

APPENDIX

APPENDIX

TABLE OF CONTENTS

Appendix A	Opinion in the United States Court of Appeals for the Fifth Circuit (February 9, 2021)	App. 1
Appendix B	Judgment in the United States Court of Appeals for the Fifth Circuit (June 28, 2021)	App. 16
Appendix C	Memorandum Opinion and Order in the United States District Court Western District of Texas El Paso Division (September 28, 2018)	App. 18
Appendix D	Memorandum Opinion and Order on Damages in the United States District Court Western District of Texas El Paso Division (September 30, 2019)	App. 32
Appendix E	Final Judgment in the United States District Court Western District of Texas El Paso Division (September 30, 2019)	App. 44

App. 1

APPENDIX A

**UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

No. 19-51119

[Filed: February 9, 2021]

UNITED STATES DEPARTMENT OF LABOR,)
)
<i>Plaintiff—Appellee,</i>)
)
<i>versus</i>)
)
FIVE STAR AUTOMATIC FIRE)
PROTECTION, L.L.C.,)
)
<i>Defendant—Appellant.</i>)

Appeal from the United States District Court
for the Western District of Texas
USDC No. 3:16-CV-282

BEFORE DENNIS, HIGGINSON, and WILLETT, *Circuit Judges.*

DON R. WILLETT, *Circuit Judge:*

Seventy-five years ago in *Anderson v. Mt. Clemens Pottery Company*, the Supreme Court fashioned a burden-shifting framework for federal wage claims

App. 2

where an employer fails to maintain proper records.¹ Under *Mt. Clemens*, if “the employer’s records are inaccurate or inadequate,” a plaintiff need only show by “just and reasonable inference” that she was an employee, worked the hours, and wasn’t paid.² It’s a lenient standard rooted in the view that an employer shouldn’t benefit from its failure to keep required payroll records, thereby making the best evidence of damages unavailable. In this un-paid-overtime case, the district court applied *Mt. Clemens* because Five Star’s bare-bones timesheets left numerous evidentiary gaps. The Department of Labor filled those gaps with consistent testimony that Five Star urged employees not to record their pre- and post-shift work hours. DOL used this testimony to estimate unpaid hours and calculate back wages. Five Star’s only rebuttal evidence was a summary chart based on the company president’s memory. As this chart failed to negate any raised inferences of unpaid work, we affirm the district court’s judgment.

I

Five Star Automatic Fire Protection, LLC is a fire-sprinkler installation and service company based in El Paso. Luis Palacios and his wife, Veronica, run the company as President and Vice President, respectively. Five Star has five separate departments — this lawsuit implicates only the construction

¹ 328 U.S. 680, 687 (1946), *superseded by statute on other grounds*, 29 U.S.C. § 254(a)).

² *Id.*

App. 3

department. During the relevant timeframe, Five Star had 53 construction employees. Construction employees typically work in two-man crews with one foreman (sprinkler fitter) and one helper (laborer).

Most of the time, the crews work at client jobsites, not at Five Star's facility where pipe is cut and welded (the "shop"). But occasionally, the construction employees work in the shop or at Palacio's personal ranch. Most of the jobsites are close to Five Star's shop, but others are up to an hour away. Several jobsites are out of state and require crews to stay out of town during the workweek.

During typical day shifts at jobsites, construction employees work from 7 am to 3:30 pm.³ The crews must first report to the shop and load the materials needed for the workday. The crews then drive a company truck to the jobsite. When the day's work is completed, the crew drives back to the shop to drop off the company vehicle. The foreman usually drives the truck to and from the jobsite.

Five Star pays its construction employees by the hour. Employees must record their own time, by handwriting on the company timesheets how many hours they worked each day. Employees only include the total number of hours worked at a jobsite, the shop, or the ranch. So when an employee has worked at two or more locations in one day, he does not record his start and stop time for each location nor does he indicate the order in which he worked at those places.

³ Some jobsites are only accessible at night, so construction employees also work nightshifts.

App. 4

In September 2015, DOL's Wage-and-Hour Investigator Sandra Alba initiated an inquiry into Five Star's compensation practices. Alba interviewed nine employees as well as Mr. and Mrs. Palacios. And she analyzed all timesheets spanning the two-year investigative period, except for two weeks for which time records were missing.

Alba presented her findings to Mr. and Mrs. Palacios. She told them that construction employees were working, without compensation, before and after their recorded shifts. Alba told Mr. and Mrs. Palacios that they owed back wages for this uncompensated time. Mr. Palacios disagreed, stating that employees needed to record their hours, and if they were working before and after the regular shift hours, they should have recorded that time. He declined to pay the back wages or consider Alba's calculations.

DOL then filed a complaint against Five Star in federal court, alleging overtime and recordkeeping violations of the FLSA and seeking back wages and liquidated damages for the affected employees. The case was tried by consent before a magistrate judge.⁴ DOL called six former employees to testify.

The district court first made preliminary factual findings about Five Star's liability, without calculating damages. After recounting the evidence presented at trial, the court found that Five Star failed to keep accurate records of off-the-clock time for the investigative period. The court then found that while

⁴ See 28 U.S.C. § 636(c).

App. 5

the typical construction shift was 7 am to 3:30 pm, Five Star required employees to arrive at the shop no later than 6:45 am and didn't compensate its employees for the 15-minute gap. The court further found that, while the typical workday ended at 3:30 pm, that was the time employees left the jobsite. And Five Star didn't compensate employees for the required travel time back to the shop. Finally, the court found that Five Star had some face-of-the-record violations concerning errors on the payroll records; the parties do not dispute this finding.

Following these preliminary conclusions on liability, the court granted the parties' request to submit additional briefing on damages. In its final order, the court adopted the preliminary findings concerning liability and proceeded to evaluate damages. The court agreed with DOL's calculations and held that Five Star was liable to 53 construction employees for \$121,687.37 in back wages, \$121,687.37 in liquidated damages, and \$2,604.35 for face-of-the-record violations. Five Star appeals the court's findings as to liability for the 47 non-testifying employees and the back-wages calculation for all 53 employees.

