COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss. Division of Administrative Law Appeals

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**SPENCER McNEIL and** Fax: (617) 626-7220

**PRIMARY POINT, INC.,** [**www.mass.gov/dala**](http://www.mass.gov/dala)

(Citation #13-08-24636-001) Docket No. LB-16-211

 Petitioners

 *v.*

**OFFICE OF THE ATTORNEY GENERAL,**

**FAIR LABOR DIVISION,**

Respondent

**Representative for Petitioners**:

Spencer McNeil

Primary Point, Inc.

2885 Sanford Ave, SW #32058

Grandville, MI 49418

**Attorney for Respondent**:

 Lillian Hirales, Assistant Attorney General

 Office of the Attorney General

 One Ashburton Place

 Boston, MA 02108

**Administrative Magistrate**:

Angela McConney Scheepers

**SUMMARY OF DECISION**

 The citation issued by the Attorney General’s Fair Labor Division, ordering the petitioners to pay $5,100.00 in restitution and a $1,100 civil penalty for their unintentional failure to make timely wage payments to an employee, in violation of G. L. c. 149, § 148, is vacated. The Petitioners have proven by a preponderance of the evidence that Citation #13-08-24636-001was issued erroneously.

**DECISION**

Pursuant to the provisions of G. L. c. 149, § 27C(b)(4), the Petitioner, Spencer McNeil d/b/a Primary Point, Inc., timely appealed a citation issued by the Attorney General’s Office for violations of the Commonwealth’s Wage and Hour Laws. *See generally* G.L. c. 149, §§ 1 *et seq*.; G. L. c. 151, §§ 1 *et seq*.

 The Respondent, Office of the Attorney General (OAG), issued Citation #13-08-24636-001 pursuant to G. L. c. 149, § 148, imposing an order of restitution in the amount of $5,100.00, a civil penalty[[1]](#footnote-1) of $1,100.00 for non-willful failure to make timely payment of wages in violation of G.L. c. 149, § 148, and an order to rectify all infractions immediately and to comply with all provisions of G. L. Chapters 149 and 151. Pursuant to G.L. c. 149, § 27C(b)(2), in determining the civil penalties, the OAG must consider the Petitioners’ previous violations or lack thereof, Mr. McNeil’s intent, the number of employees affected, the monetary extent of the violations and total monetary amount of the payroll involved.

I held a hearing on September 28, 2016 at the Division of Administrative Law Appeals (DALA), One Congress Street, Boston, MA. The Petitioners offered Exhibits 1-11 into evidence (P Exhibits 1-11). The Respondent offered Exhibits 1-10 into evidence (R Exhibits 1-11). Inspector Jennifer Pak of the OAG, Fair Labor and Business Practice Division testified on behalf of the Respondent. Former employee Marca Peterson testified for the Respondent via telephone. Mr. McNeil testified on his own behalf. The hearing was digitally recorded.

The Petitioners submitted their post-hearing brief on October 27, 2016. The Respondent submitted its post-hearing brief on October 28, 2016, whereupon the administrative record closed.

**FINDINGS OF FACT**

Based upon the testimony and documents presented at the hearing and reasonable inferences from them, I hereby render the following findings of fact:

