AMERICAN ARBITRATION ASSOCIATION | INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

AMERICAN ARBITRATION ASSOCIATION

Case # 01-18-0002-2036

In the Matter of the Arbitration between

Re: John Ralph,
Claimant
-vs-
D.O.S. Pizza, Inc.,
Respondent

REVISED INTERIM AWARD OF THE ARBITRATOR

I, THE UNDERSIGNED ARBITRATOR, having been designated in accordance with the arbitration agreement entered into by the parties dated December 3, 2012, and having been sworn and having heard the proofs and allegations of the parties, AWARD, as follows:

Procedural Background and Prehearing

The appointment of Harvey C. Berger as Arbitrator was confirmed approximately August 2, 2018. On September 7, 2018, a telephonic Case Management Conference ("CMC") was held, with a CMC Order and Notices for the original Hearing dates issued. Additional conferences were held on, November 14, 2018, January 23, 2019, March 1, 11 & 12, 2019, June 17, 2019, July 24, 2019, August 19 & 27, 2019, and November 18, 2019, with a Pre-Arbitration Conference on May 28, 2019.

Arbitration Hearing

The hearing opened on November 12, 2019, at 9:00 a.m., at Berger, Williams & Reynolds, LLP, 401 B Street, Suite 2000, San Diego, CA 92101. The hearing continued on November 13 & 14, 2019. Present was attorney Mark Potashnick of Weinhaus & Potashnick, and attorney Eli Karsh of Liberman, Goldstein & Karsh, for Claimant John Ralph, and John Ralph; and attorneys Anthony J. Zaller, Anne McWilliams of Zaller Law Group as Counsel for D.O.S. Pizza, Inc. with Shane Casey attending for Respondent.

The Hearing concluded on November 14, 2019. The Parties stipulated to keep the hearing open until post-arbitration briefing was complete. The Parties later stipulated the Arbitrator had an extension to April 14, 2020, to issue this Award.

The Parties jointly requested an Interim Award.

A Revised Interim Award was drafted due to a typographical error in the Interim Award, in which damages for the 2008 Nissan Versa were inadvertently not included in Claimant's damages on the bottom of page 10. Respondent objected to a Revised Interim Award, and the Parties were asked to brief procedural and mathematical errors in the Interim Award.

This Revised Interim Award includes corrections to mathematical errors raised in that briefing. Respondent has not objected procedurally to the issuance of a Revised Interim Award, but seeks correction of additional asserted mathematical errors, which is a valid concern, and justice requires correction of math errors, and this -Revised Interim Award corrects valid math errors. It is evident the Interim Award did not factor Claimant's percentage of business use into certain Maintenance and Repairs, Insurance and Registration costs, which was a clear typographical and math error which must be corrected pursuant to AAA Rule 40.

Background and Facts

D.O.S. Pizza, Inc. ("Respondent") operates Domino's Pizza stores located inter alia, in Vista and San Marcos, California. John Ralph ("Claimant") was employed by Respondent as a delivery driver at its Vista, California store from December 2012 to October 2015 and at its San Marcos, California store from December 2015 to the date of the hearing. R.T. 17 – 18. There was no complaint about Claimant's performance. Respondent has always paid Claimant the California minimum wage. R.T. 19.

Claimant drives his own vehicle to perform deliveries. The company requires a safe, legally-compliant, and operable car, capable of passing its inspections. Respondent has no requirement for make, model, size, vehicle class or age of delivery vehicles. Respondent inspected Claimant's vehicles, usually at intervals of about three months to make certain the vehicle is roadworthy. Claimant passed all vehicle inspections. R.T. 536 - 537.

From December 2012 to January 2019, Claimant drove his 2008 Nissan Versa to perform his job, except for about 2-3 months when he drove a 1999 Chevrolet Lumina. R.T. 20-22. Claimant bought the 1999 Chevrolet Lumina on August 6, 2013. Ex. 90. The exact dates Claimant drove the 1999 Chevrolet Lumina are unknown. Claimant uses the time frame that he drove the Lumina for work from August 7, 2013 to October 6, 2013, then resumed use of the Nissan Versa. Since February 2019, Claimant drove a 2018 Nissan Sentra, which was purchased as a new car in August 2018. He started using the Nissan Sentra because the 2008 Nissan Versa broke down. R.T. 23.