II

After a bench trial, we review findings of fact for clear error and legal conclusions *de novo*.⁵ The calculation of unpaid overtime is a mixed question of law and fact—the number of overtime hours is a finding of fact, but the methodology used to calculate

⁵ *Ransom v. M. Patel Enters., Inc.*, 734 F.3d 377, 381 (5th Cir. 2013).

App. 6

back wages based on that number is a question of law.⁶ “When reviewing mixed questions of law and fact, this court reverses only if the findings are based on a clearly erroneous view of the facts or a misunderstanding of the law.”⁷

III

Five Star argues that the district court erred in relying on the testimony of six former employees to (1) find Five Star liable to 53 employees and (2) calculate the damages resulting from that liability. The court permitted this representative evidence under the *Mt. Clemens* burden-shifting framework.

In *Mt. Clemens*, the Supreme Court noted that, typically, a plaintiff who brings an unpaid-wages claim under the FLSA “has the burden of proving that he performed work for which he was not properly compensated.”⁸ But “where the employer’s records are inaccurate or inadequate and the employee cannot offer convincing substitutes,” an employee can attempt to fill the evidentiary gap⁹. “[A]n employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he

⁶ *Id.*

⁷ *Id.*

⁸ 328 U.S. at 686–87. The FLSA states that an employer who violates the overtime provisions is liable for the unpaid overtime and “an additional equal amount as liquidated damages.” 29 U.S.C. § 216(b).

⁹ *Mt. Clemens*, 328 U.S. at 687.

App. 7

produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference.”¹⁰

The burden then “shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference.”¹¹ When an action involves a group of employees, a “representative sample,” if reliable, can shift the burden to the employer.¹² The representative proof is reliable “if the sample could have sustained a reasonable jury finding . . . in each employee’s individual action.”¹³ If the employer fails to negate the inferences raised by the representative evidence, “the court may then award damages to the employee[s], even though the result be only approximate.”¹⁴

As a preliminary matter, Five Star argues that its records were adequate because nobody, including DOL, has explained what adequate records should look like. Five Star misses the point. The adequacy of the records has to do with the evidence available to establish liability and damages, not the employer’s failure to

¹⁰ *Id.*

¹¹ *Id.* at 687-88.

¹² *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1047 (2016) (referring generally to *Mt. Clemens*).

¹³ *Id.* at 1046-47.

¹⁴ *Mt. Clemens*, 328 U.S. at 688.

App. 8

conform to a certain recordkeeping standard. As the Court noted in *Mt. Clemens*, “[w]hen the employer has kept proper and accurate records,” then “the employee may easily” satisfy his burden to show he worked overtime without overtime compensation.¹⁵ But where, as here, the records do not allow employees to show the uncompensated overtime work they completed, the burden-shifting framework applies.

Five Star next argues that, even if *Mt. Clemens* applies, the district court erred because the representative evidence offered at trial failed to raise “just and reasonable” inferences of liability. Alternatively, Five Star argues that if DOL did raise such inferences, Five Star negated them. Finally, Five Star contends that the damages calculation failed to account for the variances among employees’ schedules and work assignments. We first address Five Star’s liability then turn to the damages calculations.

A

To raise just and reasonable inferences as to Five Star’s liability, DOL called six former employees (representing both foremen and helpers) at trial. Those employees consistently testified that:

- Jorge Cobian, Five Star’s lead supervisor, required them (at the risk of discipline) to report to Five Star as early as 6:30 am and no later than 6:45 am, even though the official shift (and compensation clock) began at 7 am.

¹⁵ 328 U.S. at 687.

App. 9

- Before 7 am, the employees engaged in compensable activities, such as loading material onto company trucks.
- Employees didn't leave the jobsites until 3:30 pm, and the amount of time to drive the company truck back to Five Star's headquarters (to return the truck) varied depending on the location of the job site. The average drive time was 30 minutes.
- Cobian either instructed employees not to record time before 7 am and after 3:30 pm or told them that, if they did record the time, Five Star wouldn't compensate them for it.

DOL acknowledges that employees performed work at different jobsites but argues that all employees "typically started and ended their workday at Five Star's premises and witnessed one another performing uncompensated work."

Five Star offers three main arguments to undermine or negate these inferences. None is persuasive.

First, Five Star argues that the former employees' testimony was unreliable. Five Star points to inconsistent statements regarding whether Cobian (or anyone at the company) actually told employees they couldn't record, or wouldn't receive compensation for, time before 7 am and after 3:30 pm. For example, one former employee testified that no one instructed him to write down his time before 7 am, although he never asked about it. Another stated that he just thought he would only be paid from 7 am to 3:30 pm. Others claimed that Cobian specifically told them that they

would only be paid for eight hours per day. Despite these slight variations, all of this testimony supports the inference that the employees believed they could not, or should not, record their pre- and post-shift time, and that the company failed to compensate for this time.

Relatedly, Five Star argues that the employee testimony varied when it came to what loading work employees did before 7 am. Five Star notes that it has two types of crews—underground and overhead. For the underground crews, a third party delivers most materials directly to the jobsite. On the other hand, the overhead crews have to load their own materials for each workday before heading to the jobsite. But as DOL points out, most employees work on overhead crews, and those who worked on underground crews still had to load some materials for most of their jobsites.

Second, Five Star contends that the testifying employees lacked “personal knowledge” of the work performed by those who didn’t testify.¹⁶ Five Star claims that because some crew members worked out of town or performed different activities during the day, the testifying employees couldn’t know what the non-testifying employees were doing. But the employees who testified stated that they personally saw other employees completing similar pre- and post-shift work.

Finally, Five Star offers a string of arguments concerning its general efforts to correct timesheet

¹⁶ *See Olibas v. Barclay*, 838 F.3d 442, 450 (5th Cir. 2016).

errors and its openness to addressing employee concerns.¹⁷ But these general efforts do not undermine the specific testimony that employees worked, per company instruction, before and after their recorded hours.

