2) A bona fide lunch break (in other words, one during which no work is required) is unpaid, unless the employer agrees to pay for this time; and

(3) A lunch break can be unpaid only if the employee is completely relieved of duties during the break. The employee can remain at the workplace, but must be able not to do work. Stated another way, the employee must be free from all duties during the lunch break, and must be able to leave the workplace. Otherwise, the break, whether for meals or otherwise, must be paid as work time.

The emails in which Mr. Gallagher's reported his time for work at both the New Hampshire and Massachusetts sites did not state how much time he took for lunch on any day he worked, or that he worked through a lunch break on any of those days. With one exception, Mr. Croteau consistently deducted one-hour unpaid lunch breaks for days on which Mr. Gallagher worked six or more hours at New Hampshire sites.[15] This practice varied as to Mr. Gallagher's work at Massachusetts work sites. Mr. Croteau deducted one hour of unpaid lunch time for one day on which Mr. Gallagher's work time, minus one hour of travel time deducted, was less than six hours (September 19, 2014; *see* Finding 18). He deducted one hour of unpaid lunch time for a day on which Mr. Gallagher worked six hours after deducting the one hour of travel time he had added (September 18, 2014; *see* Finding

[15]/ Those days were September 2, 3 4 and 5, 2014 (*see* Finding 12), and September 7 and 12, 2014 (*see* Findings 13, 14). In crediting Mr. Gallagher for 6, rather than 11, hours of work at a New Hampshire site on September 14, 2018, Mr. Croteau may or may not have deducted an hour of unpaid lunch time. (*See* Finding 18(a).)

18.) Mr. Croteau also deducted two hours of unpaid lunch for the last week Mr. Gallagher worked (September 20-27) without specifying the days for which he made this deduction, even though with travel time deducted first, Mr. Gallagher worked six hours or more on only one of the three days he worked, September 26, 2014. (*See* Findings 23 and 24.)

There is no evidence of any written agreement allowing Mr. Croteau to deduct one hour of unpaid lunch for any of the dates on which Mr. Gallagher worked at a Massachusetts site. Therefore, he was not entitled to deduct one-hour unpaid lunch breaks for days on which Mr. Gallagher worked six or more hours building sheds in Massachusetts.

Per M.G.L. c. 149, § 100 and 454 C.M.R. § 27.02, Mr. Gallagher was entitled to a 30 minute lunch break on each day he worked six or more consecutive hours, absent evidence the petitioners agreed to pay for this time, provided that he was relieved from all duties during the break and was free to leave the worksite during the break, even if he remained at the work site. Because Mr. Gallagher reported his hours for each day he worked as having been between a starting and finishing time (*e.g.*, "9:00 a.m. - 2:45 p.m." on September 24, 2014), all of his daily work hours were consecutive. The days on which Mr. Gallagher worked six or more consecutive hours at Massachusetts sites, after deducting the travel time he added to his work hours on those dates, were September 18 and 26, 2014.[16] There is no evidence that Mr. Croteau directed Mr. Gallagher to work through lunch on either of those dates (or on any other dates), or that he was not free to leave the site during his lunch

[16]/ For September 18, 2014, Mr. Gallagher reported seven work hours; six are compensable hours after the hour of travel time he added is deducted. (*See* Finding 17, and above at 39.) For September 26, 2014, Mr. Gallagher reported seven work hours; six are compensable after deducting the hour of travel time Mr. Gallagher added. (*See* Finding 23, and above at 39.)

time, or that the petitioners agreed to pay for this time.

Mr. Gallagher was entitled, as a result, to a 30-minute unpaid lunch break on September 18, 2014 and on September 26, 2014. I deduct this unpaid lunch break time, which totals one hour, from the adjusted number of compensable hours Mr. Gallagher worked at Massachusetts work sites between September 14 and 27, 2014 (31.5 hours; *see above* at 40). The total number of such compensable hours is therefore **30.5** and, at the rate of $14 per hour, Mr. Gallagher was entitled to be paid $427 for his work at Massachusetts sites in September 2014.

c. Credit for Payments Made

The petitioners made no payment toward this amount, and I credit none.