1. The Petitioner, Spencer McNeil, is the owner/manager of Primary Point, Inc. (Primary Point), which was founded in 2002 and incorporated on February 18, 2015. Primary Point, Inc. (Primary Point) was a market research business services company located in Bedford, Massachusetts. (R Exhibit 8.)
2. Primary Point closed in October 2014. Mr. McNeil continues to perform market research work. (R Exhibit 5; Testimony of McNeil.)
3. Joseph Hyacinthe was an OAG Inspector; he has since retired. Jennifer Pak is also an OAG Inspector. (R Exhibit 9; Testimony of Inspector Pak.)
4. Marca Peterson performed business development and sales work at Primary Point from April 22, 2013 until July 24, 2013. Ms. Peterson reported to the Petitioner, Mr. McNeil. (R Exhibit 1; Testimony of McNeil; Testimony of Peterson, Testimony of Inspector Pak.)
5. In Mr. McNeil’s absence, Ms. Peterson was responsible for supervising the other employees. (R Exhibit 1; Testimony of McNeil.)
6. The other Primary Point employees used the ADP ezLaborManager, the web-based time and labor management system to keep track of their work hours. (R Exhibit 4; Testimony of McNeil.)
7. Ms. Peterson had no prior experience in the market research industry. She had previously worked in global equities, working in banking in Europe and opening European banks in the United States. At the time of Ms. Peterson’s hire, Primary Point was months away from insolvency. Ms. Peterson was retained to provide leads for new opportunities with her own business contacts. (Testimony of McNeil; Testimony of Peterson.)
8. Ms. Peterson was provided with a private office, access to a desk top computer and a telephone. When Mr. McNeil was not in the office, she functioned as a supervisor. No employees were allowed to work from home. (Testimony of McNeil.)
9. Ms. Peterson’s job consisted of cold calls: sending out short emails to her business contacts and the prospective clients in Primary Point’s client sales database. These emails were drafted according to a template and accompanied by a short telephone message, in most cases a one-minute voicemail message. If Ms. Peterson was able to reach a salesperson directly, the conversation would not last more than five minutes. In addition to the Primary Point client sales database, she also referenced databases of current accounts and made contacts on LinkedIn Prime. (P Exhibit 11; Testimony of McNeil; Testimony of Peterson.)
10. Ms. Peterson was also responsible for a new website design and update of the site. She retained a website design company, Revelation. After weeks of work, Mr. McNeil was unhappy with Revelation’s work and proposed to fire them. He also took over all communication with the website design company. (P Exhibits 9 and 11; Testimony of McNeil.)
11. At the time of her hire, Ms. Peterson and Mr. McNeil discussed partnership opportunities. Mr. McNeil owned 100% of Primary Point. He proposed the following vesting schedule: Phase I, a 20% partnership interest accruing to Ms. Peterson once Primary Point had achieved $100,000.00 in net revenues for three consecutive months; and Phase II, a 40% partnership interest would occur after Primary Point had achieved $200,000.00 in net revenues for three consecutive months. Once Ms. Peterson vested a partnership interest, Mr. McNeil would not be allowed to sell or disburse any corporate stock to a third party without Ms. Peterson’s permission. (P Exhibit 8; Testimony of McNeil.)
12. Under the partnership discussion, Ms. Peterson and Mr. McNeil would be paid at the same rate of pay, $25.00 per hour, which reflected Primary Point’s profitability, amortization of outstanding debt and other corporate obligations. Ms. Peterson would be paid only for hours worked in the office. (P Exhibit 8; Testimony of McNeil.)
13. On May 10, 2013, Ms. Peterson received a pay check for the pay period April 22, 2013 to May 10, 2013, for 120 hours of work. Ms. Peterson’s wages were $3,000.00, and after taxes and deductions amounted to $2,138.69. On June 7, 2013, Ms. Peterson received a pay check for the pay period May 12, 2013 through May 25, 2013, for 80 hours of work. Ms. Peterson’s wages were $2,000.00, and after taxes and deductions amounted to $1,513.68. (R Exhibits 1 and 2; Testimony of Peterson.)
14. Ms. Peterson received the May 10 and June 7, 2013 wages via direct deposit to her bank account. (R Exhibits 1 and 2.)
15. Ms. Peterson was not paid for the pay period of May 25, 2013 to July 24, 2013. She was absent from the office on June 12, 2013, her birthday. (R Exhibit 1; Testimony of Peterson.)
16. From late June, 2013 until mid-July 2013, Mr. McNeil was absent from the office for medical reasons. Ms. Peterson had been absent from the office for the previous two weeks without notification, returning only the day before Mr. McNeil’s departure. She assured him that she would be present to supervise the other employees during his absence. (P Exhibit 11; Testimony of Peterson.)
17. Ms. Peterson never appeared at Primary Point when Mr. McNeil was away. Mr. McNeil’s only notice of her absence was a July 1, 2013 email that she would be out for that one day. He later learned that she was hospitalized for an illness during his absence. (P Exhibit 11.)
18. Ms. Peterson appeared at the office upon Mr. McNeil’s return in July 2013. (Testimony of McNeil.)
19. In a July 11, 2013 email to Ms. Peterson on her Primary Point email account from his Primary Point account, Mr. McNeil stated, “I ran payroll for Jim, Steve, and Dan today. Unfortunately there is not enough available to pay either you or I. To do that we need to double the size or volume of business.” Ms. Peterson forwarded this email to Inspector Hyacinthe on January 29, 2016 from her personal hotmail email account. (R Exhibit 3.)
20. On July 24, 2913, Mr. McNeil terminated Ms. Peterson when she appeared for work. He informed her that her separation was due to her failure to generate business. He pulled out the connection cables from her desktop and told her to pack up her belongings. (P Exhibit 2; R Exhibit 4; Testimony of McNeil.)
21. On August 19, 2013, Ms. Peterson filed a complaint with the OAG, alleging that the Petitioners owed her wages in the amount of $12,000.00 for work performed from May 10 to July 24, 2013. Ms. Peterson provided a copy of her pay stub for the period of April 22 to May 10, 2013, showing that she had been paid $3,000.00 for 120 hours of work. She did not produce the June 7, 2013 paystub for $2,000.00. (R Exhibits 1 and 3; Testimony of Inspector Pak.)
22. In the complaint, Ms. Peterson wrote:

I was paid once during my employment for $3,000.00 for three weeks. I was told I would be paid once the other employees were paid and he had more money. This is not acceptable.

(R Exhibit 4.)

1. Ms. Peterson was ineligible for unemployment compensation due to her short tenure with Primary Point. (Testimony of Peterson.)
2. On October 8, 2013, the OAG, through Inspector Hyacinthe, sent a payroll demand to the Petitioners via USPS first class and certified mail, return receipt. For the time period of April 22, 2013 through July 24, 2013, pursuant to G.L. c. 151, §§ 3 and 5, the OAG sought:

Payroll records including paystub, daily and weekly time-keeping records, and all employment which reflect the Complainant’s identity, occupation, rate of pay, wages paid, and deductions taken each pay period.

Inspector Hyacinthe advised that failure to provide the documents by October 18, 2013 could result in a civil citation of $2,000.00 and a penalty of $100 per business day after October 18, 2013. (R Exhibit 2; Testimony of Inspector Pak.)

1. Mr. McNeil was further advised in the October 8, 2013 payroll demand that he could resolve the matter by (a) paying restitution in the amount of $12,000.00 via a certified check or money order made payable to the “Office of the Attorney General on behalf of Marca Peterson” and by paying $2,400.00 in civil penalties to the Commonwealth. (R Exhibit 2.)
2. Mr. McNeil responded to the payroll demand on October 16, 2013, with check stubs showing that Ms. Peterson had received a May 10, 2013 check for wages of $5,000.00 and a June 7, 2013 check for wages of $2,000.00. The May 10, 2013 check covered the pay period of April 22, 2013 until May 10, 2013; and the June 7, 2013 check covered the pay period of May 13, 2013 until May 24, 2013. (R Exhibit 4.)
3. Mr. McNeil also stated in his response that Ms. Peterson had failed to report to work at Primary Point for more than four weeks from the beginning of June to mid-July 2013. Mr. McNeil has been away from the office from mid-June to mid-July 2013, and learned from the other employees that she had not come to work. When Ms. Peterson returned to work, Mr. McNeil informed her that she had been terminated due to her failure to generate revenues for the company. (Exhibit 4; Testimony of McNeil.)
4. Based on Ms. Peterson’s recollections and emails sent while working, Inspector Hyacinthe created an audit of the work period April 21, 2013 until July 24, 2013. On the days she was not in the office, Mr. Hyacinthe credited Ms. Peterson with eight hours work on any day she sent an email from home on her Primary Point email account. Inspector Hyacinthe revised the original restitution demand of $12,000.00, instead concluding that the Petitioners owed Ms. Peterson $5,100.00 in straight time. (R Exhibits 6 and 7; Testimony of Inspector Pak.)
5. The audit recognized that Ms. Peterson had been compensated for straight wages for 120 hours at the rate of $25.00 per hour for the weeks of April 21, 2013 through May 11, 2103 in the amount of $3,000.00. The audit recognized that she had also been compensated for straight wages for 80 hours at the rate of $25.00 per hour for the weeks of May 12, 2013 through May 25, 2013 in the amount of $2,000.00. (R Exhibits 6 and 7; Testimony of Inspector Pak.)
6. On October 25, November 1, November 4 and November 6, 2013, Mr. McNeil and Inspector Hyacinthe exchanged emails in regard to the payroll demand. On November 11, 2013, Mr. McNeil sent the inspector an “Email Tracking Log” of Ms. Peterson’s emails. Mr. McNeil did not submit copies of the emails to the OAG, stating that Ms. Peterson had changed the password on her Primary Point desktop, preventing him from accessing it. He wrote, “I am told I will have to hire a computer technician to come into the office to allow us to gain access to the computer. I am working to make this happen as soon as possible.” (R Exhibit 6.)
