

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss.

Division of Administrative Law Appeals

**Abdu Nessralla and Fourstar
Landscaping & Construction, Inc.**
Petitioners,

v.

Docket No. LB-14-387 and LB-14-388

**Office of the Attorney General,
Fair Labor Division**
Respondent

Appearance for Petitioner:

Abdu Nessralla
57 Maple Street
Plympton, MA 02367

Appearance for Respondent:

Anita V. Maietta, Esq.
Assistant Attorney General
Office of Attorney General,
Fair Labor Division
105 William Street
New Bedford, MA 02740

Administrative Magistrate:

James P. Rooney

Summary of Tentative Decision

After a hearing, a citation issued by the Office of the Attorney General - Fair Labor Division seeking restitution for nonpayment of wages is modified to reflect a recalculation of wage payments. The penalty associated with the nonpayment of wages citation is proposed to be reduced in proportion to the reduction in restitution. A separate penalty for failure to produce payroll records is affirmed. The citations are also modified to reflect that a different company than the one named in the citations was the employer.

TENTATIVE DECISION

Abdu Nessralla and Fourstar Landscaping & Construction appeal from two citations issued by the Fair Labor Division alleging that they failed to pay wages to four employees of the business, in violation of the Wage Act, M.G.L. c. 149, § 148, and that they failed to furnish payroll records to the Division for inspection, in violation of M.G.L. c. 151, § 19(3). The Fair Labor Division seeks restitution for unpaid wages and penalties for both alleged violations.

I held a hearing on March 1, 2016 at the Division of Administrative Law Appeals, which I recorded digitally. I accepted into evidence nine exhibits submitted by the Fair Labor Division; I also accepted at the hearing a handwritten list of hours worked prepared by one of the employees, which I marked Exhibit 10. The Fair Labor Division presented testimony from an investigator, Celina Poindexter, and three of the employees who had filed wage complaints, Joao Santos, Eugenio Fernandes, and Augusto Amado. The three employees testified through a Portugese interpreter, Arthur Liebl. Mr. Nessralla testified on his own behalf and presented testimony from two people who had worked for him, Tina Andred and Pat Merrill.

After the hearing, I gave Mr. Nessralla an opportunity to file bank records to demonstrate that he withdrew money to pay his employees. He filed bank-related documents and a further reconciliation of his payroll records and his bank statements. I mark this submission as Exhibit 11. Investigator Poindexter filed a post-hearing affidavit in order to clarify that the investigator who had handled the case at the time the complaints were filed did not prepare an audit of the payroll records that Mr. Nessralla submitted to the Fair Labor Division. I mark this affidavit as Exhibit 12. I also mark Mr.

Nessralla's appeal as Exhibit 13. Both parties submitted closing briefs. I mark the Fair Labor Division's brief as Pleading C and Mr. Nessralla's as Pleading D.

Findings of Fact

Based on the testimony and evidence presented, and the reasonable inferences drawn from them, I make the following findings of fact:

1. Abdu Nessralla operates a landscaping business that performs landscaping for homeowners and businesses. (Nessralla testimony.) In 2009, he incorporated Fourstar Landscaping & Construction, Inc. He was the sole officer. He recalls dissolving it in 2012. (Nessralla testimony; Ex. 8.)
2. In 2013, Mr. Nessralla employed Joao Santos, Eugenio Fernandez, Augusto Amado, and Eder Mendes and others to perform landscaping work. (Exs. 2-5.) Mr. Nessralla intended that these men work for his wife's company, Nessralla Farms & Landscaping of Plympton, Inc.. (Nessralla testimony.) He produced checks drawn on the Nessralla Farms account in an effort to prove wage payments to the four employees who complained to the Attorney General. (Ex. 11.) Mr. Amado recalls that Mr. Nessralla drove a truck with "Nessralla Farms" written on it. (Amado testimony.)
3. Mr. Nessralla prepared weekly handwritten timesheets. The timesheets do not all contain the same information, but typically listed each employee by name and the hours worked per day or per week, the total amount owed, and occasionally the job site. Some of the timesheets have a written note that says the employee was paid; occasionally they record partial payments, the date and the amount of the partial payments, and how much was still owed to the employees. Some of the timesheets are printed with the name "Nessralla Enterprises" on them. Some have FourStar printed on them; most have no

company information listed. Mr. Nessralla would routinely review the timesheets with Mr. Amado and another employee, Antonio Silva, for accuracy. (Exs. 9 and 11.)

4. Mr. Nessralla paid his employees mostly in cash. He would put wages for each employee in a separate envelope. Sometimes, he would give an envelope directly to an employee; other times he would give the envelopes to one employee who was told to distribute the payments. (Nessralla testimony.) His check records reflect checks drawn on a Nessralla Farms account made out to Mr. Silva, or checks made out to cash that were cashed by Mr. Silva. Other checks from this account were made out to cash and cashed by Mr. Nessralla or, if the crew was working late on a Friday, by his daughter, Shelby Nessralla. (Ex. 11; Pleading D.)

5. Mr. Nessralla conceded that he did not always pay his employees in a timely manner. (Nessralla testimony.) Sometimes this was because he was awaiting payment from the company that had contracted with him to provide landscaping services. He then told his employees that their wage payments would be late because he had not been paid.

(Nessralla, Fernandes, Amado, and Merrill testimony.) Mr. Nessralla recalled providing his employees each week with copies of their timesheets, whether he was able to pay them that week or not. The employees who testified at the hearing recalled Mr. Nessralla keeping a record of their hours, but did not recall regularly receiving timesheet copies.

(Nessralla, Santos, Fernandes, and Amado testimony.) During this time, Mr. Nessralla's daughter was undergoing an experimental treatment for blood cancer. (Nessralla testimony.)

6. Joao Santos filed a wage complaint with the Office of the Attorney General in late September 2013. He claimed that he had worked for 163.30 hours for Fourstar

Landscape & Construction from June 13, 2013 to July 6, 2013 at \$15 per hour, but had been paid only \$350 in cash. He sought recovery of \$2,450, not including overtime. (Ex. 5.) Mr. Santos determined his hours based on the hours Mr. Amado wrote down for him. (Santos testimony.)

7. Augusto Amado and Eugenio Fernandes filed wage complaints on January 5, 2014. (Exs. 2 and 3.) Eder Mendes filed a wage complaint on January 6, 2014. (Ex. 4.)

8. Mr. Amado claimed that he worked for Fourstar Landscape & Construction from March 2013 to December 2013 at \$20 per hour and that he was owed \$5,900. (Ex. 2.) He determined the amount he was still owed based on notes he kept of his hours. Those notes were not submitted in evidence, but a summary sheet of his hours from April through June 2013 was submitted. He remembered being paid weekly in cash early on, with the last payment to him reflected in the three timesheets that he submitted with his complaint, the last of which was for June 24-28, 2013. (Amado testimony; Exs. 2 and 10.)