Our decision in *Brennan v. General Motors Acceptance Corporation* confirms the district court's liability determination.¹⁸ In *Brennan*, employees had three different job titles, all of which involved collecting on overdue accounts and repossessing vehicles.¹⁹ The employees had long, irregular hours so the employer depended on the employees to report their own time on company timesheets.²⁰ Even though upper management encouraged employees to record their overtime accurately, the employees' immediate supervisor pressured them not to report overtime hours.²¹ Fifteen of the company's twenty-six employees testified, and the district court found that the company

¹⁷ To the extent Five Star argues that it was improper to award liquidated damages because these facts demonstrate good will, the argument fails. "Even if [Five Star] acted in good faith based upon a reasonable belief that it did not violate the FLSA, the district court still had discretion to award liquidated damages." *Bernard v. IBP, Inc. of Nebraska*, 154 F.3d 259, 267 (5th Cir. 1998).

¹⁸ 482 F.2d 825 (5th Cir. 1973).

¹⁹ *Id.* at 827.

²⁰ *See id.*

²¹ *Id.*

violated the FLSA as to all twenty-six employees.²² The company argued on appeal that it was unaware that employees were not recording overtime hours.²³ We rejected that argument, holding that the record showed that the supervisor had actual knowledge or, at a minimum, constructive knowledge that the employees were working, but not reporting, overtime hours.²⁴ We further stated that “[t]he company cannot disclaim knowledge when certain segments of its management squelched truthful responses.”²⁵ Thus, based on the representative testimony of a de facto policy of underreporting time, we affirmed the district court’s finding that the employer violated the FLSA’s overtime requirements.²⁶

So too here. All testifying employees stated that their lead supervisor, Cobian, either said or implied that they shouldn’t record pre- and post-shift time. So even though Five Star’s manual instructed employees to record all of their time, the record shows that the de facto policy was that they shouldn’t. Although the sample size here was arguably small (6 of 53 employees—11% of the relevant employees), Five Star points to no authority saying 11% is insufficient for extrapolation purposes. And more importantly, Five

²² *Id.*

²³ *Id.*

²⁴ *Id.* at 827–28.

²⁵ *Id.* at 828.

²⁶ *Id.* at 829.

Star failed to negate the inferences raised by the 11% of employees who testified. We find no error in the magistrate judge's holding that Five Star is liable for unpaid overtime for all 53 construction employees.

B

Five Star also disputes the district court's damages award of \$121,687.37 in back wages. All of Five Star's arguments concern the variations in the employees' schedules and alleged overgeneralizations by Alba, the DOL investigator.

This is how Alba arrived at the number the district court adopted: Alba made initial calculations based on employee interviews, as Five Star didn't provide her with any time sheets until almost two years into the investigation. Once she had the timesheets, Alba reviewed all of them for the two-year investigative period.²⁷

Because the time records were incomplete, Alba relied on her employee interviews and the testimony at trial to calculate the amount of unpaid time employees worked. During regular day shifts, employees had to arrive sometime between 6:30 am and 6:45 am to get ready for the day's work. Alba took a "conservative approach" and estimated that, on average, all construction employees worked for 15 uncompensated minutes before their shifts officially started. For post-shift work, which only applied to foremen who had

²⁷ Five Star provided no timesheets for two of the weeks in that period—a week in September 2013 and the week of Christmas that same year.

App. 14

to drive the company truck back to Five Star at 3:30 pm, Alba calculated an average of 30 minutes per day. Alba explained that this was also a conservative estimate because some employees told her that the post-shift drive time could take up to an hour. So in total, she added 15 minutes a day for laborers and 45 minutes a day for foremen.

Alba added these averages to each employee's weekly timesheets. Following the FLSA's overtime requirement, Alba calculated damages for the weeks when employees exceeded 40 hours before or after she added the average pre- and post-shift time.²⁸ Alba didn't calculate damages for four weeks of the year to account for vacations and holidays.

Alba made other adjustments. If the timesheets showed that an employee worked only at the ranch or the shop for the day, Alba did not add uncompensated time since there would be no pre-7 am loading or post-3:30 pm driving. But when the timesheets showed that the employee worked at the ranch or shop for only part of the day, Alba added the pre- and post-shift averages because it was impossible to tell from the timesheets whether the employee started or ended the day at the ranch, the shop, or the jobsite.

Overall, Alba's final calculations were higher than what she initially estimated, but she presented the lesser amount in an effort to settle the case. After excluding four employees who were owed less than \$20

²⁸ See 29 U.S.C. § 207.

for the entire timeframe, Alba offered the amount that the district court adopted: \$120,417.62.

Five Star contends that these calculations failed to account for variations in the employees' schedules. For example, Five Star states that when employees were working the night shift, at the ranch, or in the shop, they wouldn't have the pre-work loading time and post-work driving time. The employees that testified at trial said they spent anywhere from 2.5% to 30% of their time on the night shift. Five Star also argues that Alba didn't account for all of the employees' vacation time, as crews had at least one full day off for six different weeks in the year, which doesn't include days off for personal reasons.

To substantiate these schedule variations, Five Star provided the district court with a summary chart showing, among other things, which employees worked night shifts, out of town, or at the shop or ranch. Mr. Palacios created the chart based off his memory of different work projects. The district court found this chart unreliable because "Five Star's timesheets simply do not allow for the retrospective analysis its president proffers." We agree.

In short, Five Star mainly contests that the damages award was an approximated number. But that's what *Mt. Clemens* allows when, as here, FLSA-required time records are incomplete.

IV

Five Star fails to show that the district court committed any error concerning its finding of FLSA liability or calculation of damages. We thus AFFIRM.

App. 16

APPENDIX B

**UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

No. 19-51119

[Filed: June 28, 2021]

UNITED STATES DEPARTMENT OF LABOR,)
)
<i>Plaintiff—Appellee,</i>)
)
<i>versus</i>)
)
FIVE STAR AUTOMATIC FIRE)
PROTECTION, L.L.C.,)
)
<i>Defendant—Appellant.</i>)

Appeal from the United States District Court
for the Western District of Texas
USDC No. 3:16-CV-282

BEFORE DENNIS, HIGGINSON, and WILLETT, *Circuit
Judges.*

J U D G M E N T

This cause was considered on the record on appeal
and was argued by counsel.

App. 17

IT IS ORDERED and ADJUDGED that the judgment of the District Court is AFFIRMED.

IT IS FURTHER ORDERED that each party bear its own costs on appeal.