7. The evidentiary record shows no further contact between the parties until a telephone call and an email, both taking place on February 5, 2016. (R Exhibit 6.)
8. Based on the February 5, 2016 telephone call and email, the payroll summary report and the email tracking log, on February 17, 2016 Inspector Hyacinthe emailed Mr. McNeil an audit. The audit concluded that Ms. Peterson was owed straight wages for 72 hours at the rate of $25.00 per hour for the period of May 26, 2013 through June 8, 2013 in the amount of $1,800.00; straight wages for 64 hours at the rate of $25.00 per hour for the period of June 9, 2013 through June 22, 2013 in the amount of $1,600.00; straight wages for 16 hours at the rate of $25.00 per hour for the period of June 23, 2013 through July 6, 2013 in the amount of $400.00; straight wages for 32 hours at the rate of $25.00 per hour for the period of July 7, 2013 through July 20, 2013 in the amount of $800.00; and straight wages for 20 hours at the rate of $25.00 per hour for the period of July 21, 2013 through July 24, 2013 in the amount of $500.00. (R Exhibits 6 and 7; Testimony of Inspector Pak.)
9. The audit is consistent with the email log. According to the Primary Point email log, Ms. Peterson sent emails to three Primary Point clients on June 10, 2013; an email to a Primary Point client on June 11, 2013; and emails to three Primary Point clients on June 22, 2013. These clients were from the Primary Point client database. (P Exhibit 10; Testimony of McNeil.)
10. Ms. Peterson sent eight personal emails from her office email account on June 12, 2013, while absent for her birthday. (P Exhibit 10.)
11. According to the email log, Ms. Peterson was out sick from June 24 –July 5, 2013. (P Exhibit 10; Testimony of McNeil.)
12. On February 18, 2016, Mr. McNeil emailed the OAG that he would review and respond. (R Exhibit 6.)
13. The Fair Labor Division uses form letters to issue citations under G.L. c. 151, § 19(3). They contain standard language, with checkboxes used to mark and describe alleged infractions as appropriate in each individual case. (R Exhibit 8.)
14. On April 12, 2016, the Attorney General, through Inspector Hyacinthe, issued a citation to the Petitioners. Before issuing the citations, Inspector Hyacinthe considered previous violations, whether Mr. McNeil intended to produce payroll records, whether he intended to pay Ms. Peterson her wages more than six days after she had completed the work, the number of employees affected, the monetary extent of the violation and the total monetary amount of the payroll involved. (R Exhibit 8; Testimony of Inspector Pak.)
15. Citation # 13-08-24636-001 consisted of an order to “rectify all infractions immediately,” as well as a $1,100.00 civil penalty for “[f]ailure to make timely payment of wages due and owing from 5/26/13 to 7/24/13” to Marca Peterson. G. L. c. 149, § 148. This alleged violation was marked “non-willful.” The order of restitution was in the amount of $5,100.00. (R Exhibit 8.)
16. The Petitioners filed a timely appeal with the Division of Administrative Law Appeals on April 26, 2016. (R Exhibit 10.)

**CONCLUSION AND ORDER**

*Statutory framework*

 Under the Commonwealth’s Wage and Hour Laws, employers must keep true and accurate records of each employee’s name, address, occupational classification, hours worked, wages paid, and “such other information ... deem[ed] material and necessary” by the Attorney General or the Department of Labor Standards.[[2]](#footnote-2) G. L. c. 151, § 15. *See also* G. L. c. 149, § 27B. Employers must keep these records for all employees who perform work within Massachusetts, even if the employer is a foreign corporation. *See, e.g.*, *Bona v. Office of the Atty. Gen*., LB-08-278 (DALA 2009).