9. Mr. Fernandes claimed that he worked for Fourstar from June through December 2013 at \$15 per hour and is owed \$3,080. (Ex. 3.) He remembered being paid for the first few weeks of his employment, but not thereafter. He did not write down the hours that he worked. He estimated how much he was owed based upon his recollection of his hours. (Fernandes testimony.)

10. Eder Mendes claimed to have worked for Fourstar at \$12 per hour from May 3 to June 3, 2013. In his complaint, he said he worked for two weeks for Mr. Nessralla, who then told him he would have money to pay him the following week, but then did not follow through with payment. He sought \$660 in unpaid wages. (Ex. 4.)

11. On November 22, 2013, Fair Labor Investigator Mario Paiva sent a request to Mr. Nessralla to produce by December 6, 2013 copies of “[p]ayroll records including pay stubs, daily and weekly time-keeping records, an all employment records which reflect [Joao Santos’] identity , occupation, rate of pay, wages paid, and deductions taken during each pay period” from June 1, 2013 through July 6, 2013. (Ex. 6.) On January 7, 2014, Mr. Paiva sent a similar request for the payroll records of all of Mr. Nessralla’s employees from January 1, 2013 through December 31, 2013. He gave Mr. Nessralla until January 21, 2014 to produce these records. (Ex. 7.) Mr. Nessralla did not provide payroll records until after the deadline. (Poindexter testimony.) He told Mr. Paiva that he was ill – he had suffered a heart attack and had prostate cancer – and he did not have a bookkeeper to put his records together. He recalls providing the documents in 2015. (Nessralla testimony.)

12. On June 11, 2014, the Fair Labor Division issued two citations to Mr. Nessralla and to Fourstar Landscaping & Construction, Inc. Citation MW140089 charged them with failure to furnish records for inspection on January 21, 2014 and assessed a \$3,500 penalty. Citation WH140117 charged them with failure to timely pay wages to the four employees that filed complaints, sought restitution of \$12, 089 in pay in the amounts listed in the complaints (Mr. Santos - \$2,449.50; Mr. Fernandes – \$3,079.50; Mr. Mendes – \$660; and Mr. Amado – \$5,900) and assessed a \$2,500 penalty. (Exs. 1 and 2.) Ms. Poindexter, the investigator who testified, did not participate in the decision to issue the citations or determine penalty amounts. (Poindexter testimony.)

13. Mr. Nessralla timely appealed. (Ex. 13.)

14. Mr. Nessralla provided payroll records to Investigator Paiva after the prehearing conference in the appeal. Mr. Nessralla also asked that the complainants provide him with any documentation to back up their claims, but he received none prior to the hearing. Mr. Paiva reviewed the documents produced, but told Mr. Nessralla that he did not understand them. Mr. Paiva did not prepare an audit of the records. (Nessralla testimony; Ex. 12; Pleading D.)

15. Mr. Nessralla, after being told by Mr. Paiva that he believed the complainants and after realizing that his bookkeeping efforts had not persuaded the Fair Labor Division, agreed to make three payments to settle the citations. He had to stop work, however, because of illness, and could not complete the payments. Thus, this matter did not settle. (Nessralla testimony.)

16. The records Mr. Nessralla provided post-hearing are broken down by each of the four employees who filed complaints. Mr. Nessralla included a ledger that summarizes the wage payments he owed each employee, which he alleges he paid. The ledger appears to have been prepared for purposes of the hearing. The remaining documents are week-by-week timesheets along with attachments from check records with notations that Mr. Nessralla claims reflect the source of money from which he made wage payments. (Ex. 11.)

17. The tables that follow reflect the information that was included in the documents Mr. Nessralla produced to the Fair Labor Division and the additional documents he produced post-hearing. Most of the information is gleaned from the timesheets. The information on the source of payment is included in brackets when it was available.

18. *Joao Santos Payroll*

Date	Ledger	Hours	Pay/Pay Rate	How Paid
6/13		39	\$585 (\$15/hr.)	paid cash \$100 and \$250 (total payroll \$2,418) [contractors paid \$4,300 on 6/10]
6/21	\$1,000	50	\$1,000 (\$20/hr.)	paid cash (total payroll \$3,496) [contractor paid \$2,800 on 6/10]
6/24	\$750	37.5	\$750 (\$20/hr.)	paid \$100 cash on 6/28 and \$650 cash on 7/1 (total payroll \$3,007) [check 420 for \$1,178 dated 6/20 made out to Mr. Nesseralla and cashed by him]
7/8	\$375	25	\$375 (\$15/hr.)	paid cash (and fired Joao)(Cordage terminated Mr. Nesseralla's contract on 7/12 because of Joao; Mr. Nesseralla fired Joao because of "complaints from the office poor work and customer complaints") (total payroll \$1,965) (7/11 - contractor in Marlboro "to pay Jon"; 7/12 - Jon worked "7:30 a.m. to 4 p.m. - Done - 0") [contractor paid \$4,000 cash on 6/27)
	\$2,125	151.5	\$2,710	

(Exs. 9 and 11.)

The 7/8 timesheet show that Mr. Santos worked more than 25 hours that week. He worked 10 hours on 7/8, 7.5 hours on 7/9, 5.5 hours on 7/10, 7.0 hours on 7/11, and 7.5 hours on 7/12. Mr. Nesseralla's noted on the timesheet that the contractor paid Mr. Santos directly for work on 7/10 and 7/11. Thus, the 25 hours reflect the remaining hours Mr. Nesseralla thought he owed Mr. Santos. (Exs 9 and 11.)

At the hearing, Mr. Santos did not recall any payments other than one for \$250. (Santos testimony.) In his complaint, he included a copy of a piece of paper on which he

had recorded that he worked 50 hours from 6/24 through 6/30. (Ex. 5.) This appears to correspond to the 6/21 payroll listed by Mr. Nessralla.

19. *Eder Mendes Payroll*

Date	Ledger	Hours	Pay/Pay Rate	How Paid
5/10	\$312			check 396 (total payroll \$2,532) [check 396 for \$2,532 made out to cash]
5/13	\$420	35	\$420 (\$12/hr.)	\$200 cash on 5/18; \$1,400 cash paid on 5/21 out of \$2,200 remaining payroll [check 412 for \$900 dated 5/31 and check 413 for \$1,284 dated 6/3 both made out to Antonio Silva and cashed by him}
5/24	\$504	42	\$504 (\$12/hr.)	checks 412 (\$900) and 413 (\$1,284) (total payroll of \$2,184) [check 412 for \$900 dated 5/31 and check 413 for \$1,284 dated 6/3 both made out to Antonio Silva and cashed by him]
6/8 or 5/31	\$432	36	\$432 (\$12/hr.)	paid cash (\$1,972 total payroll) [check 415 for \$1,872 dated 6/8 made out to cash and cashed by Mr. Nessralla]
6/7	\$348	29	\$348 (\$12/hr.)	paid cash (total payroll \$1,348) [contractor paid \$2,800 on 6/10]
6/14	\$468	39	\$468 (\$12/hr.)	paid cash (total payroll \$1,968) [contractor paid \$2,800 on 6/10]
6/21	\$396	33	\$396 (\$12/hr.)	paid cash (total payroll \$3,496) [contractor payments]

6/24	\$282	23.5	\$282 (\$12/hr.)	paid \$100 cash on 6/28 and paid \$182 cash on 7/1 [contractor paid \$2,800 on 6/10 and \$4,000 on 6/27]
7/8	\$210	17.5	\$210 (\$12/hr.)	paid cash [contractor paid \$4,000 on 6/27]
	\$3,372		\$3,060	

(Exs. 9 and 11.)