App. 18

APPENDIX C

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
EL PASO DIVISION**

EP-16-CV-00282-LS

[Filed: September 28, 2018]

UNITED STATES DEPARTMENT OF)
LABOR, R. ALEXANDER ACOSTA,)
SECRETARY OF LABOR;)
)
Plaintiff,)
)
v.)
)
FIVE STAR AUTOMATIC FIRE)
PROTECTION, LLC,)
)
Defendant.)

MEMORANDUM OPINION AND ORDER

Five Star is an El Paso company that installs and maintains building fire sprinkler systems. The Department of Labor (“DOL”) alleges that from September 23, 2013, through September 30, 2015, Five Star violated the Fair Labor Standards Act because it did not pay certain employees for pre-shift and post-shift work, and also improperly calculated

overtime pay for certain employees. Five Star does not dispute that the FLSA covers it and the employees at issue, and does not contest this Court's jurisdiction.

The Law

The FLSA “requires an employer to pay overtime compensation to any employee working more than forty hours in a workweek.”¹ When the Secretary of Labor “bring[s] an action by or on behalf of any employee” to recover unpaid wages or overtime compensation² he bears “the burden of proving that [the employee] performed work for which [the employee] was not properly compensated.”³ Ordinarily, this burden is satisfied using the employer's own time records.⁴ “But where the employer's records are inaccurate or inadequate and the employee cannot offer convincing substitutes...[the] employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference.”⁵ The burden then shifts to the employer to produce evidence of the precise amount of work

¹ *Allen v. Coil Tubing Servs., L.L.C.*, 755 F.3d 279, 282 (5th Cir. 2014) (citing 29 U.S.C. § 207(a)(1)).

² 29 U.S.C. § 216(c).

³ *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 686-87, 66 S. Ct. 1187, 90 L. E.d 2d. 1515 (1946).

⁴ *Id.* at 687.

⁵ *Id.*

performed or evidence negating the reasonableness of the inference drawn from the employee's evidence.⁶ "If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result be only approximate."⁷

In cases involving multiple workers, not all workers need testify. "Estimates may come from representative testimony, and the '[t]estimony of some employees concerning the hours worked by groups of non-testifying employees is sufficient if those who do testify have personal knowledge of the work performed by those who do not.'"⁸

The Evidence

Former foreman Seth Palacio worked at Five Star from January 2007 through May 2015.⁹ He testified that he was required to be at work at 6:30 a.m., even though his eight-hour workday was from 7:00 a.m. to 3:30 p.m.¹⁰ Palacio testified that supervisor Jorge Cobian mandated that Palacio arrive at work by 6:40

⁶ *Id.* at 687-88.

⁷ *Id.* at 688.

⁸ *Olibas v. Barclay*, 838 F.3d 442, 450 (5th Cir. 2016) (quoting *Beliz v. W.H. McLeod & Sons Packing Co.*, 765 F.2d 1317, 1331 (5th Cir. 1985).

⁹ ECF No. 84, at 44.

¹⁰ *Id.* at 42-43.

App. 21

a.m.,¹¹ and 6:50 a.m. was late.¹² Indeed, Palacio had to work alone on a project one day because Cobian sent Palacio's helper home for arriving only a few minutes before 7:00 a.m.¹³ All foremen, sprinkler fitters, and helpers would try to arrive at 6:30 a.m. because of Cobian's 6:50 a.m. deadline.¹⁴ Palacio arrived at 6:30 a.m. to load materials onto his work truck,¹⁵ which typically took ten to fifteen minutes.¹⁶ Once loaded, Palacio would leave for the project site ten to fifteen minutes before 7:00 a.m.¹⁷ In the afternoons, Palacio would leave the worksite at 3:30 p.m. in the company truck and arrive at Five Star between 3:45 p.m. and 4:00 p.m.¹⁸

Palacio testified that he recorded eight hours per day for timesheet purposes, which reflected his work from 7:00 a.m. to 3:30 p.m., with a thirty minute lunch.¹⁹ Palacio testified he was not paid for the work

¹¹ *Id.* at 49-50.

¹² *Id.* at 53.

¹³ *Id.* at 50-52.

¹⁴ *Id.* at 53.

¹⁵ *Id.* at 55.

¹⁶ *Id.* at 60.

¹⁷ *Id.* at 60-61.

¹⁸ *Id.* at 63.

¹⁹ *Id.* at 64.

App. 22

done before 7:00 a.m.,²⁰ nor for driving from the worksite to Five Star at the end of the workday.²¹

Dagoberto Gonzalez worked at Five Star from April 2012 through August 2017,²² starting as a laborer and eventually moving up to foreman in charge of installing underground water systems that support interior fire sprinklers.²³ His set paid workday was 7:00 a.m. to 3:30 p.m., but he actually began working between 6:30 a.m. and 6:45 a.m.²⁴ He testified “the latest we could start the day would be 6:45 a.m.”²⁵ and he was in trouble several times with Cobian for being “late.” In fact, Cobian sent two other Five Star employees home for arriving between 6:45 a.m. and 6:50 a.m.²⁶ Gonzalez echoed Palacio’s testimony that Cobian forbade crews from returning to Five Star before 3:30 p.m., and he was not paid for driving time after 3:30 p.m.²⁷ When Gonzalez approached Cobian about the unpaid time

²⁰ *Id.* at 68.

²¹ *Id.* at 69.

²² *Id.* at 113.

²³ *Id.* at 112-113.

²⁴ *Id.* at 114-15.

²⁵ *Id.* at 114.

²⁶ *Id.* at 116.

²⁷ *Id.* at 122-23.

App. 23

before 7:00 a.m., Cobian told him that work started at the jobsite, not at the shop.²⁸

Fernando Elias was a Fire Star sprinkler fitter foreman from July 2008 to March 2015.²⁹ Cobian instructed Elias to arrive at work no later than 6:40 a.m.,³⁰ and to leave the project site no earlier than 3:30 p.m.,³¹ resulting in a return to Five Star usually between 4:00 p.m. and 4:15 p.m.³² When Elias filled out his timesheet, however, it represented a work schedule of 7:00 a.m. to 3:30 p.m. because he believed that is all he would be paid for.³³ Other than receiving a sample timesheet when he was initially hired, no one at Five Star taught Elias how to fill out his time-sheet.³⁴

Pipe installer helper Lorenzo Acosta worked for Five Star from July 2008 to March 2015.³⁵ Cobian instructed Acosta to arrive at Five Star at 6:30 a.m., and to leave to the project site at 3:30 p.m.³⁶ Acosta

²⁸ *Id.* at 124-25.