Upon request, the Attorney General is entitled to inspect those records, as well as any other “documents that bear on a question of wages.” *Wiedmann v. The Bradford Group, Inc.*, 444 Mass. 698, 704 (2005). *See* G.L. c. 149, §§ 2; G. L. c. 151, §§ 3, 15. The Attorney General need not explain or justify any such request to employers. *Metro Equip. Corp. v. Commonwealth*, 74 Mass. App. Ct. 63, 67 (2009). To ensure compliance, the Attorney General may issue civil citations to any employer as follows:

Any employer or the officer or agent of any corporation who fails to keep the records required under this chapter or to furnish such records to the commissioner, or any authorized representative of the commissioner upon request, or who falsifies such records, or who fails to comply with any requirement of the commissioner… shall have violated this section and shall be punished or shall be subject to a civil citation or order…

G. L. c. 151, § 19(3). This liability extends to the corporate employer as a whole, as well as to individual “officers or agents having the management of such corporation.” G. L. c. 149, § 148. *See Wiedmann*, 444 Mass. at 710-11.

 Each day that an employer fails to keep or furnish records constitutes a separate offense. G.L. c. 151, § 19(3). All of the enumerated infractions carry strict liability, because “[n]one of the statutory criteria speaks of the employer’s intent.” *Somers v. Converged Access, Inc.*, 454 Mass. 582, 590-91 (2009). However, in determining the amount of the corresponding fine for each infraction, the Attorney General must consider the employer’s intent to commit the infraction. *See* G. L. c. 149, § 27C(b).

 G. L. c. 149, § 148 requires employers to pay their employees all wages owed to them within six days of the end of the applicable pay period. Pursuant to Section 148, a worker can recover unpaid wages if: (1) the worker is an employee of the employer; (2) the employee worked for the employers; and (3) the employee was not paid by the employer for the work he performed.

The Petitioners bear the burden of proving that the citation was erroneously issued. G. L. c. 149, § 27C(b)(4). A person aggrieved by a citation from the Attorney General may appeal to DALA, but must do so within ten days of receiving the citation. *Id*. If the petitioner “demonstrates by a preponderance of evidence that the citation ... was erroneously issued,” DALA may vacate or modify the citation as appropriate. *Id*. Otherwise, DALA must affirm the citation as issued. *Id.* If the citation is not vacated, the petitioner must comply with DALA’s decision within 30 days. *Id.* at § 27C(b)(6).

Prior to issuing the appealed citation on April 12, 2016, on August 20, 2014 the Attorney General requested records under G. L. c. 151, § 15 — namely, all applicable paystubs, employee records and time records from June 1, 2013 until the present. Mr. McNeil submitted the requested paystubs for the relevant period to the OAG, but was unable to produce timekeeping records. The inspector was able to determine from the paystubs the “actual amount paid each pay period to each employee” that is mandated by the statute, and found that Ms. Peterson had been paid an additional $2,000.00 in wages that was not included in her complaint. In reviewing the documents, the OAG reduced the restitution requested from $12,000.00 to $5,100.00.

*Orders of Restitution*

The dispute in the instant matter arises over the accuracy of the restitution orders, in addition to the onerousness of the civil penalty as imposed by the OAG. Mr. McNeil argued that he does not owe Ms. Peterson any wages because she was not working at the relevant time.

Both of the witnesses, Mr. McNeil and Ms. Peterson, present serious credibility problems. Mr. McNeil testified that all Primary Point employees, except for Ms. Peterson, used the ADP ezLaborManager, the web-based time and labor management system to keep track of their work hours. Mr. McNeil claimed that he had provided Ms. Peterson with a user name, password and instructions for this purpose. He testified that he first learned that she had not been using the ADP ezLaborManager when he had to enter her payroll information in order to cut the May and June 2013 paychecks. He testified that he advised her that she had to use the payroll system, just as any other any employee. He thought that she had been doing so until he retrieved the payroll records for the OAG October 2013 payroll demand.

This assertion makes no sense. The records show that other employees were paid from the payroll system after Primary Point issued Ms. Peterson’s June 7, 2013 paycheck, so Mr. McNeil would have been aware that Ms. Peterson was not using the system.