20. *Augusto Amado Payroll*

Date	Ledger	Hours	Pay/Pay Rate	How Paid
4/9	\$930	46.5 [39]	\$930 (\$20/hr.)	check 381 made out to Mr. Amado for \$930 on 4/19 and cashed by him
4/26	\$200	25 [40]	\$500 (\$20/hr.)	\$200 by check 388; \$600 cash on 4/29 including \$300 owed (references check 391)
4/13	\$840	[40]		check 391 [\$2,520 check made out on 5/4 to cash; cashed by Antonio Silva]
4/29	\$600	[40]		see 4/26 entry
5/10	\$860	43 [40]	\$860 (\$20/hr.)	check 396 (total payroll of \$2,532) [\$2,532 check made out on 5/10 to cash]
5/13	\$900	45 [32]	\$900 (\$20/hr.)	\$200 cash on 5/18; \$1,400 cash paid on 5/21 out of \$2,200 remaining due on payroll
5/24	\$840	42 [40]	\$840 (\$20/hr.)	checks 412 (\$900), dated 5/31, and 413 (\$1,284), dated 6/3, both made out to Antonio Silva and cashed by him (total payroll of \$2,184)

6/8 + 5/31	\$840	42 [40]	\$840 (\$20/hr.)	paid cash (1,972 total payroll; \$100 of which had been paid in cash to another employee); check 415 made out to cash on 6/8 for \$1,872 and cashed by Mr. Nessralla
6/7	\$580	29 [40]	\$580 (\$20/hr.)	paid cash (total payroll \$1,348) [contractor paid \$2,800 on 6/10]
6/13	\$610	39 [39]	\$780 (\$20/hr.)	paid \$250 by check 446 on 6/13; paid \$100 cash on 6/14/ plus \$70 in fuel costs; paid \$360 cash on 7/1 [check 446 made out for \$500 to cash on 8/3; cashed by Mr. Nessralla]
6/21	\$1,000	50 [50]	\$1,000 (\$20/hr.)	paid cash (total payroll \$3,496) [contractor payments of \$2,800 on 6/10 and \$4,000 on 6/27]
6/24	\$630	31.5 [31.5]	\$630 (\$20/hr.)	paid \$100 cash on 6/28; paid \$530 cash on 7/1 (total payroll of \$3,007) [contractor paid \$4,000 in cash to Mr. Nessralla on 6/27]
7/3	\$450	20.5	\$450 (\$22/hr.)	paid cash (total payroll \$1,275) contractor paid \$4,000 in cash to Mr. Nessralla on 6/27]
7/12	\$690	46	\$690 (\$15/hr.)	paid cash [check 433 for \$500 dated 7/13 made out to Antonio Silva and cashed by him; check 432 for \$1,498 dated 7/13 made out to cash and cashed by Augusto Amado]
7/19	\$450	22.5	\$450 (\$20/hr.)	paid cash (total payroll \$870) [contractor paid \$4,000 in cash to Mr. Nessralla on 6/27]
7/26	\$500	25	\$500 (\$20/hr.)	paid cash on 8/1 (total payroll \$1,272.50) [contractor paid \$4,000 in cash to Mr. Nessralla on 6/27]

8/1	\$670	33.5	\$670 (\$20/hr.)	paid cash on 8/12 (total payroll of \$1,072) [contractor paid \$4,000 in cash to Mr. Nessralla on 6/27]
8/7	\$380	19	\$380 (\$20/hr.)	paid cash (Augusto intoxicated) (total payroll \$608) [check 452 for \$800 dated 8/28/13 made out to cash and cashed by Shelby Nessralla]
9/21	\$130		\$130	[check 471 for \$400 dated 9/28 made out to cash and check 473 for \$160 made out to cash, both of which were cashed by Antonio Silva]
9/26	\$260	8	\$260 (\$32.5/ hr.)	(total payroll either \$260 or \$520) [check 495 for \$690 dated 11/14 made out to Antonio Silva and cashed by him; check 493 for \$1,443.20 dated 11/1 made out to cash and cashed by Mr. Nessralla]
9/27	\$112.50	7.5	\$112.50 (\$15/hr.)	(total payroll \$562.50) [check 495 for \$690 dated 11/14 made out to Antonio Silva and cashed by him; check 493 for \$1,443.20 dated 11/1 made out to cash and cashed by Mr. Nessralla]
9/28	\$100	6.5	\$97.50 (\$15/hr.)	(another listing shows him being paid \$230 on this date) [check 471 for \$400 dated 9/28, check 473 for \$160 dated 9/30, and check 454 for \$200 dated 9/1 all made out to Antonio Silva and cashed by him]
9/30	\$120	8	\$240 (\$30/hr.)	(paid another employee \$100 with \$140 listed as owed)
10/1	\$170		\$170	(total payroll \$510) [check 495 for \$690 dated 11/14 made out to Antonio Silva and cashed by him; check 493 for \$1,443.20 dated 11/1 made out to cash and cashed by Mr. Nessralla]

10/2	\$67.50	4.5	\$67.50 (\$15/hr.)	(total payroll \$135) [check 495 for \$690 dated 11/14 made out to Antonio Silva and cashed by him; check 493 for \$1,443.20 dated 11/1 made out to cash and cashed by Mr. Nessralla]
10/3	\$85		\$85	(payments of \$85 and \$50 cash listed for 2 employees; not clear what they were paid for) (total payroll for 9/26, 9/27, 9/28, 9/30, 10/1, 10/2, and 10/3 was \$1,775) [check 493 for \$1,443.20 dated 11/1 made out to cash and cashed by Mr. Nessralla; check 495 for \$690 dated 11/14 made out to Antonio Silva and cashed by him)
10/16	\$140	8	\$140 (\$17.5/ hr.)	120 + 20 cash (total payroll of \$400) [check 486 for \$1,155 dated 10/30 made out to Antonio Silva and cashed by him]
11/1	\$605	6	\$105 [plus \$500] (\$17.5/ hr.)	(total payroll \$800) [check 493 for \$1,443.20 dated 11/1 made out to cash and cashed by Mr. Nessralla]
11/4	\$225	15		(total payroll \$450) [check 493 for \$1,443.20 dated 11/1 made out to cash and cashed by Mr. Nessralla]
11/5	\$240	16	\$240 (\$15/hr.)	[homeowner paid - check 2185]
11/14	\$315	21	\$315 (\$15/hr.)	check 495 [check 495 for \$690 dated 11/14 made out to Antonio Silva and cashed by him]
11/21		30.5	\$452 (\$14.80/ hr.)	check from homeowner (total payroll \$787) ["pd. check from R. Hodge"]
11/27	\$150			

11/30	\$90	13	\$195 (\$15/hr.)	paid. \$150 on 11/27; paid \$45 on 11/30 (total payroll \$380) [check 492 for \$850 dated 11/2 made out to cash and cashed by Mr. Nessralla; check 493 for \$1,443.20 dated 11/1 made out to cash and cashed by Mr. Nessralla]
	\$14,780		\$13,609. 50 or \$14,109. 50	

(Exs. 9 and 11.)

