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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

PETE E. SARANTOPOULOS, Plaintiff and Appellant, v. SHEPHERD HOME HEALTH CARE, INC., Defendant and Respondent.	B267364 Los Angeles County Super. Ct. No. BC516945

APPEAL from a judgment of the Superior Court of Los Angeles County, Elizabeth R. Feffer, Judge. Affirmed in part, reversed in part, with directions.

Strauss & Palay and Michael A. Strauss for Plaintiff and Appellant.

Law Offices of William R. Ramsey and William R. Ramsey for Defendant and Respondent.

INTRODUCTION

In this wage-and-hour case, plaintiff Pete E. Sarantopoulos appeals portions of the judgment entered after a court trial denying his unpaid wage claims. Plaintiff, a licensed vocational nurse, provided in-home health care services to Medicare patients on behalf of Shepherd Home Health Care, Inc. (Shepherd), and he received a fixed payment for each patient visit he completed. Shepherd's records showed plaintiff visited as many as 15 patients a day and almost always worked seven days a week. The parties agreed plaintiff spent additional uncompensated time attending required training classes, visiting Shepherd's home office to replenish his medical supplies and submit required paperwork, and traveling between patient visits. After Shepherd terminated plaintiff's employment, he filed the present action, primarily seeking unpaid wages.

The trial court found Shepherd failed to timely pay plaintiff upon termination of his employment and awarded waiting time penalties. Otherwise, the court found plaintiff failed to establish entitlement to unpaid wages, mainly because he failed to produce credible evidence of the hours he worked. However, where an employer fails to maintain adequate payroll records which would establish the employee's hours worked, the court must make approximate findings based upon the evidence presented. On this record, we conclude plaintiff established he is entitled to minimum wages for non-patient-visit tasks such as driving between patients' homes, visiting Shepherd's office to collect medical supplies and handle required paperwork, and attending monthly training sessions. In addition, plaintiff is entitled to compensation for unpaid rest breaks, as well as overtime premium wages. Accordingly, we reverse the judgment on

plaintiff's first cause of action for unpaid wages and remand for a determination of plaintiff's damages. In light of our holding that Shepherd unlawfully withheld plaintiff's wages, we reverse the judgment in favor of Shepherd on plaintiff's fourth cause of action for unfair competition and remand for further proceedings. In addition, we instruct the court to award plaintiff reasonable attorneys' fees and costs under section 1194. We affirm the judgment in all other respects.

FACTS AND PROCEDURAL BACKGROUND

1. Plaintiff's Employment

Shepherd provides home health care services to Medicare patients throughout greater Los Angeles and Orange Counties. Plaintiff, a licensed vocational nurse, was a non-exempt employee of Shepherd from December 28, 2007 to September 6, 2011. As a field nurse for Shepherd, plaintiff would visit patients in their homes or at residential facilities and provide care based upon their doctor's requests and Shepherd's care plan. Generally, plaintiff would do some or all of the following during a patient visit: perform a body assessment, take and record vital signs, administer medication, and provide wound care.

Shepherd assigned patients to plaintiff and provided him with a care plan and proposed visit schedule for his patients each week. However, plaintiff was free to decide which patients to visit on any given day. According to Shepherd's employee handbook, employee hours were limited to 40 hours per week, eight hours per day. Any overtime work needed to be approved in advance by Odette Nayrouz, Shepherd's president. In addition, the employee manual instructs employees to take a 30-minute lunch break and 15-minute rest breaks. However, because

plaintiff was a field nurse in control of his own schedule, it was not possible for Shepherd to ensure that he took meal or lunch breaks.

Each of Shepherd's patients had an individualized care plan. Because not all offered services were required at every patient visit, the duration of visits varied considerably. At trial, Nayrouz said a typical patient visit should take "much less than an hour," including the time needed to fill out paperwork. Although Nayrouz conceded that the length of a visit varied, she suggested that most routine visits would probably last about 30 minutes, while visits requiring wound care could last 45 minutes or more. Occasionally, according to Nayrouz, a visit could last more than one hour. For his part, plaintiff said the average patient visit lasted 45 to 60 minutes, not including paperwork. According to plaintiff, he was advised that a visit less than 45 minutes in duration was "unacceptable" and "wasn't something that was going to be paid."

Shepherd paid plaintiff a flat rate for each patient visit he completed, regardless of the length of the visit. The precise per-visit rate varied and ranged between $25 and $35 per visit during the early years of plaintiff's employment with Shepherd. Plaintiff also received a mileage reimbursement from Shepherd because he used his personal vehicle to travel between patients. The mileage reimbursement compensated plaintiff for the use of his vehicle, but not for the time he spent traveling between patients. The parties agreed the travel time between patients was absolutely necessary in order for plaintiff to perform his job, and stipulated that the travel time between patients was 15 minutes on average.