Mr. McNeil further argued that Ms. Peterson was paid for working only in the office. He also argued that Ms. Peterson did not deliver on the purpose for which she was hired, to create opportunities for Primary Point with her alleged extensive business contacts. Because Ms. Peterson’s work was telephone and email based, she could indeed work from home. However, Mr. McNeil disputed that that was their arrangement. Mr. McNeil stated that as Ms. Peterson was hired as a commission-only salesperson, she could draw against the commissions equal to $25.00 per hour she spent working in Primary Point’s office location. He disputes the OAG’s audit based on hours Ms. Peterson worked from home, especially its computation that she should receive credit for a whole day’s pay for any day on which she sent an email. Mr. McNeil proposed that Ms. Peterson should instead be paid for each email sent.

Mr. McNeil further stated that Ms. Peterson was absent from Primary Point’s office from June 2013 to the third week in July 2013. She was not only absent from the job, she also left the other employees without supervision. Ms. Peterson gave Mr. McNeil notice of her absence for only one day, July 1, 2013, via email. Ms. Peterson admitted that she was absent from the office and did not perform any work for only one day, her birthday on June 12, 2013. When Ms. Peterson reappeared in July 2013, Mr. McNeil terminated her, allegedly due to her failure to generate business. Ms. Peterson’s last paid working day was May 25, 2013.

Mr. McNeil testified that Ms. Peterson did not appear at the Primary Point offices from June to mid-July 2013. Ms. Peterson testified that she was working from home. Mr. McNeil stated that she was ill. In the absence of any recordkeeping for Ms. Peterson from the Petitioners for May 26 to July 24, 2013, even records stating that she was absent or had not worked, I examined the OAG’s audit. Inspector Hyacinth credited Ms. Peterson for eight hours pay for any day on which she sent a work email. The emails that the inspector relied upon are not in evidence, but the Petitioners’ February 2016 “Email Tracking Log” is. Although Mr. McNeil stated in his November 2013 email to the OAG that he could not access Ms. Peterson’s desktop at Primary Point, he was able to create a log of her emails.

Inspector Hyacinth concluded from his investigation that Ms. Peterson was owed straight wages for 72 hours at the rate of $25.00 per hour for the period of May 26, 2013 through June 8, 2013 in the amount of $1,800.00; straight wages for 64 hours at the rate of $25.00 per hour for the period of June 9, 2013 through June 22, 2013 in the amount of $1,600.00; straight wages for 16 hours at the rate of $25.00 per hour for the period of June 23, 2013 through July 6, 2013 in the amount of $400.00; straight wages for 32 hours at the rate of $25.00 per hour for the period of July 7, 2013 through July 20, 2013 in the amount of $800.00; and straight wages for 20 hours at the rate of $25.00 per hour for the period of July 21, 2013 through July 24, 2013 in the amount of $500.00.

The Petitioners bear the burden of proving that the citation was erroneously issued, pursuant to G. L. c. 149, § 27C(b)(4). Mr. McNeil has argued that the order of restitution is incorrect. Mr. McNeil stated that Ms. Peterson was not allowed to work from home, was only paid for hours she appeared in the office, and thus Primary Point owes her no wages. It is Mr. McNeil’s responsibility to comply with the Commonwealth’s Wage and Hour laws, and he failed to do so when he did not maintain proper employee records for Ms. Peterson. Because of the incomplete payroll records, the OAG relied in part on Ms. Peterson’s computations.

However, I am dissatisfied with the OAG’s audit. Inspector Hyacinthe depended on Ms. Peterson’s statements and the email log produced by Mr. McNeil. As previously stated, the emails are not in evidence and it is uncertain whether they were provided to the OAG by any party. Although an email log is referenced in a November 2013 email between Mr. McNeil and the inspector, the email log introduced into evidence is not contemporaneous.

Mr. McNeil and Ms. Peterson each present a version of events that is partially credible, but the testimony of each is also problematic. The OAG arguments would have had more force if Ms. Peterson were a credible witness, more forthcoming and less reticent in her testimony. Her testimony was not reliable. She testified that she could not access the emails from her Primary Point account after her termination in July 2013. However, using her hotmail personal email account on January 29, 2016, she was able to forward Inspector Hyacinthe a July 11, 2013 email from her Primary Point account. Thus she had access to the work email account more than two years after her separation.