The table includes Mr. Amado’s list of hours he worked from April through June 2014. (Ex. 10.) Mr. Amado’s list was a relatively straightforward list of hours worked week-by-week. Mr. Nessralla’s timesheet records were for time periods of varying lengths. Mr. Amado’s hours, as he recalled them, are listed in brackets in what appear to be the corresponding payroll periods from Mr. Nessralla’s timesheet records.

With his complaint, Mr. Amado submitted timesheets for 6/10-6/14, 6/15-6/21, and 6/24-6/28. The timesheets list employee names, hours worked and money owed. The handwriting appears to be the same as the handwriting on the timesheets submitted by Mr. Nessralla. Unlike the timesheets submitted by Mr. Nessralla, there is no notation as to payments made. (Ex. 2.)

21. *Eugene Fernandes Payroll*

Date	Ledger	Hours	Pay/ Pay Rate	How Paid
6/13	\$250			check 446 (total paid on 6/13 - \$500) [check for \$500 to cash dated 8/3 and cashed by Mr. Nessralla]

6/24	\$525	35	\$525 (\$15/hr.)	paid cash (total payroll \$3,007) [contractor paid \$2,800 on 6/10 and \$4,000 on 6/27]
7/3	\$325	15	\$375 (\$15/hr.)	paid cash (total payroll \$1,275) [contractor paid \$4,000 in cash on 6/27]
7/12	\$690	46	\$690 (\$15/hr.)	paid cash (total payroll \$1,965) [check 433 for \$500 dated 7/13 made out to Antonio Silva and cashed by him]
7/19	\$420	35	\$420 (\$12)	paid cash (total payroll \$900) [contractor paid \$4,000 cash on 6/27]
7/26	\$187.50	12.5	\$187.50 (\$15/hr.)	paid cash on 8/1 (total payroll \$1,272.50) [contractor paid \$4,000 cash on 6/27]
8/1	\$402	33.5	\$402 (\$12/hr.)	paid cash (total payroll \$1,072) [contractor paid \$4,000 cash on 6/27]
8/7	\$228	19	\$228 (\$12/hr.)	paid cash (Eugene intoxicated) (total payroll \$608) [check 452 for \$800 dated 8/28 made out to cash and cashed by Shelby Nessralla]
9/26	\$260	8	\$260 (\$32.50/hr.)	(total payroll either \$260 or \$520) [check 495 for \$690 dated 11/14 made out to Antonio Silva and cashed by him; check 493 for \$1,443.20 dated 11/1 made out to cash and cashed by Mr. Nessralla]
9/27	\$112.50	7.5	\$112.50 (\$15/hr.)	(total payroll \$562.50) [check 495 for \$690 dated 11/14 made out to Antonio Silva and cashed by him; check 493 for \$1,443.20 dated 11/1 made out to cash and cashed by Mr. Nessralla]
10/1	\$170		\$170	(total payroll \$510) [check 495 for \$690 dated 11/14 made out to Antonio Silva and cashed by him; check 493 for \$1,443.20 dated 11/1 made out to cash and cashed by Mr. Nessralla]
10/2	\$67.50	4.5	\$67.50 (\$15/hr.)	(total payroll \$135) [check 495 for \$690 dated 11/14 made out to Antonio Silva and cashed by him; check 493 for \$1,443.20 dated 11/1 made out to cash and cashed by Mr. Nessralla]

10/16	\$140	8	140 (\$17.50/ hr.)	120 + 20 cash (total payroll \$400) [check 486 for \$1,155 dated 10/30 made out to Antonio Silva and cashed by him]
11/1	\$105	7	105 (\$15/hr.)	(total payroll \$800) [check 493 for \$1,443.20 dated 11/1 made out to cash and cashed by Mr. Nessralla; check 492 for \$850 dated 11/2 made out to cash and cashed by Mr. Nessralla]
11/4	\$72	6	[90?]	(total payroll \$450) [check 493 for \$1,443.20 dated 11/1 made out to cash and cashed by Mr. Nessralla; check 492 for \$850 dated 11/2 made out to cash and cashed by Mr. Nessralla]
11/21	\$330	22	330 (\$15/hr.)	(total payroll \$787) [“pd. check from R. Hodge”]
11/30	\$195	13	195 (\$15/hr.)	\$150 on 11/27; \$45 on 11/30 (total payroll \$380) [check 493 for \$1,443.20 dated 11/1 made out to cash and cashed by Mr. Nessralla; check 492 for \$850 dated 11/2 made out to cash and cashed by Mr. Nessralla]
	\$4,479.50		\$4,297.50 or \$4,207.50	

(Exs. 9 and 11.)

Discussion

A. Responsible Employer

The Massachusetts Wage and Hour statute provides that “[e]very person having employees in his service shall pay weekly or bi-weekly each such employee the wages earned by him . . . within six days of the termination of the pay period during which the wages were earned if employed for five or six days in a calendar week.” M.G.L. c. 149, § 148. The Attorney General has the authority to seek restitution on behalf of any person

whose wages have not been timely paid in accordance with the statute. M.G.L. c. 149, § 27C(b)(1).

Not only is the company that hired the employees responsible for paying wages but “[t]he president and treasurer of a corporation and any officers or agents having the management of such corporation shall be deemed to be the employers” who are responsible as well for making wage payments. M.G.L. c. 149, § 148. Here, there is no question that Mr. Nessralla employed the four landscapers who complained of nonpayment of wages, and thus he is personally liable for any wages that were not paid. The Fair Labor Division also cited Fourstar Landscaping & Construction, Inc. as being responsible for any unpaid wages. The Division did so doubtless because each of the complainants identified Fourstar as the employing entity. Why they did so is unclear from the testimony at the hearing. Mr. Nessralla testified that he had dissolved Fourstar in 2102, the year before he employed the four complainants. The only testimony from the four men at the hearing concerning the company that employed them was from Mr. Amado, who stated that Mr. Nessralla drove a truck on which was written Nessralla Farms, which Mr. Nessralla identified as his wife’s company. The check copies that Mr. Nessralla ultimately produced were from Nessralla Farms. I assume from this that the money used to pay the employees reflected money Mr. Nessralla received from the homeowners and businesses with whom he had contracted to perform landscaping and then deposited in the checking account. I thus conclude that because Mr. Nessralla was using a Nessralla Farms truck at the worksites relevant to the complaints, and because he was purportedly paying the complainants with money from a Nessralla Farms corporate checking account, the company that employed the men was Nessralla Farms not Fourstar.