Nayrouz admitted Shepherd never paid plaintiff hourly wages or overtime wages during his employment. However, plaintiff performed tasks for Shepherd in addition to making patient visits. For example, once a month, Shepherd required its nurses to attend continuing education classes which lasted approximately one hour. The parties stipulated that plaintiff attended the classes on a monthly basis, but was not paid for doing so. In addition, plaintiff visited Shepherd's home office several times a week to pick up medical supplies he needed during patient visits, such as gloves, colostomy bags, and wound care supplies. He also stopped at the office to pick up blank forms (and drop off completed forms) Shepherd required him to fill out as he made each patient visit. Occasionally, plaintiff needed to review a patient's medical records, which were only accessible at Shepherd's office.

2. Paper Trail

2.1. Timesheets

Officially, Shepherd required plaintiff to submit timesheets on a weekly basis. However, plaintiff never provided Shepherd with timesheets, and although Nayrouz claimed she asked him to comply with the policy, she never disciplined him for failing to do so during the four years he worked for Shepherd. Plaintiff did not keep a contemporaneous record of the hours he worked.

2.2. Route Sheets

Plaintiff generated two pieces of paperwork each time he visited a patient. He recorded medical information, such as vital signs and other treatment provided, in nursing progress notes. Those notes were submitted to Shepherd and later reviewed by Shepherd's nursing director. Plaintiff also documented his

patient visits using a "route sheet" form provided by Shepherd. On the route sheet, plaintiff recorded the date of each patient visit, along with the name of the patient, a visit code, and the start time, end time and total duration of the visit. Plaintiff was also required to obtain the signature of the patient or caregiver on the route sheet.

After plaintiff submitted his route sheets to Shepherd, an employee would input the information he provided into a computer software program. The software would alert the company if a visit would likely be disallowed by Medicare, such as if two patient visits overlapped.

When plaintiff began working for Shepherd, he recorded the start and end times of his visits on his route sheets. However, after his entries began triggering alerts in Shepherd's compliance software, he was asked to leave the start and end times on the route sheets blank, so that the employee inputting the data could select a time period that would not trigger any alerts (and thereby increase the likelihood that Medicare would pay Shepherd for the visit.) Plaintiff testified that the entries regarding the duration of the patient visits, as opposed to the start and end times, were "more or less" accurate. Plaintiff indicated patient visits generally lasted 45 minutes because "45 minutes was a standard that was asked of me from the office. Said, [*sic*] minimum 45 minutes, minimum 15 minutes between these visits."

After the information from the route sheets was entered into Shepherd's computers, Shepherd generated "Employee Visit Detail" summary reports which listed all patient visits performed by plaintiff during a specific time period. The employee visit detail reports contained the same basic information as the route

sheets: date of visit, visit start time, visit end time, visit duration, and patient name. However, the start and end times, which were chosen by the employees entering the data, did not accurately reflect the time the visit occurred. Shepherd paid plaintiff for each patient visit reflected in the visit detail sheets.

2.3. Pay Stubs

Shepherd's work week runs from Sunday to Saturday. At trial, plaintiff introduced copies of his pay stubs which reflect the number of visits he conducted and was paid for during each pay period. Early pay stubs show his per-visit pay rate ranged between $22 and $27 per visit. In 2009, plaintiff started receiving a mileage reimbursement in addition to his patient-visit compensation. Initially, he received a reimbursement in the range of $300 to $500 every two weeks. Later that year, the reimbursements increased and were typically around $1,200 per two week period.

In mid-2010, plaintiff's per-visit rate dropped to $15. At the same time, Shepherd began including a "miscellaneous addition" as a non-wage item on plaintiff's pay stubs. Nayrouz admitted the "miscellaneous addition" to plaintiff's paycheck was specifically designed to maintain plaintiff's total compensation at the prior per-visit rate but was paid to plaintiff as non-wages so Shepherd could avoid paying payroll tax on those amounts.