Mr. Croteau paid Mr. Gallagher $546 by personal check on September 12, 2014. (Finding 15.) This payment is not disputed. The Division, and Mr. Gallagher, asserted that this payment was entirely for Mr. Gallagher's work at New Hampshire sites through September 13, 2014, and therefore did not offset the hours he worked at Massachusetts sites for which he was not paid. They are correct. The total number of hours Mr. Gallagher reported for that work was 63.25 hours (40.25 hours during the week of August 31-September 6, 2014) and 23 hours during the week of September 7-13, 2014. At the rate of $14 per hour, Mr. Gallagher was entitled to be paid $885.50 for his work at the New Hampshire sites through September 13, 2014, more than the $546 Mr. Croteau paid Mr. Gallagher by personal check on September 14, 2014. The $546 payment was a partial payment to Mr. Gallagher for his work time up through September 13, 2014, all of which had been at New Hampshire sites. That payment left a balance due Mr. Gallagher, rather than any amount to be credited against what

Mr. Gallagher is owed for his adjusted work hours at Massachusetts sites in September 2014, therefore. The amount Mr. Gallagher was due for his work at the Nashua New Hampshire site on September 14, 2014 (*see* Finding 17) was resolved by the New Hampshire Department of Labor in its February 2015 Decision on Mr. Gallagher's unpaid wages claim to that agency. (Finding 30.)

Mr. Croteau claimed that he made a $400 cash payment to Mr. Gallagher on September 23, 2014, and that the payment should be credited against what he owed Mr. Gallagher for his work at Massachusetts sites. I would have done so if the petitioners had proven this cash payment by a preponderance of the evidence. They did not do so, however. The alleged cash payment was shown on Mr. Croteau's worksheet printout, but it is unclear when that entry was made or when data regarding the payment was inputted into the spreadsheet software; moreover, Mr. Croteau received no receipt for this payment from Mr. Gallagher, and there is no email or other communication in the record confirming the payment. (*See* Finding 25.) Essentially, whether the cash payment was made or not depends upon whether one believes Mr. Croteau's testimony that he made it, or Mr. Gallagher's testimony that he never received it. The testimony of both witnesses was self-serving as to the cash payment, essentially cancelling each other out. In sum, the evidence did not preponderate in favor of either party as to the alleged $400 cash payment, but the burden of proof as to the alleged payment was upon the petitioners. The competing quanta of self-serving and equally-unconvincing evidence was insufficient to meet the burden or prove the alleged cash payment.

d. Adjusted Restitution Amount

With no payment toward the amount owed Mr. Gallagher for 30.5 hours of compensable work at Massachusetts sites in September 2014 that I can credit, the restitution amount the petitioners owe for this work is **$427** (30.5 hours x $14/hour). I reduce the restitution ordered by the citation to this amount.

e. Cost to Complete Former Employee's Work

Mr. Croteau testified although Mr. Gallagher's work was "good," he did not complete construction of the shed at the Woburn, Massachusetts site —he had placed the footings and had installed the flooring, walls and roof rafters, but the shed still needed a roof, windows and siding. Mr. Croteau testified further that he had to pay another person $864 to complete the shed, and this was why he declined to pay Mr. Gallagher for his work at the Woburn site on September 24, 25 and 26, 2014. (Finding 28.)

This is not a valid defense to restitution, and I do not offset the alleged cost to complete work against the restitution amount I have recomputed.

Beyond Mr. Croteau's testimony and the notation on the spreadsheet printout, there is no evidence supporting the cost to complete Mr. Gallagher's work on the Woburn shed, such as the work hours it took to complete the shed or the rate at which this work was paid. Mr. Croteau did not offer an itemized receipt for this work. There is also no claim, or evidence, that Mr. Gallagher's work was defective and required correction, or that the petitioners paid more for the other person to complete the shed than they would have paid Mr. Gallagher if he had done so.