To conform the pleading to the proof, I will treat Nessralla Farms, as well as Mr. Nessralla, as the proper subjects of the citations. *Cf.* Mass. R. Civ. P. 15(b).

B. *Penalty for Failure to Produce Records*

An employer not only has the obligation to make timely wage payments to employees, but also must keep records showing such payments and make them available to the Attorney General for inspection promptly when requested to do so. The governing statute provides that:

Every employer shall keep a true and accurate record of the name, address and occupation of each employee, of the amount paid each pay period to each employee, of the hours worked each day and each week by each employee, and such other information as the commissioner or the attorney general in their discretion shall deem material and necessary. Such records shall be kept on file for at least 3 years after the entry date of the record. Such records shall be maintained at the place of employment, at an office of the employer, or with a bank, accountant or other central location and shall be open to the inspection of the commissioner or the attorney general, or their authorized representatives at any reasonable time, and the employer shall furnish immediately to the attorney general, commissioner or representative, upon request, a copy of any of these records.

M.G.L. c. 151, § 15. This provision aids in the enforcement of wage and hour laws by giving the Attorney General the opportunity to quickly check the records of an employer against whom a wage claim has been filed to determine its validity. The recordkeeping requirement protects both employers and employees. A check of the wage and hour records may quickly reveal that an employee is owed unpaid wages and lead to the prompt payment called for by the statute. On the other hand, it may establish that there is no merit to an unpaid wage claim.

In this instance, Mr. Nessralla did not promptly respond to the Fair Labor Division's request for wage and hour records. Indeed, he did not produce any records

until after the citations were issued. His reasons for doing so – poor health and lack of a bookkeeper – are insufficient. He should have been maintaining wage and hour records in good order all along, so that they would be readily available and comprehensible should the Fair Labor Division seek to inspect them. I therefore affirm the \$3,500 penalty the Division issued for failure to produce wage and hour records when requested.

C. *Restitution of Unpaid Wages*

1. *Payroll Record Evaluation*

The records he ultimately produced are difficult to follow – difficult enough that when Inspector Paiva saw them, he told Mr. Nessralla that he could not understand them. Part of the problem is that they were not kept in an entirely consistent manner. The same employee is sometimes referred to by a given name, sometimes by a nickname. Sometimes daily work hours are noted, while other times only weekly work totals are listed.

The major problem, however, is that Mr. Nessralla paid his employees in cash. The statute does not require an employer to pay employees by check, but an employer who does so has a record of having actually paid the employee – a cancelled check made out to the employee that was signed by the employee and cashed or deposited. An employer who pays cash lacks such a record, unless he has the employee sign for receipt of the cash, which Mr. Nessralla did not do.¹

¹ The statute requires that the employer provide a record of payment to the employee. It declares that :

An employer, when paying an employee his wage, shall furnish to such employee a suitable pay slip, check stub or envelope showing the name of the employer, the name of the employee, the day, month, year, number of hours worked, and hourly rate, and the

An additional problem arises here because it is fairly clear that even when Mr. Nessralla paid his employees, he did so late. This means that, while a weekly record of what Mr. Nessralla owed his employees may be an accurate contemporaneous record of what should have been paid, it is most likely not a contemporaneous record of what was actually paid.

Mr. Nessralla asserted that he ultimately paid all that was owed. That is hard to credit. His records hardly make that clear. Indeed, his own actions show that he is not certain how much he paid or how much he still owed. That he asked the Fair Labor Division's investigator to have the complaining employees come forward with specific information about what weeks they were unpaid, rather than coming forward himself with proof that he had paid them, showed a level of uncertainty as to whether he had paid them for each week they worked or what he owed.

I am also not entirely convinced by the testimony of the employees. While it is possible that an employee may work for some time without expected wage payments being made, it would be rare that anyone worked for months on end without any pay, as Mr. Fernandes and Mr. Amado asserted.² It is far more likely that Mr. Nessralla managed to keep them on by paying them intermittently and promising further payment.

amounts of deductions or increases made for the pay period.

M.G.L. c. 149, § 148.

² Ms. Andred testified that while sitting in the audience she heard one of the complainants say to another, "we shouldn't be lying like this." Ms. Andred was not asked to identify who she heard say this, nor was the person whom she overheard recalled to the stand. The possibility that some of the testimony was fabricated is too undeveloped for me to evaluate. I note, however, that I did not entirely credit any of the principal witnesses.

But late and intermittent payments would have made it difficult for the employees to keep track of exactly what they were still owed.

The payroll records and bank statements that Mr. Nessralla ultimately produced offer some insight as to how much is owed. It would have been better had Mr. Nessralla produced all these records when requested and sat down with a Fair Labor Division investigator to explain them in detail. Reconciling what these records show with what the complainants seek would have taken a good deal of effort and multiple conversations with Mr. Nessralla and his employees. This is not the straightforward approach that the statute conceives of as happening in the typical case, but had Mr. Nessralla done so, it would have been more fruitful than trying to sort out the implications of these records in the course of an adjudicatory hearing.

Nonetheless, I will make an effort to determine what these records show concerning what is owed. I do so in light of the general burden imposed by the wage and hour law on an employer issued a citation to demonstrate “by a preponderance of evidence that the citation or order was erroneously issued.” M.G.L. c. 149, § 27C(b)(4). A “finding is ‘clearly erroneous’ when, although there is evidence to support it, [one viewing] the entire evidence is left with the definite and firm conviction that a mistake has been committed.” *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395, 68 S. Ct. 525, 542, 92 L. Ed. 746 (1948); *see also Marlow v. City of New Bedford*, 369 Mass. 501, 508, 340 N.E.2d 494, 497 (1976). I also note that some of the key documents Mr. Nessralla produced – the records of his purported sources of payment – were not produced until after the hearing was over, and thus Assistant Attorney General Maietta did not have an opportunity to review them or cross-examine Mr. Nessralla about them. I

thus do not give them the same weight had they been produced earlier and subject to examination.

The timesheet records Mr. Nessralla produced appear to have been made contemporaneously with the work. Mr. Amado had three such sheets that were similar to the ones Mr. Nessralla produced, except that Mr. Nessralla's copies also included notes reflecting payments he allegedly made. The timesheets also appear to record the hours worked and the pay rate more or less accurately. The three timesheets that Mr. Amado introduced show an agreement during these weeks between the hours Mr. Amado said he worked and the hours Mr. Nessralla recorded as his work hours. Mr. Santos's claim that he worked 163.30 hours for Mr. Nessralla is also fairly consistent with Mr. Nessralla's records showing that Mr. Santos worked for 151.5 hours. The difference likely reflects the 12.5 hours Mr. Santos worked that Mr. Nessralla did not record because he noted that the contractor had paid Mr. Santos directly. As for the pay rate, the records are reasonably consistent with the pay rates claimed by the four employees. Mr. Amado said he was to be paid \$20/hour, Mr. Fernandes said he was paid \$15/hour, and Mr. Mendes said he was to be paid \$12/hour; the records agree with this. Mr. Santos said he was paid \$15/hour. The records reflect wage rates of \$15/hour and \$20/hour. They also reflect that toward the end of the season, pay rates became more erratic, and appear to have depended on the particular job.