²⁹ *Id.* at 202-203.

³⁰ *Id.* at 209.

³¹ *Id.* at 217-18.

³² *Id.* at 213.

³³ *Id.* at 216.

³⁴ *Id.* at 216-17.

³⁵ ECF No. 85, at 7-8.

³⁶ *Id.* at 8.

testified that he would sometimes go to work earlier than 6:30 a.m. to load material onto the truck.³⁷ Acosta explained that almost all other employees were at Five Star at 6:30 a.m., and that they would all load the work trucks for twenty-five to thirty minutes.³⁸ Acosta's timesheet reflected only the eight work hours from 7:00 a.m. to 3:30 p.m. because that is the period for which Cobian said he could be paid.³⁹ His timesheets did not include work before 7:00 a.m. or the return to Five Star at 4:00 - 4:10 p.m.⁴⁰ Cobian taught Acosta how to fill out his timesheet,⁴¹ and explicitly told Acosta he would not be paid for work performed before 7:00 a.m. or after 3:30 p.m.⁴²

Pipe installation helper Jonathan Hernandez worked at Five Star from June 2013 through February 2015.⁴³ He arrived for work at Five Star at 6:30 a.m. per Cobian's instructions, and left for the day after 4:00 p.m.⁴⁴ Cobian instructed Hernandez to put only put

³⁷ *Id.* at 8-9.

³⁸ *Id.* at 9-11.

³⁹ *Id.* at 11-12.

⁴⁰ *Id.* at 13.

⁴¹ *Id.* at 13.

⁴² *Id.* at 37-38.

⁴³ *Id.* at 45, 48.

⁴⁴ *Id.* at 46.

eight hours on his timesheet per day,⁴⁵ and made Hernandez generate a new timesheet when Hernandez tried to claim the time he worked before 7:00 a.m.⁴⁶

Foreman Jorge Hernandez worked at Five Star from December 2011 through September 2015.⁴⁷ Hernandez arrived for work in the mornings at 6:30 a.m.⁴⁸ per Cobian's instructions.⁴⁹ The eight hours on his timesheet represented 7:00 a.m. to 3:30 p.m., because that is what a Five Star foreman taught him to do when he was hired.⁵⁰ Hernandez asked Cobian why he was not paid for work before 7:00 a.m., and Cobian answered that Hernandez was to be paid for eight hours daily.⁵¹

As Five Star's payroll clerk since 2011,⁵² Mary Anne Morales collects employee timesheets and generates a spreadsheet that is used to calculate employee pay.⁵³ She testified that a new employee's assigned foreman

⁴⁵ *Id.* at 52.

⁴⁶ *Id.* at 52-54.

⁴⁷ *Id.* at 81.

⁴⁸ *Id.* at 83.

⁴⁹ *Id.* at 82.

⁵⁰ *Id.* at 88.

⁵¹ *Id.* at 89.

⁵² *Id.* at 128.

⁵³ *Id.* at 130-31.

teaches him how to fill out his timesheet, and that Cobian taught the foremen.⁵⁴ She also testified that if an employee's timesheet reflected five eight-hour workdays, she would not know whether those forty hours included time working before 7:00 a.m. or after 3:30 p.m.⁵⁵

Sandra Alba, a Department of Labor wage and hour investigator, testified that employers must pay employees time and half their regular rate for work in excess of forty hours per week.⁵⁶ If an employee works at two or more rates of pay during a single workweek, overtime pay cannot be based on the lower regular rate, but must be based on a "weighted average."⁵⁷ Employers are also required to maintain and keep accurate and complete employee payroll records.⁵⁸

Alba began investigating Five Star in September 2015.⁵⁹ Five Star vice president and owner Veronica Palacios told Alba the company's construction employees worked from 7:00 a.m. to 3:30 p.m., with thirty minutes for lunch.⁶⁰ Five Star did not, however,

⁵⁴ *Id.* at 137-38.

⁵⁵ *Id.* at 143.

⁵⁶ ECF No. 86, at 8.

⁵⁷ *Id.* at 9.

⁵⁸ *Id.*

⁵⁹ *Id.* at 12.

⁶⁰ *Id.* at 14.

actually keep track of when an employee started and ended his workday.⁶¹ With no accurate records to calculate back pay due, Alba based her calculations on employee interview “averages.” Arrival times at Five Star ranged from 6:30 a.m. to 6:55 a.m.,⁶² and departure times ranged from 3:40 p.m. to 4:30 p.m.⁶³

With an average of fifteen and thirty unpaid minutes in the morning and afternoon, respectively, Alba calculated that each subject employee was underpaid three hours and forty five minutes per week.⁶⁴ She later adjusted this figure and removed the unpaid afternoon thirty minutes from the laborers and helpers, because they probably drove straight home from the worksite.⁶⁵ Only the foremen and sprinkler fitters kept the unpaid afternoon thirty minutes. She adjusted downward further to take into account an average of four weeks per year for vacation and holidays.⁶⁶

On cross examination Alba conceded there may be problems in her methodology. For example, employees might work some days at the Five Star shop or at a

⁶¹ *Id.*

⁶² *Id.* at 97.

⁶³ *Id.* at 99.

⁶⁴ *Id.* at 43-44.

⁶⁵ *Id.* at 44.