3. Plaintiff's DLSE Complaint

Shepherd terminated plaintiff's employment on September 6, 2011. Shortly thereafter, plaintiff filed a complaint against Shepherd with the Department of Labor Standards Enforcement (DLSE) seeking unpaid overtime wages. Plaintiff's amended complaint included a chart purporting to list the

number of hours he worked each week. Plaintiff based the chart on a handwritten weekly schedule he devised using his paystubs as a guide. However, plaintiff admitted he created the handwritten schedule after Shepherd terminated his employment and solely for purposes of submitting his claim to the DLSE. In fact, he repeatedly suggested he was instructed by someone at DLSE to create a work schedule to support his claim for overtime wages. Ultimately, plaintiff conceded the handwritten schedule was "right off the top of [his] head," that the numbers were not true "in real life," the details were "just randomly picked," and the schedule "had nothing to do with what was actually being done while [he] was employed by Shepherd." The complaint included claims for overtime wages but did not include claims for missed meal or rest periods, or for unpaid minimum wages.

The DLSE dismissed plaintiff's case without prejudice after plaintiff failed to appear for a scheduled hearing.

4. The Complaint in the Present Action

4.1. Claims Asserted

Plaintiff filed the complaint in the present action on August 1, 2013. The complaint contains four causes of action: failure to pay wages (Lab. Code, §§ 510 [overtime], 512 [meal periods], 1194 [civil suit to recover unpaid minimum and overtime wages])[1]; failure to provide proper pay stubs (§ 226 [defective pay stubs]); failure to provide reimbursement for work-related expenses (§ 2802); and request for unpaid wages as restitution under the Unfair Competition Law (Bus. & Prof. Code, § 17200) (UCL). With respect to the first cause of action for

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[1] All undesignated statutory references are to the Labor Code.

unpaid wages, plaintiff alleged Shepherd failed to pay him overtime premium wages for hours worked in excess of eight hours in one day, and/or 40 hours in one week. (§ 510.) Plaintiff also claimed Shepherd failed to provide duty-free meal periods in violation of sections 226.7 and 510. He sought unpaid wages for the period September 19, 2008 to September 3, 2011, as well as penalties and attorneys' fees under section 203. The second cause of action alleged Shepherd failed to provide itemized wage statements as required under section 226. The third cause of action sought reimbursement for mileage, cell phone expenses, and purchase of medical supplies under section 2802. The fourth cause of action under the UCL reasserted plaintiff's claim for unpaid wages, and sought wages and unreimbursed expenses incurred during the four years preceding the filing of the complaint.

4.2. Plaintiff's Damages Calculations

4.2.1. Overtime Wages

Plaintiff explained that he used Shepherd's employee visit detail reports to determine that he was employed by Shepherd for 1,344 calendar days (or 192 weeks); he visited patients on 1,320 of those days. Plaintiff calculated that he worked 98.21% of the time, or an average of 6.88 days per week. During his employment, he performed a total of 9,583 patient visits and averaged 7.26 patient visits per day. According to the time entries on the employee visit detail reports, plaintiff spent an average of 0.81 hours with each patient.

Using those average numbers, plaintiff claimed he spent 40.52 hours on average visiting patients each week. Travel time between patients, calculated at 15 minutes per trip, increased

plaintiff's weekly hours by 1.57 per day, or 10.8 hours per week. Plaintiff also sought unpaid wages of one hour per day for his commute time (to his first patient and home from his last patient), and two hours per week spent collecting medical supplies and handling paperwork at Shepherd's home office. All told, plaintiff asserted he worked an average of 60.2 hours per week, and thus claimed he was entitled to overtime wages for 20.2 hours each week over 192 weeks, or 3,878.4 hours.

Plaintiff calculated his overtime wage rate using average numbers as well. Plaintiff produced a chart purportedly listing his gross pay for each pay period and the number of patient visits he conducted during that period. Plaintiff included both his mileage reimbursement and the "miscellaneous addition" in the gross pay figure. According to plaintiff's calculations, over the course of his employment with Shepherd, he received gross pay of $292,118.50 and performed 9,921.25 total patient visits during that period, yielding an average of $29.44 gross pay per visit. Plaintiff then used $29.44 as his "piece rate," and claimed he was entitled to overtime pay equal to half the piece rate ($14.72) multiplied by the overtime hours (3,878.4), or $57,090.05.

4.2.2. Meal and Rest Breaks

Nayrouz testified Shepherd's employee handbook instructed all employees, including full-time field nurses such as plaintiff, to take legally required 30-minute meal periods and 15-minute rest breaks. However, she conceded Shepherd kept no records which would indicate whether plaintiff actually took meal or rest breaks during the course of his employment. Further, Nayrouz agreed Shepherd never paid for a rest break during plaintiff's employment. She also testified that because plaintiff

devised his own schedule, she could not control whether plaintiff did or did not take his breaks.