The handwritten exhibit Mr. Amado introduced of his hours does not coincide overall with Mr. Nessralla's records. I do not find this exhibit to be as accurate as Mr. Nessralla's records of hours worked. Mr. Amado was asked at the hearing to copy a line from the sheet of his hours. His handwriting is entirely different from the neat

handwriting of the unknown person who wrote the list of his hours. Although there is evidence that Mr. Amado had contemporaneous knowledge of the hours employees worked – he met regularly with Mr. Nessralla to go over the timesheets prepared by Mr. Nessralla and he wrote down Mr. Santos’s hours for him – I cannot tell if the summary Mr. Amado introduced at the hearing was made contemporaneously or on what it was based. Because there are more indications that Mr. Nessralla’s records are accurate, at least insofar as they record hours, I give them more weight.

Although Mr. Nessralla’s records appear to accurately reflect the hours his employees worked and the wages he owed them, whether they accurately reflect what he paid them is not clear. Mr. Amado and Mr. Fernandes acknowledged being paid early on, but testified that payment ceased after a time. Exactly how long they were paid is uncertain. Mr. Fernandes stated he was paid for only the first few weeks he worked; Mr. Amado stated that the June timesheets he included with his wage complaint reflect the last wage payments he received. Mr. Amado, in particular, is seeking much less (\$5,900) than Mr. Nessralla’s records show that he owed him overall (around \$14,000). Thus, he must have been paid for at least a few months. Mr. Fernandes is also seeking less (\$3,080) than Mr. Nessralla’s records show he was owed (over \$4,000). Thus, he too must have been paid for some of his work. That applies to Mr. Mendes as well, who seeks \$660, but was owed overall \$3,372, according to Mr. Nessralla’s records.

The major problem with determining how much the four employees were paid remains that they were paid, if at all, in cash. Below is a chart that compiles how much Mr. Nessralla owed the men and out of what source he claims to have paid them:

	Augusto Amado	Eugene Fernandes	Eder Mend es	Joao Santos	Total Payroll	How Paid
4/9	\$930					check 381 made out to Mr. Amado for \$930 on 4/19 and cashed by him
4/26	\$500					\$200 by check 388; \$600 cash on 4/29 including \$300 owed (references check 391)
4/13	\$840					check 391 for \$2,520 dated 5/4 made out to cash; cashed by Antonio Silva
5/10	\$860		\$312		\$2,532	check 396 for \$2,532 made out on 5/10 to cash
5/13	\$900		\$450		\$3,000	\$800 cash on 5/18; \$1,400 cash on 5/21
5/24	\$840		\$504		\$2,184	checks 412 (\$900), dated 5/31, and 413 (\$1,284), dated 6/3, both made out to Antonio Silva and cashed by him
5/31	\$840		\$432		\$1,972	check 415 made out to cash on 6/8 for \$1,872 and cashed by Mr. Nessralla; \$100 paid in cash to another employee
6/7	\$580		\$348		\$1,348	contractor paid \$2,800 on 6/10
6/14	\$780	\$250	\$468	\$585	\$2,668	contractor paid \$2,800 on 6/10; check 446 made out for \$500 to cash on 8/3 and cashed by Mr. Nessralla
6/21	\$1,000		\$396	\$1,000	\$3,496	contractor payments of \$2,800 on 6/10 and \$4,000 on 6/27

6/24	\$630	\$525	\$282	\$750	\$3,007	same
7/3	\$450	\$325			\$1,275	contractor paid \$4,000 in cash on 6/28
7/12	\$690	\$690	\$210	\$375	\$1,965	check 433 for \$500 dated 7/13 made out to Antonio Silva and cashed by him; check 432 for \$1,498 dated 7/13 made out to cash and cashed by Augusto Amado; contractor paid \$4,000 on 6/27
7/19	\$450	\$425			\$870	contractor paid \$4,000 on 6/27
7/26	\$500	\$187.50			\$1,272.50	same
8/1	\$670	\$402			\$1,072	same
8/7	\$380	\$228			\$608	check 452 for \$800 dated 8/28/13 made out to cash and cashed by Shelby Nessler
9/26	\$260	\$260			\$520	check 495 for \$690 dated 11/14 made out to Antonio Silva and cashed by him; check 493 for \$1,443.20 dated 11/1 made out to cash and cashed by Mr. Nessler
9/27	\$112.50	\$112.50				same
9/28	\$97.50					same
9/30	\$120				\$240	same
10/1	\$170	\$170			\$510	same
10/2	\$67.50	\$67.50			\$135	same
10/3	\$135				\$270	same [not clear if this is part of payroll]

10/16	\$140	\$140			\$400	check 486 for \$1,155 dated 10/30 made out to Antonio Silva and cashed by him
11/1	\$105	\$105			\$300 (plus \$500 to Mr. Amado)	check 493 for \$1,443.20 dated 11/1 made out to cash and cashed by Mr. Nessralla
11/4	\$225	\$72			\$450	check 493 for \$1,443.20 dated 11/1 made out to cash and cashed by Mr. Nessralla; check 492 for \$850 dated 11/2 made out to cash and cashed by Mr. Nessralla
11/14	\$315					check 495 for \$690 dated 11/14 made out to Antonio Silva and cashed by him
11/21	\$452	\$330			\$782	"pd. check from R. Hodge"
11/27	\$150					?
11/30	\$195	\$195			\$380	check 492 for \$850 dated 11/2 made out to cash and cashed by Mr. Nessralla; check 493 for \$1,443.20 dated 11/1 made out to cash and cashed by Mr. Nessralla
	\$10,399.50	\$4,234.50	\$3,054	\$2,125		

In only two instances were any of the four employees paid directly by check, that being Mr. Amado for his first paycheck and a check on July 13, 2013. In all other instances payment was made, if at all, in cash. Cash is fungible, and there is no guarantee that just

because Mr. Nessralla had cash on hand that he paid it to his employees. I am willing to credit that, when Mr. Nessralla withdrew an amount of money from the bank that corresponded to an amount that was the same or similar to his payroll obligations, he paid that money to his employees. Thus, I accept that when he withdrew \$2,532 on May 10, 2013 to meet his payroll obligation of the same amount he actually paid his employees on that date. I also accept that a check for \$800 cashed by Mr. Nessralla's daughter, Shelby Nessralla, on August 28, 2013 paid an August 7, 2013 payroll obligation of \$608, and that checks for \$1,443.20 and \$850 that Mr. Nessralla cashed on November 1 and 2, 2013 went towards various payroll obligations.