The "recovery period" is from July 2013, and this award will go through the date of the hearing, November 14, 2019, since no evidence was presented for future damages at the hearing.

Claimant's mother, age 85, also "very, very rarely" drove the vehicles, R.T. 439, and his sister "very rarely" did so. R.T. 25, 401. Some of the repair bills and insurance premiums were in her name. Respondent points out that many of the repair bills are in her name, which means little since the car is registered to her, and also argues she got into an accident, which suggests she drove the car (at least on one occasion.) The Arbitrator accepts Claimants testimony that she

drove the cars, "very, very rarely." In *Cochran v. Schwan's Home Serv., Inc.*, 228 Cal App. 4th 1137 (2014), the court stated,

> "If an employee is required to {incur work-related expenses} …, then he or she is incurring an expense for purposes of section 2802. It does not matter whether the [expense] is paid for by a third person, or at all. In other words, it is no concern to the employer that the employee may pass on the expense to a family member or friend, or to a carrier that has to then write off a loss."

Therefore, it is irrelevant in whose name the repairs or registration were in.

The Versa (except for about two months) was used from July 2013 through January 2019, with total mileage of approximately 89,188. Exs. 11, 14 pg. 12, 14 figure 5 and Ex. 6 (to Ex. 14). There is no good evidence of the mileage driven by the Lumina for the two months it was used. For purposes of this award, it is assumed the Lumina was driven the same average miles for work as the 2008 Versa, and expenses and damages for the two months the Lumina was driven will be extrapolated based on calculations for the Versa. The 2018 Nissan Sentra was driven a total of 15,912 miles between August 2018 and November 14, 2019. Ex. 97. The EPA sticker for the 2008 Versa reflects 27 mpg for city driving. R.T. 104. Claimant testified he believes the car achieved 22 mpg. R.T. 27, 402. The EPA sticker for the 2018 Sentra reflects 29 mpg for city driving. R.T. 104. Claimant's dashboard display shows 25.1 mpg. R.T. 30, 411-12. Respondent's expert calculated total miles driven from the repair bills as 17,257 miles per year for all business and personal use. Ex. 14, Pg. 12.

Respondent reimburses its employees by using analysis done by Runzheimer International (later Motus) (collectively, "Runzheimer"). Respondent selects an average age car (about 10 years old) and Runzheimer then calculates average costs for each store by zip code, using average gas prices for that zip code. Claimant contends the Runzheimer analysis uses the lower capital cost of an older car, but the lower operating cost of a new vehicle. R.T. 96, 181, 194. Claimant's expert acknowledges that using an average cost of ownership would be an appropriate basis to reimburse a group of employees. R.T. 260. That does not change the fact that under Labor Code 2802, Claimant has an unwaivable right to reimbursement for his expenses for use of his personal vehicle on company business.

Respondent reimbursed Claimant on a per-delivery basis, which varied based on Runzheimer analysis (primarily due to the variable cost of gas). R.T. 57. It never tracked his mileage. R.T. 551-552. Respondent reimbursed Claimant a total of $18,672.55 for use of his cars ($10,229.39 through Oct. 4, 2015, and $8,443.16 through December 29, 2018). Ex. 7.

Respondent's policy states:

> "If an employee believes the mileage reimbursement is not enough to pay for the reasonable operating costs of operating his or her vehicle for business purposes, upon request, the Company will conduct an individualized evaluation of the appropriate reimbursement rate. The employee must request such a review in writing and will need to submit documentation evidencing the need for any modification to the reimbursement rate."
>
> Exs. 32 – 49, 93.

While there is no evidence Claimant ever made a request in writing, there was evidence presented at the hearing by Respondent's witness that a verbal complaint would be sufficient to trigger an investigation. Whether or not Claimant made such a request verbally is moot, since his claim was made in writing in this case when he filed his demand for arbitration on June 4, 2018 (and presumably much earlier, as he filed a letter with the LWDA on June 28, 2017). Further, there is nothing in Labor Code 2802 that requires a request for business expense reimbursement to be in writing, and the obligation to reimburse is unwaivable. See, Labor Code 2804, *Gattuso v. Harte-Hanks* Shoppers, Inc. 42 Cal.4th 554, 479-80 (2007). Finally, an employer that knows or has reason to know that an employee has incurred work-related expenses must reimburse the employee, even if the employee does not request reimbursement. *Stuart v. RadioShack Corp*., 641 F. Supp. 2d 901, 903 (N.D. Cal. 2009).