Ms. Peterson could not testify to any specificity as to work performed during June and July 2013. Information could have been redacted or edited in order to protect Primary Point clients and customers, and Ms. Peterson’s alleged business contacts. She admitted that she was away from the office on June 12, 2013, spending her birthday on Nantucket. She also emailed Mr. McNeil that she would be out of the office on July 1, 2013. She testified that she had pneumonia in either July or August of 2013, but that she worked from home as she was able. She also testified that she communicated with Mr. McNeil via Skype when he was away from late June to mid-July 2013. There are no telephone logs in evidence, either from Ms. Peterson’s home telephone or her cell phone, to establish whether or not she made follow-up telephone calls after sending emails from her home.

Ms. Peterson’s credibility was further diminished by the fact that she omitted the second $2,000.00 paycheck from Primary Point in her August 19, 2013 complaint. The wages had been deposited via direct deposit to her bank account. After Mr. McNeil responded to the payroll demand in October 2013, Inspector Hyacinthe reduced the restitution order and civil penalty.

Mr. McNeil’s testimony was similarly not credible. He testified that he could not access Ms. Peterson’s emails. It is reasonable to assume that he gained access at some point, allowing him to create the email log which he emailed to the OAG. In fact, he also noted in the log when Ms. Peterson’s emails were personal or work related. There is no evidence that he relied on Primary Point’s telephone records to note whether or not Ms. Peterson was conducting follow up calls after emails while at work.

Mr. McNeil testified to his general frustration with the OAG. There was a twenty-seven month delay between his last contact with the OAG in 2013 and the February 2016 telephone discussion with the OAG before the issuance of the citation in April 2016. Mr. McNeil testified that he was in negotiations with a previous AAG, and after producing the paystub for the $2,000.00 in wages and disputing that he owed Ms. Peterson any further wages, he thought that the matter had been resolved in his favor when he heard nothing further. In that twenty-seven month time period, Primary Point had closed. According to Mr. McNeil’s testimony, since Primary Point is no longer in operation and has no agent in the Commonwealth, the Secretary of State’s office has requested that he dissolve the corporation.

The statute allows me to modify the citation, but the evidence is too undeveloped to allow me to make a supportable finding as to the total hours of Ms. Peterson’s unpaid work. There is not sufficient evidence that Ms. Peterson had been working on the days she was absent from the office. I am inclined to accept Mr. McNeil’s assertion that Ms. Peterson generated no new revenue to Primary Point. 

As I noted earlier, the governing statute provides that an Administrative Magistrate who hears an appeal from a citation for violating state labor laws on timely payment to employees “may affirm [the citation] or if the aggrieved person demonstrates by a preponderance of evidence that the citation or order was erroneously issued, vacate, or modify the citation.” G. L. c. 149, § 27C(b)(4). The Petitioners have established by a preponderance of the evidence that the citation issued them by the OAG for failure to pay $5,100.00 wages to Marca Peterson was erroneously issued.

Now that I have determined that the citation was erroneously issued, I may not affirm it; I may only vacate or modify it. G. L. c. 149, § 27C(b)(4). Because the evidence is insufficient to show any particular level of unpaid wages, I have no basis on which to modify the citation. Accordingly, I conclude that the citation cannot be modified and must therefore be vacated.

ORDER

Citation #13-08-24636-001 as issued by the Attorney General’s Fair Labor Division, ordering Spencer McNeil and Primary Point, Inc. to pay $5,100.00 in restitution and a $1,100 civil penalty for their unintentional failure to make timely wage payments to Marca Peterson, in violation of G. L. c. 149, § 148, is vacated.

SO ORDERED.

DIVISION OF ADMINISTRATIVE LAW APPEALS

Angela McConney Scheepers

Administrative Magistrate

DATED: March 22, 2017

1. Pursuant to G.L. c. 149, § 27C(b)(2), in determining the civil penalties, the OAG must consider the Petitioners’ previous violations or lack thereof, Mr. McNeil’s intent, the number of employees affected, the monetary extent of the violations and total monetary amount of the payroll involved. [↑](#footnote-ref-1)
2. G. L. c. 151, § 15 applies generally to all “employers” and “employees.” [↑](#footnote-ref-2)