These evidentiary shortcomings aside, the alleged cost-to-complete fails as a defense to unpaid wages he owes Mr. Gallagher, as a matter of law.

M.G.L. c. 149, § 150 provides that no defense by an employer for failure to pay wages as chapter 149, section 148 requires "other than the attachment of such wages by trustee process or a valid assignment thereof or a valid set-off against the same, or the absence of the employee from his regular place of labor at the time of payment, or an actual tender to such employee at the time of payment of the wages so earned by him, shall be valid." Mr. Croteau did not claim specifically any of the defenses to unpaid wages that section 150 lists. The only one that arguably applies to costs he allegedly incurred in having Mr. Gallagher's unfinished work completed is "valid set-off." This defense refers to "circumstances where there exists a clear and established debt owed to the employer by the employee" that may be set off against earned wages. *Camara v. Attorney General*, 458 Mass. 756, 763, 941 N.E.2d 1118, 1123-24 (2011). However, an employer's unilateral assessment of an employee's liability for damages and their cost "does not amount to 'a clear and established debt owed to the employer by the employee.'" *Id.*; 458 Mass. at 763, 941 N.E.2d at 1124, *quoting Somers v. Converged Access, Inc.*, 454 Mass. 582, 593, 911 N.E.2d 739, 740 (2009). Mr. Croteau's testimony and notation as to the amount paid to finish the Woburn site shed is evidence of a unilateral assessment of liability, rather than evidence of a clear and established debt that Mr. Gallagher owes the petitioners. It is not a defense to the modified restitution the petitioners owe Mr. Gallagher, or an offset to the modified restitution amount, therefore. In addition, the petitioners would have had to pay for the shed's completion, regardless of who performed that work. The petitioners showed no additional expense incurred because someone other than Mr. Gallagher completed the shed.

4. Civil Penalties

M.G.L. c. 149, § 27C(b)(2) directs that in determining the amount of any civil penalty it assesses for violations of specified provisions of the Wage and Hours Law including M.G.L. c. 149, §§ 148 and 148B, the Attorney General "shall take into consideration" previous violations of those provisions by the employer, the intent by such employer to violate them, the number of employees affected by the present violation or violations, the monetary extent of the alleged violations, and (if the project in question was a public contract) the total monetary amount of the public contract or payroll involved. At a minimum, the factors listed by the statute must be considered. The statute does not state how any of them are to be considered or what weight they should be given. It also does not state that the penalty factors listed at M.G.L. c. 149, § 27C(b)(2) are exclusive. Other potentially-relevant factors could also be considered in determining the amount of a civil penalty.

M.G.L. c. 149, § 27C(b)(4) directs DALA to "vacate or modify" an appealed citation or order that was "erroneously issued." The challenged citation or order directing payment of a civil penalty must have been erroneously issued for DALA to vacate or modify it. If the citation or order was erroneously issued, DALA must, per the statute's directive, vacate it or modify it. *See Briggs v. Fair Labor Div.*, Docket Nos. LB-09-1022, LB-09-1029, Decision at 26 (Mass. Div. of Admin. Law App., Feb. 26, 2013), *reconsideration denied* (Mass. Div. of Admin. Law App., Jun. 24, 2013), *citing Majowicz v. Fair Labor Div*., Docket No. LB-11-163, Decision at 9-10 n. 2 (Mass. Div. of Admin. Law App., Sept. 11, 2012).

One such circumstance of erroneous issuance is where the violation alleged by the citation

occurred, but the amount of restitution due (for example, unpaid wages or overtime) proves to be less than what the citation alleged. In that case, the appropriate disposition on appeal, per M.G.L. c. 149, § 27C(b)(4), may be to modify the citation rather than vacate it. If the citation is to be modified, the DALA magistrate must decide whether the appropriate modification is an adjustment of the restitution amount downward to conform to the evidence, without adjusting the penalty amount, or whether the penalty amount should also be adjusted downward.