⁶⁶ *Id.* at 45.

nearby ranch and would leave at 3:30 p.m.⁶⁷ On hot summer days, employees might work 6:00 a.m. to 2:30 p.m.,⁶⁸ and employees regularly worked night projects where they would be allowed to drive straight to the worksite and/or drive straight home. Other employees may have worked under forty hours, or no hours, in particular weeks, and thus fail to engage the overtime rules.⁶⁹

Jorge Cobian is Five Star's lead supervisor.⁷⁰ He denied ever telling any employee to be at work at 6:30 a.m., with no pay until 7:00 a.m.⁷¹ According to Cobian, work schedules varied according to the general contractors' schedules.⁷² Cobian had no role with respect to employee timesheets,⁷³ and never told any employee to add or subtract time from his timesheet.⁷⁴ During the relevant time period crews would return to Five Star from 2:50 p.m. to 3:45 p.m.⁷⁵ If crews

⁶⁷ *Id.* at 106.

⁶⁸ *Id.* at 109.

⁶⁹ *Id.* at 121, 129-31.

⁷⁰ *Id.* at 206-07.

⁷¹ *Id.* at 229.

⁷² *Id.* at 232.

⁷³ *Id.* at 242.

⁷⁴ *Id.* at 243.

⁷⁵ *Id.* at 251.

returned at 4:00 p.m., 4:15 p.m., or 6:00 p.m., they should record have recorded that time.⁷⁶ Cobian denied disciplining employees for being late.⁷⁷

Luis Palacios, Five Star's founder and president, testified that employees are to record all hours worked.⁷⁸ He testified that Five Star works twenty-four hours per day, seven per days per week, and that there is no set schedule because of the need to accommodate the general contractors' schedules.⁷⁹ Five Star crews also regularly work out of town and stay in hotels in Albuquerque, Alamogordo, and Truth or Consequences, all in New Mexico.⁸⁰ For projects closer, such as in Las Cruces, New Mexico, the crews will drive back every day and are paid for the travel time.⁸¹ The typical workweek is Monday through Friday, but some employees work four days per week.⁸² Palacios testified about several projects within the relevant time period that were close to Five Star with presumably short driving times back.⁸³

⁷⁶ *Id.* at 252.

⁷⁷ *Id.* at 253.

⁷⁸ ECF No. 87, at 16-17.

⁷⁹ *Id.* at 18, 21-22.

⁸⁰ *Id.* at 37.

⁸¹ *Id.* at 39.

⁸² *Id.* at 45.

⁸³ *Id.* at 97-104.

Factual Conclusions Bearing on Liability

Pursuant to the parties' request that I make preliminary factual determinations bearing on liability, I find based on the witness testimony and exhibits admitted at trial:

1. When the Five Star employees at issue were working a typical 7:00 a.m. to 3:30 p.m. day shift, they were required to be at Five Star no later than 6:45 a.m., and were not compensated for the pre-shift time from 6:45 a.m. to 7:00 a.m.

2. When the Five Star employees at issue were working a typical 7:00 a.m. to 3:30 p.m. day shift, they were required to leave the project site no earlier than 3:30 p.m. Travel time from the worksite back to Five Star, if any, was not compensated.

3. The parties do not dispute the face of the record violations when an employee worked two or more rates during an overtime week, nor the arithmetic errors in calculating the number of overtime hours worked.

4. Five Star, for the time period in question, failed to keep accurate records of off-the-clock time that its employees worked.

The parties have requested an opportunity to submit briefing on potential damages. A status conference on this matter will be set within the next two weeks.

SIGNED and ENTERED on September 28, 2018.

App. 31

/s/ LEON SCHYDLOWER
LEON SCHYDLOWER
UNITED STATES
MAGISTRATE JUDGE

APPENDIX D

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
EL PASO DIVISION**

EP-16-CV-00282-LS

[Filed September 30, 2019]

R. ALEXANDER ACOSTA, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,)
)
Plaintiff,)
)
v.)
)
FIVE STAR AUTOMATIC FIRE PROTECTION, LLC,)
)
Defendant.)

**MEMORANDUM OPINION AND
ORDER ON DAMAGES**

After a bench trial I found that Five Star, during the relevant time period, did not compensate its employees for pre-shift work from 6:45 a.m. to 7:00 a.m., and for travel time from the worksite back to Five

Star after 3:30 p.m.¹ I also found that Five Star failed to keep accurate records of off-the-clock time that its employees worked. The parties submitted briefs regarding their respective positions on damages. I agree with DOL's computation of damages for uncompensated time and find that Five Star has not met its burden to overcome liquidated damages.

Uncompensated Time

Sandra Alba, DOL's wage and hour investigator assigned to the Five Star investigation, submitted a declaration² explaining her post-trial revised backwages calculation. Consistent with the evidence presented during trial, this recalculated figure incorporates fifteen minutes of pre-shift uncompensated time for all affected employees, and an additional thirty minutes of uncompensated time for affected foremen who drove worktrucks back to Five Star after 3:30 p.m. She verified whether these figures caused any employee to work more than forty hours on any particular week, omitted holiday weeks because employees were not likely to reach forty hours, and omitted workdays where Five Star's records show that an employee worked the full day at Five Star or at the Five Star president's nearby ranch. This methodology, utilizing the records that Five Star was able to provide, generated backwages in the amount of \$121,687.37. An additional amount for undisputed face-of-the record-violations totals \$2,604.35.

¹ ECF No. 91 ("Memorandum Opinion and Order"), at 9.

² ECF No. 96-1.

Five Star's president submitted a declaration³ asserting that backwages total no more than \$44,103.41. Relying exclusively on his personal review of the handwritten employee timesheets,⁴ he claims to be able to reduce pre-shift and post-shift backwages due by taking into consideration a number of factors, including work on projects that were out of town, days off (i.e., for holidays, illness), night work, worksite location, and whether the employee drove to the worksite. For example, if an employee worked a night shift, there should be no pre-shift or post-shift backwages due because the employee ostensibly reported directly to and left directly from the worksite, bypassing the Five Star shop altogether.⁵ The timesheets, however, do not indicate the particular hours an employee worked, and do not reflect whether the work was done at night or during the day.

In reviewing a typical timesheet from July of 2015,⁶ the employee worked fifteen hours on Monday at three different locations, including four hours at the Five Star shop. The timesheet itself does not reflect whether any of the work was done at night. It also does not reflect whether the employee reported first to Five Star for four hours of work (which would qualify for fifteen minutes of unpaid pre-shift time), nor whether he

³ ECF No. 95-1.