I am less willing to accept that his efforts to pay his employees by paying one of them and having that employee distribute the appropriate amount of cash to each man were successful. On six occasions, Mr. Nessralla made out checks that were cashed by Antonio Silva, and the money was allegedly used by Mr. Silva to pay his fellow employees. Without impugning Mr. Silva's honesty, there is no evidence that he actually paid any of these employees, and hence I generally discount those payments as unproven, with some exceptions – for example, the two payments in April and May 2013, partly because the payments of \$2,184 to Mr. Silva around the date of the May 24, 2013 payroll exactly corresponds to the payroll amount owed on that date, and partly because Mr. Amado said he was paid early on, which suggests that he was paid in April 2013 by Mr. Silva.

In June and July, 2013, Mr. Nessralla claimed to have paid his employees mostly from two payments he received from a contractor, one for \$2,800 and the other for \$4,000. Even assuming that he used all the money he received from the contractors to pay his employees, which is not proven, his numbers do not add up. The payroll of June 7 (\$1,348) and June 14,

2013 (\$2,668), when added together, total \$4,016. Thus, he could not have paid in full his payroll for these two pay periods with the \$2,800 he received from the contractor on June 10, 2013. If he paid the \$1,348 June 7 payroll with this money, he would have had \$1,452 left over he could have put toward the next payroll of \$2,668. His records for the June 14 payroll suggest that he paid \$1,035 immediately (which would have left only \$417 from the amount paid by the contractor) and the rest on July 13, 2014. But the records are at best confusing. Reading the payroll summary for the week of June 14 that lists what the four people who worked then were still owed after the initial payment to them, it would seem that Mr. Nessralla paid them \$1,383 on July 13. However, looking at just the summary of how Mr. Amado was paid for this period, it looks like he was owed \$780 in total, and was paid \$100 on June 14, then \$70 was deducted as a fuel expense, leaving \$610 owed. He was paid \$250 in cash on June 13 (as was Mr. Fernandes, who was not otherwise listed on the payroll as working that week), and then paid \$360 in cash on July 1 to complete the entire payment obligation. Thus, it is unclear what, if anything, was paid to Mr. Amado on July 13. What seems clear is that Mr. Amado and Mr. Fernandes were each paid \$250, which corresponds to a check Mr. Nessralla made out to cash. If Mr. Amado was paid \$360 in cash on July 1, presumably using up what was left of the \$417 still remaining from the contractor's payment, it is unclear what funds Mr. Nessralla used to pay Mr. Mendes \$468 on July 13 or Mr. Santos \$235 on the same date.

Six of the following seven payroll periods were supposedly paid out of the additional \$4,000 in cash paid to Mr. Nessralla by the contractor on June 28, 2013. The exception is the payroll of July 12. In that period, Mr. Nessralla owed \$1,965 total. The two checks he claims covered it – one to Mr. Silva for \$500 and the other to Mr. Amado for \$1,498 – total \$1,998

and were contemporaneous (both are dated July 13).³ Thus, they would appear to have covered this payroll adequately. The other six payrolls total \$10,992.50. The \$4,000 he received from the contractor would have covered little more than 40% of these payrolls, assuming all of it went to payroll, which would be unlikely and for which there is no proof. I very much doubt Mr. Nessralla kept \$4,000 in cash on him from late June until the beginning of August 2013 and slowly doled it out to make payroll payments. It seems more likely that any payments he made from this cash would have been made soon after he received it, and if any money was left over, he would have deposited that money in the bank, and later drew on it. On July 13, 2013, for example, he made out two checks totaling nearly \$2,000 that he claims to have applied to payroll. The check records he produced that include these two checks also show that he made out checks totaling \$2,975 around this time, none of which he claims he applied toward payroll. (Ex. 11.) Furthermore, Mr. Amado testified that he last received pay for the June 24, 2013 payroll, a pay period in which the total payroll was \$3,007, which strongly suggests that, if the \$4,000 was used to meet this payroll, most of its was spent immediately. Under the circumstances, I cannot credit the assertion that any of the \$4,000 was applied toward payroll after the June 24 payroll.

For the payrolls from September 26 through November 30, 2013, Mr. Nessralla identifies two main sources of payment: checks of \$1,155 and \$690 cashed by Mr. Silva and

³ This records Mr. Nessralla produced post-hearing to show the source of payment for this payroll period show some uncertainty on Mr. Nessralla's part. In the records relating to Mr. Amado, he references the checks that Mr. Silva and Mr. Amado cashed. In the records relating to Mr. Mendes, he references only the \$4,000 payment by the contractor. I take this to mean that Mr. Nessralla's effort to show the source of payment are recent attempts to recreate those sources, and that his memory is not entirely accurate.

checks of \$1,443.20 and \$850 cashed by himself. For the reasons stated above, I discount the checks Mr. Silva cashed because there is not proof that money made its way to the employees. The \$2,293.20 worth of checks Mr. Nessralla cashed would have covered a little over half the \$4,442.50 in payroll obligations for that period. The other source is a “check from R. Hodge,” evidently a homeowner who contracted for Mr. Nessralla’s services that supposedly directly paid a \$782 payroll on November 21, 2013. There is no evidence of such payment, and I therefore disregard it.

2. *Pay Owed Individual Employees*

a. *Mr. Amado*

Turning to the pay of the individual employees, I address Mr. Amado, the longest serving employee, first. Mr. Amado attached three timesheets to his complaint and testified that they represented the last payroll periods for which he was paid. The last one is for the June 24, 2013 payroll. Assuming Mr. Amado was ultimately paid for the previous pay periods – and I have found the records for those pay periods to be reasonably reliable regarding payment – I look to the later payroll periods to determine how much Mr. Amado is still owed. Four of the next payroll periods were supposedly paid out of the \$4,000 in cash Mr. Nessralla was paid by a contractor on June 27, 2013. But as previously explained, there is little reason to believe that money was still available to pay employees after the June 24 payroll was paid. This, I conclude that Mr. Amado is owed \$2,070 for the payroll periods from July 3 to August 1, 2013. I have also concluded that Mr. Nessralla likely paid payroll on July 12 and August 7, 2013, and though he did so in part with a \$1,498 check that Mr. Amado cashed, I treat that check as reflecting money paid to make the July 12 payroll in its entirety, and thus attribute as received by Mr. Amado only the \$690 he was owed that week. I look

next to the payrolls from September 26 through November 30, 2013. As previously explained, I reject, as unproven, Mr. Nessralla's claim that some portion of these payrolls were paid through checks cashed by Mr. Silva. I also reject, as unproven, Mr. Nessralla's claim that the November 21, 2013 payroll was paid directly by a client. Mr. Amado was owed \$452 for that week. That leaves only checks cashed by Mr. Nessralla that would pay about half of the remaining payroll. Mr. Amado was owed \$2,996.50 for these weeks. Half of that would be \$1,498.25. Mr. Nessralla's records list four specific payments to Mr. Amado over that period totaling \$1,270, suggesting that he was indeed paid around half of what he was owed. Thus, I conclude that he is still owed \$1,498.25 for this period. In total, he is owed \$4,020.25.