Plaintiff denied receiving a copy of Shepherd's employee handbook (which contained Shepherd's meal and rest break policy) and also denied ever being told he was required to take a 30-minute meal break if he worked more than five hours, and was permitted to take a 10-minute rest break when he worked more than three and one-half hours.

Plaintiff testified it was virtually impossible for him to take any sort of break during his work day because he would frequently receive phone calls from Shepherd and patients' families. The parties stipulated that between August 1, 2009 and September 2, 2011, plaintiff worked 748 days. Plaintiff claimed he was denied meal and rest breaks 98 percent of the time, or on 733 occasions. Plaintiff asserted he was entitled to receive his average piece rate of $29.44 for each violation, for a total of $21,579.52 for meal breaks and $21,580.70 for rest breaks.

4.2.3. Unpaid Minimum Wages

Plaintiff also sought minimum wages for the hours he worked performing tasks other than patient visits and again relied on average numbers to support his damages calculations. Specifically, plaintiff asserted he spent on average 5.89 hours per day seeing patients but routinely worked more than 8 hours per day, leaving 2.11 hours per day, or 14.52 per week, unaccounted for and uncompensated. Accordingly, plaintiff requested minimum wages ($8/hour at all times) for uncompensated hours

worked on the 748 days between August 1, 2009 and September 2, 2011, for a total of $12,380.32.[2]

5. The Trial and the Judgment

The court conducted a four-day bench trial in May 2015. Following the testimony and admission of exhibits, plaintiff moved to amend the complaint to conform to proof regarding the scope of the unpaid wage claims and to add a request for statutory fees. It is unclear from the record before us whether the court granted plaintiff's request.

The court issued its judgment in September 2015. On the first cause of action for unpaid wages, the court denied each of plaintiff's claims, except that it awarded waiting-time penalties of $2,250.39. The court also found, conditionally, that plaintiff could be entitled to minimum wages of $1,952 for time spent at Shepherd's office each week (two hours per week) and once a month to attend training sessions (one hour per month). However, the court did not ultimately award plaintiff any wages for that time because it concluded plaintiff was barred from asserting the minimum wage claim, which was not contained in his DLSE complaint. As to overtime, the court found plaintiff worked an average of 5.88 hours per day, and on that basis concluded plaintiff failed to demonstrate that he worked more than eight hours per day. The court also denied plaintiff's request for time spent commuting to work or traveling between patients' homes. The court further concluded plaintiff failed to establish a claim for missed meal or rest periods, and also failed

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[2] Plaintiff also asserted claims for defective pay stubs and unpaid mileage. As plaintiff does not challenge the judgment on those claims, we do not discuss them further.

to establish entitlement to minimum wages for work performed in addition to patient visits. In light of the court's conclusion that Shepherd did not fail to pay wages, the court also found in favor of Shepherd on plaintiff's UCL claim.

6. The Appeal

Plaintiff timely appeals from the judgment.

DISCUSSION

1. Standard of Review

" ' "In general, in reviewing a judgment based upon a statement of decision following a bench trial, 'any conflict in the evidence or reasonable inferences to be drawn from the facts will be resolved in support of the determination of the trial court decision. [Citations.]' [Citation.] In a substantial evidence challenge to a judgment, the appellate court will 'consider all of the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference, and resolving conflicts in support of the [findings]. [Citations.]' [Citation.] We may not reweigh the evidence and are bound by the trial court's credibility determinations. [Citations.] Moreover, findings of fact are liberally construed to support the judgment." ' " (*Tribeca Companies, LLC v. First American Title Ins. Co.* (2015) 239 Cal.App.4th 1088, 1102; accord, *Barickman v. Mercury Casualty Co.* (2016) 2 Cal.App.5th 508, 516.)

2. The judgment on plaintiff's first cause of action for unpaid wages must be reversed.

Shepherd paid plaintiff a piece rate for every patient visit he conducted. Plaintiff asserts he performed additional, non-patient-visit work for Shepherd, for which he was not

compensated. Specifically, plaintiff seeks unpaid minimum wages for time spent attending required training classes, picking up medical supplies, dropping off paperwork at Shepherd's home office, and traveling between patients, as well as unpaid overtime wages for hours worked in excess of 40 hours per week and/or on the seventh day of each work week. In addition, plaintiff contends Shepherd unlawfully failed to pay him for rest breaks.