⁴ *Id.* at 1, ¶3 (“I have personally reviewed the hand-written time sheets for the period of time at issue in this case ...”).

⁵ *Id.* at 2.

⁶ ECF No. 74-14, at 132.

returned to Five Star at 4:00 p.m. or later (which would qualify for thirty minutes of unpaid post-shift time if the employee was a foreman). Indeed, that day, the employee could have worked an entire night shift starting at midnight, return home to sleep for eight hours, and drive directly to the other two worksites, for which there would be no pre-shift or post-shift unpaid time. Five Star's timesheets simply do not allow for the retrospective analysis its president proffers, and given that he relied exclusively on the timesheets in generating his backwages figure, his methodology lacks reliability.

Again, the FLSA "requires an employer to pay overtime compensation to any employee working more than forty hours in a workweek."⁷ When the Secretary of Labor "bring[s] an action by or on behalf of any employee" to recover unpaid wages or overtime compensation⁸ he bears "the burden of proving that [the employee] performed work for which [the employee] was not properly compensated."⁹ Ordinarily, this burden is satisfied using the employer's own time records.¹⁰ "But where the employer's records are inaccurate or inadequate and the employee cannot offer

⁷ *Allen v. Coil Tubing Servs., L.L.C.*, 755 F.3d 279,282 (5th Cir. 2014).

⁸ 29 U.S.C. § 216(c).

⁹ *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 686-87, 66 S. Ct. 1187, 90 L. E.d 2d. 1515 (1946).

¹⁰ *Id.* at 687.

convincing substitutes ... [the] employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference.”¹¹ The burden then shifts to the employer to produce evidence of the precise amount of work performed or evidence negating the reasonableness of the inference drawn from the employee’s evidence.¹² “If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result be only approximate.”¹³

In cases involving multiple workers, not all workers need to testify. “Estimates may come from representative testimony, and the ‘[t]estimony of some employees concerning the hours worked by groups of non-testifying employees is sufficient if those who do testify have personal knowledge of the work performed by those who do not.’”¹⁴

Five Star’s records are inaccurate and inadequate. Employees simply listed the number of hours worked at a particular worksite, on a particular day, without any reference to when the work was performed and in

¹¹ *Id.*

¹² *Id.* at 687-88.

¹³ *Id.* at 688.

¹⁴ *Olibas v. Barclay*, 838 F.3d 442, 450 (5th Cir. 2016) (quoting *Beliz v. W.H. McLeod & Sons Packing Co.*, 765 F.2d 1317, 1331 (5th Cir. 1985)).

which order the employee worked that day's worksites. DOL's Alba used the Five Star records as best she could, with sound methodology, to show the amount and extent of unpaid work, overtime, and backwages due, "as a matter of just and reasonable inference." Moreover, Five Star did not meet its shifted burden to produce evidence of the *precise* amount of work performed and did not negate the reasonableness of the inferences drawn from the DOL's evidence. I therefore find that backwages due amount to \$121,687.37, and that the undisputed face-of-the record violations total \$2,604.35.

Liquidated Damages

The FLSA provides that an employer who violates the overtime provisions is liable for the unpaid overtime compensation and "an additional equal amount as liquidated damages."¹⁵ Liquidated damages are compensatory, not punitive, and "constitute[] compensation for the retention of a work[er]'s pay which might result in damages too obscure and difficult of proof for estimate other than by liquidated damages."¹⁶ A court can reduce or decline to award such damages if it concludes the employer acted in "good faith" and "had reasonable grounds" to believe its actions complied with the FLSA.¹⁷ An employer, however, "faces a substantial burden of demonstrating

¹⁵ 29 U.S.C. § 216(b).

¹⁶ *Brooklyn Sav. Bank v. O'Neill*, 324 U.S. 697, 707, 65 S. Ct. 895, 89 L. Ed. 1296 (1945).

¹⁷ 29 U.S.C. § 260.

good faith and a reasonable belief that its actions did not violate the FLSA.”¹⁸ Even if the district court determines the employer acted in good faith and had a reasonable belief its actions were legal, the court may still award liquidated damages.¹⁹

DOL does not allege that Five Star failed to pay overtime altogether. Indeed, there are no allegations in this case that Five Star improperly withheld overtime pay for hours that employees claimed on their timesheets. Five Star paid its employees nearly \$500,000.00 in overtime²⁰ during the relevant time period, and the timesheets presented at trial and in the record reflect that employees routinely entered more than forty hours on their weekly timesheets. The employee in the example timesheet explained above worked and claimed fifty-seven hours that week.²¹

The problem in this case is that employees were not including the pre-shift and post-shift work at issue on their timesheets. DOL witness and former Five Star foreman Seth Palacio testified that he “think[s] it was [Five Star supervisor Jorge] Cobian” who told Palacio how to fill in his timesheet, but also testified “[t]hat’s how we started filling it out, and that’s how we always

¹⁸ *Singer v. City of Waco*, 324 F.3d 813, 823 (5th Cir. 2003) (internal quotes omitted).

¹⁹ *Bernard v. IBP, Inc.* 154 F.3d 259,267 (5th Cir. 1998).

²⁰ ECF No. 95-2, at 8.

²¹ ECF No. 74-14, at 132.

filled it out.”²² He reiterated that no one told him to include on his timesheet “time ... spent working in the morning before 7:00 a.m.”²³ Similarly, former Five Star foreman Fernando Elias testified that no one at Five Star taught him how to fill out his timesheet, and he believed he could only be paid for work he did from 7:00 a.m. to 3:30 p.m.²⁴ Elias testified that he never asked anyone about getting paid for pre-shift time and he filled out his timesheet the way he did out of “ignorance.”²⁵ Former Five Star foreman Dagoberto Gonzalez did not include the pre-shift and post-shift time on his timesheets because a “colleague” whose name he does not remember taught him that way.²⁶ Gonzalez testified that Cobian told him that “the work started at 7:00 at the job site, not at the shop, “that you would have to paid once you were at the – at the site.”²⁷

Five Star employee Lorenzo Elias-Acosta testified that Cobian taught Elias how to fill out his timesheet, explicitly told Elias he would only be paid for work performed from 7:00 a.m. to 3:30 p.m.,²⁸ and explicitly told Elias that he would not be paid for work done

²² ECF No. 84, at 66.