That depends, in turn, upon whether the penalty amount was related to the restitution amount. If the Division calculated a penalty in proportion to the amount of restitution owed—for example, by computing a specific percentage of the restitution amount—and the restitution amount proves to be less than what the Division determined, DALA will attempt to recalculate the penalty relative to the lower restitution amount, based upon the same proportion the Division applied. *See Hatfield v. Fair Labor Div.*, Docket Nos. LB-11-427, LB-11-428, Decision at 11 (Mass. Div. of Admin. Law App., Apr. 7, 2015); *see also Tavares v. Fair Labor Div.*, Docket No. LB-11-156, Decision at 12 (Mass. Div. of Admin. Law App., Feb. 7, 2012). However, the evidence may show that the Division did not assess a penalty in proportion to unpaid wages—for example, if the Division selected a penalty amount it viewed as reasonable in light of the violations the citation asserted. In that case, DALA will determine whether the penalty amount assessed for the applicable Wage and Hours Law violation is unreasonable or otherwise erroneous, and the evidence it considers on this point will include what it understands to be the Division's penalty assessment policy or practice. *Hatfield*; Decision at 14.[17]

[17]/ In *Hatfield*, DALA sustained civil penalties totaling $250 for failure to pay wages timely and failure to pay overtime as reasonable, because (1) a $150 civil penalty assessed by the Division against an

Here, the Division assessed two civil penalties against the petitioners for Wage and Hours Law violations. The $250 penalty was assessed for an unintentional failure to pay wages timely to Mr. Gallagher, in violation of M.G.L. c. 149, § 148. Investigator Pak explained that this penalty amount was just below 50 percent of the $532 restitution amount (actually, 46.99 percent), and that 50 percent was the "normal" penalty assessed for this unpaid wage amount when, as here, there were no prior violations and the violation was unintentional. (Finding 34.) In contrast, the $500 penalty was not assessed in proportion to the restitution amount. Instead, the amount of this penalty was based upon the nature of the Wage and Hours Law violation the citation alleged (unintentionally misclassifying an employee as an independent contractor), and it was within the lower range of penalties the Division applied to this violation in other cases. (Findings 33, 34.)

The Division identified sufficiently the basis on which it computed both penalties, underscoring that both reflected unintentional first-time violations. In terms of the sufficiency of penalty factor consideration and how the Division weighed those factors, neither penalty was erroneously issued.

The December 3, 2018 Decision reduced, tentatively, the $250 penalty for unintentional failure to pay wages timely. The Division based the penalty amount upon a specific percentage of

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employer for nonpayment of wages exceeded the amount of wages owed, and a $100 civil penalty assessed for unpaid overtime was slightly less than the amount of overtime pay owed; (2) the alleged violations occurred, but the restitution amounts for unpaid wages and overtime proved to have been less than citations alleged, and were therefore modified by the DALA magistrate; (3) there was no evidence that the Division based either penalty upon a percentage of the restitution amounts; (4) the Division investigator testified that, notwithstanding the reduction of the restitution amounts, the combined penalty amount ($250) remained reasonable in light of the nature of the Wage and Hours Law violations on which they were based; and (6) the employer did not show that the penalty amounts assessed for the violations were unreasonable or otherwise erroneous.

the restitution amount (46.99 percent). The December 3, 2018 Decision reduced the restitution amount. Mr. Gallagher's compensable work hours should not have included commuting time he included in the hours he reported. It also should not have included unpaid 30-minute lunch breaks to which Mr. Gallagher was entitled by statute on each day he worked six or more consecutive hours at Massachusetts sites, absent any evidence that Mr. Croteau directed him to work through those lunch breaks. I reduced the penalty assessed for unintentional failure to pay wages timely by multiplying the reduced restitution amount I have determined ($427) by the percentage of the restitution amount the Division applied in computing the original restitution amount (46.99 percent). The penalty was therefore reduced, tentatively, to $200.65.