2.1. Relevant Legal Principles

" '[W]age and hour claims are today governed by two complementary and occasionally overlapping sources of authority: the provisions of the Labor Code, enacted by the Legislature, and a series of 18 wage orders, adopted by the IWC.' (*Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1026 (*Brinker*).) The IWC, a state agency, was empowered to issue wage orders, which are legislative regulations specifying minimum requirements with respect to wages, hours, and working conditions.[ ] [Citations.]" (*Mendiola v. CPS Security Solutions, Inc.* (2015) 60 Cal.4th 833, 838-839 (*Mendiola*).) Although the Legislature has since defunded the IWC, its wage orders are still in effect. (*Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1102, fn. 4 (*Murphy*); § 1182.13, subd. (b).) Nurses fall under the scope of Wage Order No. 4-2001 (Cal. Code Regs., tit. 8, § 11040 (Wage Order 4)), which applies to all persons employed in professional, technical, clerical, mechanical, and similar occupations. (Wage Order 4, subd. (2)(O) [listing nurses].)

The applicable statute of limitations for unpaid wage claims is three years. (Code Civ. Proc., § 338, subd. (a) [providing three year statute of limitations for "[a]n action upon a liability created by statute, other than a penalty or forfeiture"]; *Murphy,*

supra, 40 Cal.4th at p. 1102.) Plaintiff asserted he was entitled to equitable tolling of the statute of limitations with regard to his claim for overtime wages during the pendency of his DLSE complaint.

2.2. Plaintiff is entitled to unpaid minimum wages for non-patient-visit-related work.

Wage Order 4 requires that employers "pay to each employee, on the established payday for the period involved, not less than the applicable minimum wage for all hours worked in the payroll period, whether the remuneration is measured by time, piece, commission, or otherwise." (Wage Order 4, subd. 4(B); see also § 1194, subd (a) ["[A]ny employee receiving less than the legal minimum wage . . . is entitled to recover in a civil action the unpaid balance of the full amount of this minimum wage . . . , including interest thereon, reasonable attorney's fees, and costs of suit"].) Plaintiff contends the trial court erred in failing to award him minimum wages for hours he worked performing tasks other than visiting patients. We agree.

Wage Order 4 defines "hours worked" as "the time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so." (*Mendiola, supra*, 60 Cal.4th at p. 839, citing Wage Order 4, subd. 2(K).) The applicability of this provision may cause some confusion where, as here, the employee is paid a piece rate—a fixed amount for each task performed—rather than by the hour for certain tasks, but also performs additional tasks not related to the piece-rate work. Two Court of Appeal decisions guide us in our application of Wage Order 4 to the case before us.

In *Armenta v. Osmose, Inc.* (2005) 135 Cal.App.4th 314 (*Armenta*), the court explained Wage Order 4 "expresses the intent to ensure that employees be compensated at the minimum wage for *each* hour worked." (*Armenta, supra*, 135 Cal.App.4th at p. 323, italics added.) There, the plaintiffs were employed by a company that maintained utility poles in rural locations. (*Id.* at p. 317.) The employer paid its employees only for time it deemed "productive," i.e., which related directly to maintaining utility poles in the field. (*Ibid.*) Employees were not paid for "nonproductive" time, such as traveling between job sites, loading the company vehicles with tools required for maintenance, filling out required paperwork, and attending safety meetings. (*Ibid.*) The employer argued this practice did not violate minimum wage laws because it paid its employees substantially more than the minimum wage for their productive time; as a result, the employees' average hourly rate (factoring in both productive and nonproductive time) still exceeded the minimum wage. (*Id.* at p. 320.) However, the Court of Appeal rejected the employer's argument, concluding that the Wage Order provision requiring minimum wage compensation for "*all* hours worked" means an employee must be paid a minimum wage for "*each and every* separate hour worked." (*Id.* at p. 320, italics added.) Thus, the court held, the employer violated California's minimum wage laws by not compensating employees for travel time and time spent on daily paperwork. (*Ibid.*)

Subsequently, our colleagues in Division Two of this court applied *Armenta*'s reasoning to a case in which the employees were paid a piece rate for their work. In *Gonzalez v. Downtown LA Motors, LP* (2013) 215 Cal.App.4th 36 (*Gonzalez*), the court considered whether California wage laws required an employer to

pay its automotive service technicians, who were paid a piece rate for repair work, a separate hourly minimum wage for time spent during their work shifts waiting for vehicles in need of repair, or performing other tasks (such as cleaning work stations) required by the employer. (*Id*. at p. 42.) Applying the reasoning of *Armenta* to the provisions of Wage Order 4 cited *ante*, the court concluded that " 'a piece-rate formula that does not compensate directly for all time worked does not comply with California Labor Codes, even if, averaged out, it would pay at least minimum wage for all hours worked.' " (*Id*. at p. 49.) Accordingly, the employer was required to pay its mechanics an hourly wage for time spent performing non-repair-work tasks and waiting for work assignments, over and above the piece rate paid for repair work actually performed.