At both the Vista and San Marcos stores, Claimant testified he complained to managers and assistant managers about Respondent's reimbursement. R.T. 58-59; 384-385; 420-423. It is not clear if he was complaining about gas prices or the total reimbursement, but it is more likely than not that the complaints could have been considered complaints about the amount he was being reimbursed for driving for the company. It appears that nothing was done about these complaints by the managers, because the company requires any complaints about insufficient reimbursement to be in writing. Claimant testified the managers and assistant managers typically told Claimant "that there was nothing they could do about it." R.T. 60.

Respondent presented evidence that two employees used the complaint procedure to be paid more than the standard reimbursement, but absolutely no foundation was laid as to how the amount of that increase was determined, the facts and circumstances of those two deviations, and therefore they have no evidentiary value, other than an inference that if an employee did complain (presumably in writing according to Respondent's requirement), that a change might be agreed to. R.T. 468 – 471; Exs. 50, 51. Whether or not that change was reasonable, or paid the two employees the actual cost of driving their cars, is unknown. Notably, Respondent did not call either of those two employees as witnesses. Respondent's assertion that Claimant waived his claims because he did not follow company policy by requesting an investigation in writing is simply without merit.

During the relevant time period, Respondent reimbursed Claimant a set amount per delivery, ranging from $0.90 (Jan. 2015) to $1.66 (Apr. 2019). The Parties dispute whether this amount was sufficient to reimburse Claimant for the use of his vehicle.

Both parties are guilty of spoliation of evidence and despite this arbitration commencing on June 4, 2018, neither party kept records which were available that could have been used to solidify their own claims or defenses.

Claimant argues Claimant drove about 5,000 miles per year for personal reasons. R.T. 580-581. Respondent vigorously contends there is no evidentiary support of the amount of personal mileage, arguing the only evidence presented at hearing was Claimant's counsel's instruction to Claimant's expert to use 5,000 miles for personal use. Ex. 88, R.T. 247-248, 400-01, 426). When Claimant was asked the amount of his personal versus work use, he stated "I don't have a number, no" R.T. 434. Further, Claimant tracked the number of miles he drove for "a month or

two", but those records were never produced. R.T. 400-01. The failure to keep a log after the claim was brought, and the failure to produce the log Claimant did keep for a month or two should not be attributed to Claimant, but to his counsel.

On the other hand, one of the hotly contested issues in the case was the average distance a pizza delivery driver drives for a given delivery at each store. Respondent gets this information on a monthly basis, but "disposes" of the reports. Respondent kept two months of calculations of average delivery distances, for which it kept the summaries only (2 lines of information) and tried to introduce (Exs. 55 and 56). It provided the summaries to its expert, but disposed of the underlying supporting evidence. This, despite Claimant's requests for production that requested this information, and this information could have been saved electronically very easily. Such information was conditionally admitted, but is found unreliable, unsupported hearsay and shall not be considered. Unlike Claimant's failure to keep a log, which was certainly questionable judgment by his counsel, Respondent's disposal of this information during the pendency of this case was clearly intentional. The Arbitrator in one of the first Case Management Conferences made it clear that "hiding the ball" would not be tolerated. That instruction was ignored by Respondent.

As if the date of the Post Arbitration briefs, Claimant was still working for Respondent. Claimant wishes this award to extrapolate damages to the issuance of the award, however, due to a lack of evidence post-hearing, such a request is declined. Of course, nothing in this award will prevent Claimant from seeking additional compensation after November 10, 2019, if he believes the payment by Respondent is inadequate to compensate him for his business expenses.

Legal Analysis

The issue of reimbursement for employee business expenses was addresses in *Gattuso v. Harte-Hanks* Shoppers, Inc. 42 Cal.4th 554 (2007). In that case, the Court found that Labor Code 2802 requires the employer to, "to fully reimburse its outside sales representatives for the automobile expenses they actually and necessarily incur in performing their employment tasks." The Court agreed that an employer could use an actual expense method, a lump sum method or a fixed amount (such as a car allowance.) But in all cases, *the employer has an unwaivable obligation to pay the employee the actual cost* of using his or her vehicle for business purposes. Id. at 567-570 (emphasis added).