However, I sustained the $500 penalty assessed against the petitioners for unintentionally misclassifying Mr. Gallagher as an independent contractor. It is true that this penalty amount was nearly 100 percent of the restitution amount the Division computed ($532), but the Division did not base the penalty upon a specific percentage of the restitution amount, as it did in computing the $250 penalty it assessed for failure to pay wages timely. Instead, the $500 penalty amount was applied relative to the nature of the violation the citation alleged (unintentionally misclassifying an employee as an independent contractor) and, as to this type of violation, the amount was as a minimum below which the Division would not go, as a matter of policy or practice. Because the penalty amount was not based upon the amount of unpaid wages owed to Mr. Gallagher, I did not reduce it in proportion to the reduced restitution amount. Instead, I determined whether the $500 penalty was unreasonable or otherwise erroneous.

The petitioners had the burden of proving that the $500 penalty was erroneously issued,

whether because its amount was unreasonable or for any other reason. They did not sustain this burden. The petitioners did not show that the citation for misclassification was issued for want of enforcement jurisdiction or factual basis, as they had claimed. I concluded, instead, that Mr. Gallagher was indeed an employee of the petitioners in September 2014 rather than an independent contractor, and that the Division had enforcement jurisdiction here as a result. Nor did they show that the penalty was disproportionate in the circumstances. The $500 penalty was based upon a first-time, unintentional violation, and reflected a lower-range penalty amount for such unintentional violations. It was not based upon, or assessed in proportion to, the maximum penalty the Division could assess for an intentional violation.

The December 3, 2018 Decision affirmed the $500 civil penalty, therefore.

5. Fair Labor Division's Comments in Response to Tentative Penalty Modification

The Fair Labor Division filed comments on the tentative modification of the $250 civil penalty on December 21, 2018. It argued that the penalty reduction was not warranted and requested that it not be reduced in the final Decision. I turn to the Division's arguments against reducing the $250 penalty next.

a. Relationship of Penalty Amount to Restitution Amount

I begin with the Division's assertion that the penalty amount "may have been" related to the restitution amount, but this was only one factor the Division considered in assessing it, and the penalty amount was reasonable.

The testimony showed that the Division assessed a penalty based upon a percentage of the restitution amount (46.99 percent) that was lower than the percentage it normally assessed for an unintentional failure to pay wages (50 percent of the restitution amount). In contrast, the $500 penalty it assessed here for misclassifying Mr. Gallagher as an independent contractor was based not on a percentage of restitution but on the nature of the violation, and was within the lower range of penalties the Division assessed for this violation in other cases. (*See* Findings 33-34, and discussion above at 50-51.) Accordingly, the $250 penalty was *definitely*, not "possibly," related to the restitution amount.

Next, the Division argues that it considered factors other than the restitution amount in computing the $250 penalty, so that the penalty need not, and should not, be reduced simply because the restitution amount is reduced. This argument is contrary to the evidence, and to DALA's consistent approach to recomputing the penalty amount when it was in fact based upon the restitution amount.

The December 3, 2018 Decision explained that when the restitution amount proves to be less than what the Division determined it to be, "DALA will attempt to recalculate the penalty relative to the lower restitution amount, based upon the same proportion the Division applied," *citing Hatfield v. Fair Labor Div.*, Docket Nos. LB-11-427, LB-11-428, Decision at 11 (Mass. Div. of Admin. Law App., Apr. 7, 2015), and *Tavares v. Fair Labor Div.*, Docket No. LB-11-156, Decision at 12 (Mass. Div. of Admin. Law App., Feb. 7, 2012). (*See* above at 49-50.) If the evidence shows that the Division did not assess the penalty in proportion to unpaid wages, and selected, instead, an amount it viewed as reasonable in light of the violations alleged, "DALA will determine whether the penalty

amount assessed for the applicable Wage and Hours Law violation is unreasonable or otherwise erroneous, and the evidence it considers on this point will include what it understands to be the Division's penalty assessment policy or practice," citing *Hatfield*, Dec. at 14.