Here, the uncontroverted evidence establishes Shepherd paid plaintiff a piece rate for each patient visit he conducted, and never paid him for any other work. Under *Armenta* and *Gonzalez*, however, Shepherd should have paid plaintiff for *all* work he performed for Shepherd.

At trial, plaintiff requested compensation for all his travel time, including travel from his home to his first patient, between each patient visit, and from his final patient visit of the day back to his home. The court characterized all this time as "commuting time" and declined to award unpaid wages, citing the federal Portal-to-Portal Act (29 U.S.C. § 251 et seq.). As the court noted, the Portal-to-Portal Act generally relieves employers from paying minimum or overtime wages for ordinary travel time, i.e., time spent commuting between an employee's home and regular workplace. (See *Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575, 588-589; cf. § 510, subd. (b) ["Time spent commuting to and

from the first place at which an employee's presence is required by the employer shall not be considered to be a part of a day's work, when the employee commutes in a vehicle that is owned, leased, or subsidized by the employer and is used for the purpose of ridesharing, as defined in Section 522 of the Vehicle Code"].) The court properly declined to award wages for time plaintiff spent traveling from home to his first patient, and from his last patient visit back to his home.[3]

The court erred, however, in denying plaintiff's request for wages for time spent traveling between patient visits. As a field nurse providing in-home care, plaintiff was required to travel to the homes of his patients; the travel time was necessary to the performance of his job and was performed for the benefit of the employer. That plaintiff had considerable flexibility over the order and schedule of his patient visits does not convert his travel between patients to non-compensable commute time. Plaintiff is entitled to recover minimum wages for travel time between patients, which the parties stipulated was 15 minutes on average.

In addition, plaintiff is entitled to recover minimum wages for time spent at Shepherd's home office obtaining medical supplies and handling paperwork. Based on the evidence presented, the court found plaintiff spent two hours per week picking up supplies, and one hour per month attending required training sessions. Substantial evidence supports these findings. Plaintiff testified he spent two hours each week picking up supplies from and dropping off paperwork at Shepherd's home office. Further, both plaintiff and Nayrouz testified in-service

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[3] Plaintiff does not challenge this portion of the court's judgment.

training sessions occurred once a month for approximately one hour, and plaintiff stated he attended all sessions during his employment.

Although the court found plaintiff spent uncompensated time attending training sessions and picking up medical supplies, the court did not award plaintiff minimum wages for that time "because the court does not believe that such amounts are recoverable, because they are not reflected in Plaintiff's claim to the Labor Commissioner. That is, the court finds that Plaintiff is estopped from asserting a claim for unpaid minimum wages." On this point, the court was mistaken. "An employee pursuing a wage-related claim ' "has two principal options. The employee may seek *judicial* relief by filing an ordinary civil action against the employer for breach of contract and/or for the wages prescribed by statute. [Citation.] Or the employee may seek *administrative* relief by filing a wage claim with the [commissioner] pursuant to a special statutory scheme codified in sections 98 to 98.8 . . . ." ' [Citations.]" (*Murphy, supra*, 40 Cal.4th at p. 1115 [final brackets added, italics in original].) "An employee need not administratively exhaust his claim before filing a civil action." (*Id*. at p. 1117.) Accordingly, plaintiff is entitled to recover minimum wages for time spent attending training sessions and conducting business at Shepherd's home office.

2.3. Plaintiff is entitled to unpaid overtime wages.

Plaintiff also contends he is entitled to overtime premium wages for all hours worked in excess of eight hours per day and/or 40 hours per week under California law. We agree.

As noted *ante*, Wage Order 4 requires employers to compensate employees at one and one-half times their regular

rate of pay for "all hours worked over 40 hours in the workweek" and for "all hours worked in excess of eight (8) hours . . . in any workday or more than six (6) days in any workweek." (Wage Order 4, subd. 3(A)(1); see also § 510, subd. (a).) These provisions apply whether employees are "paid on a time, piece rate, commission, or other basis." (Wage Order 4, subd. 1; *Mendiola, supra*, 60 Cal.4th at p. 839, fn. 7.) Where an employee is paid on a piece-rate basis, the overtime rate is either one and one-half times the piece rate, or one and one-half times the employee's total earnings for the week divided by the number of hours worked. (See *Gonzalez, supra,* 215 Cal.App.4th at p. 52 [discussing methods of computing overtime pay where employee is paid a piece rate].) The latter method may be utilized where, as here, an employee is paid at different rates for different tasks. (*Ibid*.)