²³ *Id.* at 67.

²⁴ *Id.* at 216-17.

²⁵ *Id.*

²⁶ *Id.* at 124.

²⁷ *Id.* at 124-25.

²⁸ ECF No. 85, at 11-12.

before 7:00 a.m. and after 3:30 p.m.²⁹ Cobian also taught former Five Star employee Jonathan Hernandez how to fill out his timesheet.³⁰ When Hernandez tried to claim on his timesheet work that began at 6:30 a.m., Cobian made him generate a new timesheet and told Hernandez he could only claim time from 7:00 a.m. onward.³¹ Former Five Star employee Jorge Hernandez testified that several different foremen and other Five Star employees told him to include only work from 7:00 a.m. to 3:30 p.m. on his timesheet.³² When Hernandez asked Cobian about getting paid for work done before 7 :00 a.m., Cobian’s response was that “work hours were eight hours daily.”³³

Five Star’s payroll clerk processed the timesheets and generated employee pay.³⁴ She testified that Cobian taught the Five Star foremen how to generate timesheets, and the foremen in turn would teach the new Five Star employees.³⁵

Five Star’s president argues that the company acted in good faith and reasonably believed its conduct was

²⁹ *Id.* at 37-38.

³⁰ *Id.* at 52.

³¹ *Id.* at 52-54.

³² *Id.* at 88.

³³ *Id.* at 89.

³⁴ *Id.* at 130-31.

³⁵ *Id.* at 137-38.

lawful because it relied on employees to correctly report the hours they worked.³⁶ The Five Star employee manual provides that “all employees must record the exact time worked.”³⁷ I find, however, that Five Star supervisor Cobian implemented and enforced a policy that forbade employees from including on their timesheets the pre-shift and post-shift time at issue. The evidence reflects he disseminated the policy directly to Five Star employees, and also through Five Star foremen who taught new employees how to generate their timesheets. Consequently, I cannot find that Five Star acted in good faith and had a reasonable belief that its actions were legal.

Findings of Fact and Conclusions of Law

The findings of fact in this order and in the order on liability³⁸ show:

1. Five Star does not dispute that the FLSA covers it and the parties do not contest this court’s jurisdiction. The relevant time period is September 23, 2013 to September 20, 2015.

2. When the Five Star employees at issue were working a typical 7:00 a.m. to 3:30 p.m. day shift, they were required to be at Five Star no later than 6:45 a.m., and were not compensated for the pre-shift time from 6:45 a.m. to 7:00 a.m.

³⁶ ECF No. 95-2, at 2.

³⁷ ECF No. 75-1, at 3.

³⁸ ECF No. 91.

3. When the Five Star employees were working a typical 7:00 a.m. to 3:30 p.m. day shift, they were required to leave the project site no earlier than 3:30 p.m. Foremen and other employees who drove back to Five Star from the project site were not paid for their travel time after 3:30 p.m. The average post-shift unpaid time was thirty minutes.

4. During the relevant time period, Five Star failed to keep accurate records of off-the-clock time that its employees worked.

5. DOL wage and hour investigator Sandra Alba submitted a revised post-trial backwage calculation that utilized sound methodology and the records that Five Star was able to provide. The backwage amount due is \$121,687.37. An additional amount for undisputed face-of-the-record violations totals \$2,604.35.

6. Five Star's proposed backwage figure of \$44,103.41 is based on a review of the employee timesheets and a methodology that lacks reliability.

7. Five Star's failure to pay the affected employees for the pre-shift and post-shift work at issue was not in good faith nor based on a reasonable belief that its actions were legal.

The conclusions of law from this order and the order on liability show:

1. During the period of September 23, 2013 through September 20, 2015, Five Star violated the FLSA's overtime provisions by failing to pay its employees for the pre-shift and post-shift work at issue.

2. Five Star's FLSA violations were willful.

3. Five Star's employees should have been paid for the fifteen minutes of pre-shift time and the thirty minutes of post-shift time at issue.

4. Five Star failed to demonstrate its violations of the FLSA's overtime provisions were in good faith, and failed to show it had reasonable grounds to believe its actions were legal. Consequently, liquidated damages in an amount equal to the back wages due are appropriate in this case.

5. Based on the foregoing, Plaintiff R. Alexander Acosta, Secretary of Labor, United States Department of Labor, shall recover against Defendant Five Star Automatic Fire Protection, LLC, on his FLSA claim in the amount of (1) \$121,687.37 for unpaid backwages, (2) \$121,687.37 in liquidated damages, and (3) \$2604.35 for face-of-the record violations. A judgment will be filed contemporaneously.

SIGNED and ENTERED on September 30, 2019.

/s/ LEON SCHYDLOWER
LEON SCHYDLOWER
UNITED STATES
MAGISTRATE JUDGE

APPENDIX E

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
EL PASO DIVISION**

EP-16-CV-00282-LS

[Filed September 30, 2019]

R. ALEXANDER ACOSTA, SECRE-)
TARY OF LABOR, UNITED STATES)
DEPARTMENT OF LABOR,)
)
)
Plaintiff,)
v.)
)
FIVE STAR AUTOMATIC FIRE)
PROTECTION, LLC,)
)
Defendant.)

FINAL JUDGMENT

From the evidence adduced during a contested bench trial and based on the pleadings and briefing of the parties, the Court entered orders on liability¹ and

¹ ECF No. 91.

damages.² Based on the findings of fact and conclusions of law explained within those two orders, the Court enters the following judgment:

IT IS FINALLY ORDERED, ADJUDGED, AND DECREED that Plaintiff R. Alexander Acosta, Secretary of Labor, United States Department of Labor, recover against Defendant Five Star Automatic Fire Protection, LLC, on his FLSA claim in the amount of (1) \$121,687.37 for unpaid backwages, (2) \$121,687.37 in liquidated damages, and (3) \$2,604.35 for face-of-the record violations.

SIGNED and ENTERED on September 30, 2019.

/s/ LEON SCHYDLOWER
LEON SCHYDLOWER
UNITED STATES
MAGISTRATE JUDGE

² ECF No. 97.