In *Hatfield,* there was no evidence that the Division based either of the two civil penalties in question (one for failure to pay wages timely, and the other for failure to pay overtime wages) upon a percentage of a related restitution amount for unpaid wages. Here, the evidence showed that the Division chose different approaches in computing the two civil penalties it assessed. It based the $500 penalty for misclassifying Mr. Gallagher as an independent contractor upon its consideration of the penalty factors recited by M.G.L. c. 149, § 27C(b)(2), rather than upon the amount of unpaid wages Mr. Gallagher is owed. In computing the $250 penalty, however, it based the penalty upon the restitution amount (46.99 percent) , and it applied a percentage of restitution only slightly lower than what it applied generally in assessing civil penalties in other unpaid wage cases (50 percent).

The Division made a reasoned, and deliberate, decision to follow these different approaches. Clearly, the Division knew how to identify a penalty as unrelated to a restitution amount if that was indeed the case. I credit its choice to do so here as to the $500 penalty, but not as to the $250 penalty.

The $250 penalty was related to the restitution amount. As a result, I recompute the penalty amount in proportion to the reduced restitution, maintaining the percentage of restitution on which the penalty was based (46.99 percent), consistent with the approach DALA followed *in Hatfield*.

b. The Reduced Restitution Was Not Based Upon Petitioners' Spreadsheet

The Division also asserts that the December 3, 2018 Decision reduced the restitution amount

based upon Mr. Croteau's spreadsheet (Exh. 10), a document it describes as unreliable because it contains information that was not presented during the hearing, and because Mr. Croteau did not appear for cross-examination related to the spreadsheet.

The argument misunderstands the reasons for admitting this exhibit in evidence, misstates the evidentiary basis for reducing the amount of Mr. Gallagher's unpaid wages from $532 to $427, and overstates significantly the weight that the spreadsheet was given, which, in fact, was close to none.

In its post-hearing memorandum, the Division argued that the spreadsheet should be given no weight as to the hours Mr. Gallagher had worked between September 17 and 26, 2014 or as evidence of Mr. Croteau's alleged $400 cash payment. The Division asserted these arguments in its post-hearing brief, and repeated them in responding to the December 3, 2018 Decision.

Although Mr. Croteau's spreadsheet (Exh. 10) remained in the mix of evidence regarding Mr. Gallagher's work hours, and while I considered all this evidence in attempting determine what restitution he is owed, this exhibit was not determinative. Mr. Croteau's spreadsheet appeared to corroborate portions of each party's hearing testimony, all of which had been subject to cross-examination, and that reduced substantially any hearsay-related risk this exhibit may have posed, (*See* above at 6-7.) Rather than strike the spreadsheet, therefore, I marked it in evidence and allowed the parties to present arguments as to what weight it should be given. (*See* above at 7.)

The December 3, 2018 Decision clearly rejected Mr. Croteau's arguments regarding the $400 cash payment and the reduction of Mr. Gallagher's hours as his spreadsheet showed. It recited no finding that Mr. Croteau had made this cash payment, and found, instead, that (1) he recalled having made it; (2) although the spreadsheet showed this cash payment, it did not show the date of payment,

and it was unclear when the spreadsheet was created or when the data regarding the $400 cash payment was inputted into whatever program was used to create it; (3) Mr. Croteau had no written backup for this payment, such as an email to Mr. Gallagher confirming that this payment was made, or a receipt or email from Mr. Gallagher acknowledging this cash payment; and (4) Mr. Gallagher denied receiving this cash payment. (See Finding 25.) I also determined that Mr. Croteau's spreadsheet not only deducted excessive unpaid lunch break time from his paid hours, but also showed that Mr. Gallagher had worked 16.5 hours during the week of September 21-27, 2014, two more hours than the 14.5 total work hours the same spreadsheet recorded. (*Id*.) The December 3, 2018 Decision pointed out, thus, two errors that made Exhibit 10 unreliable in determining the total number of hours that Mr. Gallagher worked, and the unpaid work hours for which he was owed restitution.

The December 3, 2018 Decision reduced the amount of restitution due, but on different grounds than Mr. Croteau asserted or that Exhibit 10 purported to show. The adjustments made to the work hours Mr. Gallagher claimed were based upon the time he reported in his emails to Mr. Croteau. Mr. Gallagher's reported time included travel time and did not show any lunch breaks.