Here, determining the precise *amount* of plaintiff's damages is complicated by the fact that neither Shepherd nor plaintiff maintained contemporaneous records of the hours plaintiff worked. However, plaintiff's entitlement to overtime wages in the first instance is a separate issue. (See, e.g., *Brock v. Seto* (9th Cir. 1986) 790 F.2d 1446, 1448 [stating that once the employee proves he has performed work and has not been properly compensated, "the *fact* of damage is certain . . . [and] [t]he only uncertainty is the *amount* of damage"].) It appears the court may have conflated these two issues in the present case, as the court's written opinion denying plaintiff's claim for overtime wages focuses in large part on the unreliability of the handwritten work schedules created by plaintiff to support his DLSE complaint—evidence which was, even by plaintiff's

admission, not remotely indicative of the hours he actually worked.

While we defer to the court's assessment of plaintiff's evidence, we emphasize it is the *employer's* responsibility to maintain accurate payroll records and the absence of such records does not relieve an employer from paying overtime wages: "Although the employee has the burden of proving that he performed work for which he was not compensated, public policy prohibits making that burden an impossible hurdle for the employee. (*Anderson v. Mt. Clemens Pottery Co.* [1945] 328 U.S. [680], 687.) '[W]here the employer's records are inaccurate or inadequate and the employee cannot offer convincing substitutes a . . . difficult problem arises. The solution, however, is not to penalize the employee by denying him any recovery on the ground that he is unable to prove the precise extent of uncompensated work. Such a result would place a premium on an employer's failure to keep proper records in conformity with his statutory duty; it would allow the employer to keep the benefits of an employee's labors without paying due compensation . . . . In such a situation . . . an employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. 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 to be drawn from the employee's evidence. If the employer fails to produce such evidence, the court may then award damages to the employee,

even though the result be only approximate.' [Citations.]" (*Hernandez v. Mendoza* (1988) 199 Cal.App.3d 721, 727.)

Here, the court found plaintiff worked an average of 5.88 hours per day, which the court concluded "is below the threshold for awarding overtime." In order to provide the court guidance on remand, we address several aspects of the court's conclusion.

First, it appears the court found Shepherd's employee visit detail reports to be a reliable and credible source of information about the patient visits plaintiff performed. Although both parties agreed the start and end times for patient visits were not accurate, neither side seriously challenged the reliability of the other information contained in the employee visit detail reports. Although Nayrouz obliquely suggested plaintiff may not have performed all the patient visits he reported to Shepherd, she offered no specific facts to support that implication. Shepherd did not challenge the accuracy of plaintiff's recorded visit duration (as opposed to the starting and ending times) during the trial, and plaintiff maintained the visit duration entries were accurate. On appeal, Shepherd does not point to any other, more reliable evidence concerning plaintiff's work. Therefore, on remand, the court may reasonably rely on the information contained in the employee visit detail reports in making its damages award.

Second, it appears the court found that the average length of a patient visit was 0.81 hour.[4] This figure is supported by substantial evidence. Nayrouz conceded that the length of a visit

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[4] During trial and in his closing brief, plaintiff represented that he visited an average of 7.26 patients per day and the average length of a patient visit was 0.81 hours. Multiplying those two figures yields a total of 5.88 hours of patient visits per day—the precise figure the court adopted.

varied considerably, and although she suggested routine visits could be completed in 30 minutes, she acknowledged that visits requiring wound care could last 45 minutes or more. Plaintiff said the average patient visit lasted 45 to 60 minutes, not including paperwork, figures that are consistent with his reported visit duration as reflected in Shepherd's employee visit detail reports.

However, the court's legal conclusion that plaintiff is not entitled to overtime wages is incorrect. Assuming plaintiff worked 5.88 hours per day, as the court concluded, he was not entitled to overtime wages because he exceeded eight hours of work per day. Nevertheless, the evidence showed plaintiff almost always worked seven days a week. Accordingly, during most work weeks, plaintiff worked more than 40 hours and also worked on the seventh day of the workweek—both circumstances which require payment of overtime wages. (Wage Order 4, subd. 3(A)(1); § 510, subd. (a).)