b. *Mr. Mendes*

I turn next to Mr. Mendes, who did not testify. He complained of not being paid for two of the weeks that he worked and sought \$660. Mr. Nessralla's payroll records list him for nine payroll periods from May to July 2013. I assume then that Mr. Mendes complains only of not being paid for his last two payroll periods, which were June 24 and July 12, 2013. However, having accepted Mr. Amado's testimony that he was paid through the June 24 payroll period, I conclude that Mr. Mendes was as well, with one exception. The exception is the June 14 payroll. Records for that payroll period indicate that Mr. Mendes was paid the \$468 he was owed on July 13. The records also indicate that Mr. Amado was paid \$680 on July 13. Elsewhere, as noted earlier, the records show Mr. Amado received multiple payments that paid him in full for this payroll period before July 13. Thus, it is unclear what, if anything, was paid to Mr. Amado or to Mr. Mendes on July 13. I therefore conclude that Mr. Mendes is owed \$468. For the June 24 payroll, the records support that he was paid that

week. Mr. Mendes was owed \$282. The records show a payments of \$100 on June 28 and a payment of \$182 on July 1, 2013. As for the July 12 payroll, when Mr. Mendes was owed \$210, I conclude that he was paid that week as well. Although Mr. Nessralla, in the portion of his records that he devotes to Mr. Mendes, claimed that he paid him out of the \$4,000 in cash he received from a contractor on June 28, 2013, elsewhere (in the records relating to Mr. Amado's pay) he claimed that he made this payroll with checks made out to Mr. Silva and Mr. Amado. I have found that claim to be credible, and thus conclude that Mr. Mendes was paid that week as well. I therefore conclude that Mr. Mendes is still owed \$468.

c. *Mr. Santos*

Mr. Santos also worked for Mr. Nessralla for only a short time. At the hearing, he recalled receiving only one cash payment of \$250. In his compliant, however, he recalled cash payments of \$350. This latter number corresponds to Mr. Nessralla's records for the June 14, 2013 payroll, which show two payments to Mr. Santos, one for \$250 and the other for \$100. That left \$235 still owed him for work that week. As discussed earlier, Mr. Nessralla's records are confusing as to when or if any additional payments were made on this payroll. Thus, I conclude that Mr. Nessralla has failed to show that Mr. Santos was paid the \$235 owed for that week. For the final payroll on which Mr. Santos is listed, July 12, 2013, I have found that the amount of money Mr. Nessralla withdrew from the bank and paid to Mr. Silva and Mr. Amado that day corresponds to the payroll due employees that day, and thus payroll was likely paid. This would be consistent with Mr. Nessralla's records in which he wrote "pd cash + fired Jon complaints from office poor work + customer complaints." (Ex. 11.) But that raises the issue of whether it can be believed that Mr. Nessralla, who was not particularly good about making payroll, would pay an employee he had just fired. Indeed,

Mr. Nessralla's records list Mr. Santos as working 7.5 hours on his last day, but instead of recording Mr. Santos's total hours for the day, as he did with the other employees, Mr. Nessralla wrote "Done 0." However, Mr. Nessralla also wrote that Mr. Santos had worked a total of 25 hours that week. The records show that Mr. Santos in fact worked 37.5 hours that week, but they also show that for two of the days Mr. Santos worked, Mr. Nessralla noted that he had been paid directly by the contractor. The 25 hours worked the rest of the week includes Mr. Santos's last day. I thus conclude that Mr. Santos was paid \$375 on that day. As noted, earlier, there is no proof that any contractors actually paid any employees directly, and thus I conclude that Mr. Nessralla has failed to prove that Mr. Santos was paid the additional \$187.50 he was owed for the week. Mr. Santos is listed on two other payroll records, those for June 21 and June 24, 2013. Mr. Nessralla recorded that he worked 50 hours one week and 37.5 hours the next week. Because Mr. Nessralla's records and Mr. Santos's testimony about the number of hours he worked correspond, I accept that the records accurately record Mr. Santos's hours. The records also appear to reflect that Mr. Santos was to be paid \$20/hour for those weeks, though he was otherwise paid \$15/hour. Mr. Santos does not claim that he was ever owed more than \$15/hour, and hence I accept that as his pay rate. Mr. Nessralla claims to have paid the payrolls for these two weeks out of \$4,000 in cash he received from a contractor on June 27, 2013. I have already expressed my skepticism about his claim that this cash was sufficient to make many weeks of payroll. However, because Mr. Amado testified that he was paid through the June 24 payroll period, I take that to show that the other employees were paid as well, and I thus conclude that Mr. Santos was paid for these weeks. I therefore conclude that Mr. Santos is still owed \$422.50.

d. *Mr. Fernandes*

The last employee I address is Mr. Fernandes. Mr. Fernandes first appears in Mr. Nessralla's records as being paid on June 13, 2013. I assume since Mr. Amado was paid through the June 24, 2013 payroll, that Mr. Fernandes was paid until then as well. This would find support in Mr. Fernandes's testimony that he was paid for the first few weeks of his employment. As with Mr. Amado, I conclude he was paid the amount he was owed for the July 12 payroll (\$690) and the August 7 payroll (\$228), and he was not paid what he was owed for the remaining payrolls between July 3 and August 1, 2013, which amounted to \$1,342.50. And, because it would appear that Mr. Amado was paid about half of what he was owed for the payrolls from September 26 through November 30, 2016, I assume the same applies to Mr. Fernandes. He was owed \$1,112 for this period, and is still owed half of that or \$561. He is also owed the \$330 for the November 21, 2013 payroll that was supposedly paid by a client, though no proof of this was offered. Thus, Mr. Fernandes is still owed \$2,233.50.

I have conclude that Mr. Nessralla owes a total of \$7,144. 25 in restitution to the four employees who filed complaints with the Fair Labor Division, rather than the \$12,089 in restitution listed in the citation.

3. *Penalty for Nonpayment of Wages*

The penalty the Division assessed Mr. Nessralla for failure to pay wages in a timely manner was \$2,500. There is no evidence as to how the penalty was calculated. It is, however, about 20% of the restitution of \$12,089 the complainants sought. I therefore assume the penalty was meant to be proportional. The \$7,144.25 I have concluded is still owed the complaints is 59% of the restitution the Division sought. 59% of \$7,144.25 is \$1,477. I therefore modify the penalty for failure to pay wages in a timely manner to \$1,477.

Conclusion

For the reasons set forth above, I modify the citations to treat the employer as Nessralla Farms rather than Fourstar Landscaping, and conclude that Nessralla Farms and Mr. Nessralla were the employers of the four complainants, whom they owe \$7,144.25 in restitution. They must pay as well a \$1,477 penalty for failure to pay wages in a timely manner. I also affirm the \$3,500 penalty for failure to produce wage and hour records when requested. Thus, Mr. Nessralla and Nessralla Farms owe a total of \$12,121.25, minus whatever sum Mr. Nessralla has already paid the Fair Labor Division. I give the parties until **May 17, 2017** to comment on the modified penalty for failure to pay wages in a timely manner.

DIVISION OF ADMINISTRATIVE LAW APPEALS

James P. Rooney
First Administrative Magistrate

Dated: April 18, 2017