This information, other than Mr. Croteau's spreadsheet (Exh. 10), proved determinative in computing the unpaid wages Mr. Gallagher was owed. (S*ee* Findings 17 and 23). It does so still.

As to the travel time Mr. Gallagher reported, the December 3, 2018 Decision applied the legal standard that travel time was work time payable as wages if it was required during work hours, such as traveling between job sites, but was not payable as wages if it was commuting time. *See* Department of Labor Standards Minimum Wage Regulations, 454 C.M.R. § 27.04(4). All of the

travel time Mr. Gallagher reported was time commuting to and from Massachusetts job sites. It was not compensable, therefore, and was not included in recomputing the unpaid hours worked for which Mr. Gallagher is owed restitution, (*See* Dec. 3, 2018 Decision at 37-40.)

As for lunch breaks: Mr. Gallagher reported none; I determined that Mr. Croteau did not justify deducting a full hour of lunch for each day Mr. Gallagher worked because there was no agreement that he would do so; however, as a matter of law, Mr. Gallagher was entitled to 30 minutes of unpaid lunch breaks on each day he worked six or more consecutive hours, exclusive of his commuting time, absent evidence that Mr. Croteau directed him to work through his lunch breaks on those days. *See* M.G.L. c. 149, § 100 and 454 C.M.R. § 27.02. According to the time Mr. Gallagher reported to Mr. Croteau, he worked six or more consecutive hours on Massachusetts work sites on September 18, 2014 and on September 26, 2014. (*See* Findings 17 and 23.) Therefore, the December 3, 2018 Decision deducted 30 minutes of unpaid for each of those two days, for a total of one hour of noncompensable lunch break time that was then deducted from the hours Mr. Gallagher reported working at Massachusetts work sites. (*See* December 3, 2018 Decision at 40-43).

Accordingly, the reduction of restitution owed to Mr. Gallagher was not based upon Mr. Croteau's spreadsheet (Exh. 10), and, as a result, neither was the reduction of the $250 penalty in proportion to the recomputed restitution amount. Exhibit 10 was considered, but was not relied upon in recomputing the restitution amount or the reduction of the civil penalty assessed for failure to pay wages timely to Mr. Gallagher. Consequently, neither was based upon Exhibit 10, neither gave determinative weight to what Exhibit 10 purported to show, and both rejected Mr. Croteau's deductions for lunch breaks as Exhibit 10 showed. There was no Exhibit 10-related error, therefore.

c. Additional Arguments Offered by the Comments

The determination of the lunch break and travel time deductions as a matter of law also resolves the two additional argument the Division raises in its comments on the tentative penalty reduction.

One is that in deducting 30 minutes of work time on those days on which Mr. Gallagher worked more than six hours, I assumed that he took meal breaks, but it was equally possible that he took none.

There was ample opportunity during the hearing to cross-examine Mr. Gallagher about this subject. Every other aspect of Mr. Gallagher's work day was addressed by his direct and cross-examination. (*See* Findings 7 and 8.) Despite that, the testimony revealed many assumptions, but no agreement, and minimal certainty, regarding Mr. Gallagher's work day except for the total hours of work he reported including commuting time:

> There was no written agreement regarding this work, the number of hours Mr. Gallagher was expected to work and when the work day started or ended, whether the hourly rate Mr. Croteau was paying would be only for Mr. Gallagher's actual work hours at a job site, or whether paid hours would also include the time Mr. Gallagher spent traveling to and from a job site. Mr. Gallagher assumed that he was to include his travel time to and from a work site in the hours he reported to Mr. Croteau weekly by email. Mr. Croteau's opinion, which he may or may not have shared with Mr. Gallagher before hiring him, was that travel time was not hours spent working, although he would pay travel time to some workers whose travel time was one hour or more to and from a work site. If there was any email correspondence between Mr. Gallagher and Mr. Croteau in which these competing opinions regarding payment for travel time was raised and discussed, it is not in the record.

(Finding 7.)