2.4. Plaintiff is entitled to compensation for unpaid rest breaks.

Plaintiff asserts the court erred in failing to award him wages for unpaid rest periods. We agree. Wage Order 4 provides that an employee who works more than three and one-half hours is entitled to a paid 10-minute rest period. (Wage Order 4, subd. 12(A).) For the reasons stated in *Armenta* and *Gonzalez*, discussed *ante*, "a piece-rate compensation formula that does not compensate separately for rest periods does not comply with California minimum wage law." (*Bluford v. Safeway Stores, Inc.* (2013) 216 Cal.App.4th 864, 872.) "If an employer fails to provide an employee a meal period or rest period in accordance with an applicable order of the Industrial Welfare Commission, the

employer shall pay the employee one additional hour of pay at the employee's regular rate of compensation for each work day that the meal or rest period is not provided." (Former § 226.7, subd. (b) [effective Jan 1, 2001 to December 31, 2013].)

Here, it was undisputed that Shepherd paid plaintiff a piece rate for each patient visit and did not separately compensate plaintiff for anything else. The court erred in concluding that plaintiff failed to demonstrate entitlement to damages for unpaid rest breaks. It appears the court may have rejected plaintiff's rest period claim because it concluded plaintiff failed to provide credible evidence as to whether he did or did not actually take rest periods. Although we defer to the court's assessment of the evidence on that issue, it is beside the point. Plaintiff does not contend Shepherd prohibited him from taking rest breaks; rather, he asserts Shepherd failed to provide him with *paid* 10-minute rest periods. Because Shepherd failed to compensate plaintiff for anything other than patient visits, it necessarily follows that Shepherd did not provide plaintiff with any paid rest breaks during the course of his employment. Plaintiff is therefore entitled to his average hourly rate of compensation for each uncompensated rest period. (Wage Order 4, subd. 12(B).)

3. We reverse the judgment on plaintiff's fourth cause of action for unfair competition.

Withholding wages is an unlawful act or practice as a matter of law, and such wages may be recovered as restitution in an action under the UCL. (*Cortez v. Purolator Air Filtration Products Co.* (2000) 23 Cal.4th 163, 177-178.) Further, the applicable statute of limitations for an unfair business practice is four years. (*Id.* at pp. 178-179, citing Bus. & Prof. Code, § 17208.)

In light of our conclusion, *ante*, that Shepherd unlawfully withheld wages from plaintiff, we reverse the judgment on the fourth cause of action. On remand, the court should consider whether plaintiff is entitled to additional wages or other restitution under the UCL.

4. Further Proceedings

On remand, the court must determine the amount of plaintiff's damages or restitution.

As an initial matter, the court will need to determine the applicable statute of limitations for plaintiff's wage claims, and address plaintiff's assertion that the statute of limitations was tolled as to some of his unpaid wage claims during the pendency of the DLSE proceeding. We see no evidence in the record before us to indicate the court resolved that issue, and it is not presented for our consideration on appeal.

Further, the court will need to determine the hours plaintiff worked. The court found plaintiff spent 0.81 hours on average conducting a patient visit, and his visits are well documented in Shepherd's employee visit detail reports. In addition, as we have explained, plaintiff spent time performing tasks for Shepherd in addition to visiting patients, namely, 15 minutes travel time between patients, two hours each week to conduct business at Shepherd's home office, one hour each month to attend training sessions, and a 10-minute rest break on each day in which he worked more than 3.5 hours. Taking all these hours into account, the court should determine the hours plaintiff worked. Only then can the court properly determine plaintiff's entitlement to overtime wages. (See, e.g., *Gonzalez, supra*, 215 Cal.App.4th at p. 52 [citing DLSE Manual section 49.2.1.2].) We leave the precise method of this analysis to the court's sound

discretion. We note only that the court is not bound to accept plaintiff's four-year average figures, particularly in light of the fact that Shepherd's employee visit detail reports provide sufficient information to make a more precise damages award.

In addition to overtime wages, plaintiff is entitled to minimum wages for (1) travel time between patients (not including commute time to his first patient and home from his last patient each day), (2) two hours per week visiting Shepherd's home office, and (3) one hour per month attending training classes. The court should also determine plaintiff's regular rate of compensation, see *Gonzalez, supra*, 215 Cal.App.4th at p. 52, for purposes of awarding wages for unpaid rest periods, and in order to recalculate waiting time penalties under section 203.

Finally, in light of our holding that Shepherd withheld minimum and overtime wages from plaintiff, the court shall award plaintiff reasonable attorneys' fees and costs of suit under section 1194, subdivision (a). The court must also consider plaintiff's UCL claim and award restitution damages if appropriate.

DISPOSITION

The judgment is reversed as to plaintiff's first and fourth causes of action and the court is directed to conduct further proceedings consistent with this opinion. The judgment is affirmed in all other respects. Plaintiff to recover his costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

LAVIN, J.

WE CONCUR:

EDMON, P. J.

ALDRICH, J.*

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* Retired Associate Justice of the Court of Appeal, Second Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.