The ambiguity as to whether or not Mr. Gallagher took lunch breaks or not is not determinative here. The deduction of time for lunch breaks is resolved as a matter of law. On most days for which Mr. Gallagher reported his work hours, he did not report having worked six consecutive hours or more. For those days he was not entitled to uncompensated meal breaks as a matter of law, and for those days the December 3, 2018 Decision deducted no uncompensated lunch break time. For each of the two days he reported working six consecutive hours or more after commuting time was deducted from the hours Mr. Gallagher reported (September 18 and 26, 2014), the December 3, 2018 Decision deducted half an hour of uncompensated lunch break time. Absent any evidence that Mr. Gallagher was directed by the respondents to work without a lunch break (which would have violated M.G.L. c. 149, § 100), or that he did not include unpaid lunch break time in the hours he reported, the uncompensated lunch break time to which Mr. Gallagher must be deducted from the hours he reported. As 454 C.M.R. § 27.02 provides, "[w]orking time does not include meal times during which an employee is relieved of all work-related duties." That Mr. Gallagher may have chosen to work through the required period of unpaid lunch break does not entitle him to include that time as compensable work time or as unpaid time for which wages are owed, absent any evidence that Mr. Croteau directed Mr. Gallagher to work without a lunch break on the two work days in question.

The Division also argues that DALA's deduction of travel time from the hours Mr. Gallagher worked should not have affected the penalty amount, because the Division complied fully with M.G.L. c. 149, § 27C(b)(2) in computing the $250 penalty. The argument misstates what this statute requires and is not supported by the Division's general practice. That the Division complied fully

with the penalty computation requirements of the statute shows no more than that it considered at least the penalty factors the statute specifies—previous Wage and Hours Statute violations by the employer, whether the employer intended to violate them, the number of employees affected by the present violations, and the monetary extent of the violations. M.G.L. c. 149, § 27C(b)(2) does not make those penalty factors exclusive.

The evidence shows that the Division based the $250 penalty on other factors the statute does not list—the restitution amount, and applying a percentage of it (here, 46.99 percent) that did not exceed, and was close to, the percentage the Division applied generally when the penalty and restitution amounts were related (50 percent of unpaid wages). In these circumstances, the actual hours Mr. Gallagher worked should have affected the penalty amount, and indeed did so, per the Division's own testimony. As the original penalty was 46.99 percent of the original restitution amount the Division computed, the reduced penalty is 46.99 percent of the reduced restitution amount recomputed here based on the evidence and the applicable law.

Accordingly, I confirm the reduction of the restitution amount from $532 to $427, and make final the December 3, 2018 Decision's tentative reduction of the $250 penalty to $200.66.

Disposition

For the reasons stated above:

(1) Amended Citation No.14-10-32076-001, issued to the petitioners for failure to pay wages timely to former employee Michael J. Gallagher without specific intent, is modified as follows:

(a) The restitution amount the citation ordered the petitioners to pay is reduced from

$532 to $427.

(b) The civil penalty assessed by the citation ($500) is reduced in proportion to the reduced restitution amount. Because the original penalty amount was 46.99 percent of the restitution amount, I multiply the reduced restitution amount ($427) by the same percentage (46.99 percent), which results in a reduction of the penalty from $250 to $200.66. This penalty amount is now made final.

(c) The total amount due and payable under the citation is therefore reduced from $750 to $627.66.

(2) I do not modify Citation No. 14-10-32076-002, issued to the petitioners for misclassifying Mr. Gallagher as an independent contractor without specific intent, which the December 3, 2018 Decision made final, together with the $500 penalty the citation assessed.

As a result of the above disposition, the total amount due and payable by the petitioners under both Citations is reduced from $1,282.00 to $1,127.66.

This is a final decision. Each of the parties is hereby notified that any person aggrieved by this decision may, within 30 days of receiving notice of it, seek judicial review by filing an appeal with the Superior Court, pursuant to M.G.L. c. 30A, § 14.

SO ORDERED.

DIVISION OF ADMINISTRATIVE LAW APPEALS

Mark L. Silverstein
Administrative Magistrate

Dated: September 21, 2020