Respondent argues that *Gattuso* places the burden of proof on the employee to provide actual costs through documentation, by submitting "detailed and accurate contemporaneous records." Resp. Brief. Pg. 7, citing *Gattuso* at 568–570. However, Respondent conflates the holding of *Gattuso. Gattuso* states the requirement is heightened for the *actual expense method*; "To calculate the reimbursement amount using the actual expense method, therefore, the employee must keep detailed and accurate records of amounts spent in each of these categories. Calculation of depreciation will require information about the automobile's purchase price and resale value (or lease costs). In addition, the employee must keep records of the information needed to apportion those expenses between business and personal use. This is generally done by separately recording the miles driven for business and personal use. The employee then must

submit all of this information to the employer for calculation of the reimbursement amount due." *Id.*

But Respondent does not reimburse based on the actual expense method; it uses a hybrid, and pays based on a per-trip delivery. This is a critical distinction. If an employee is told at the outset that the employee will only be reimbursed based on detailed recorded records of miles driven and expenses incurred, then, if the employee fails to keep such records, the employee may fail to meet his or her burden of proof. But Respondent does not do this; rather, it tells its employees it calculates the "real" expense and reimburses based on a per-trip fee. An employee is **not** told to keep track of his or her mileage, and is **not** told to keep track of actual expenses. Respondent knows that these minimum wage pizza delivery drivers will not have records of actual miles driven, because they are reimbursed by the number of deliveries they make. Then, when an employee such as Claimant makes a claim, Respondent contends that claim should be denied due to a failure to meet the burden of proof. That argument falls on deaf ears. This highly inappropriate argument is compounded by the fact that Respondent has the evidence of actual miles driven by the drivers, but disposes of that information each month; there can be only one rationale for that; it wants to hide the information; and it certainly hid that critical information from Claimant in this arbitration. It is further compounded in a case such as this, where clearly that information is necessary for the employee to prove his case, and throughout several years of litigation, Claimant sought this information, and Respondent *intentionall*y continued to dispose of that necessary information on a monthly basis.

The consequence of an employer failing to keep records of business expenses (or informing the employee to do so) is that the burden-shifting standards of *Anderson v. Mt. Clemens Pottery Co. ("Mt. Clemens")*, 328 U.S. 680, 687-88 (1946) is applied and a plaintiff may rely on "just and reasonable inference." *Villalpando v. Exel Direct Inc.*, 2016 Dist. LEXIS 53773 (N.D. Cal. Apr. 21, 2016) at *30-31. Thus, because Respondent admits that it never tracked Claimant's vehicle costs or mileage, Claimant may prove his claims based on estimates and mere "just and reasonable inference." *Mt. Clemens*, 328 U.S. at 687-88; *Villalpando,* 2016 U.S. Dist. LEXIS 53773, at *30-31.

The conclusion is that Claimant may present the evidence at his disposal, to the best of his ability, and a reasonable reimbursement based on the information available is required. This litigation reflects the absurd end result of multi-year litigation, with thousands spent on "expert" witnesses, both of whom try to calculate damages based on various external information and assumptions, trying to convince the trier of fact how much is owed to the penny. That cannot be the standard necessary for an employee to request *reasonable* reimbursement for the cost of driving his or her vehicle. To take this to its logical conclusion, the parties could dispute whether a driver's car, because it starts and stops so often, with the door opening and closing more than the average use of a car, has increased wear and tear on the door hinges. This cannot be a logical interpretation of Labor Code 2802. If the hinges break, and an expense is incurred, it is an expense. If the car is used for work, depreciation is certainly a recoverable expense. If the hinges break shortly after work is concluded, certainly that cost should be included as a business expense. But neither the employer nor the employee need to use an electron microscope to determine if the hinges are worn, nor should the employee be allowed to argue such a *de minimis* issue if there is no actual damage. Labor Code 2802 has been interpreted to require

reimbursement for *reasonable* and necessary business expenses. By definition "reasonable" does not necessarily mean to the penny, and coupled with the "just and reasonable inference" standard, "reasonable" means rough justice. Given the spoiliation of evidence by Respondent, coupled with the lightened burden of proof for Claimant, rough justice means that objections and arguments raised by Respondent are denied except as detailed below.

Mileage Driven

The use of 5,000 miles per year for personal use is reasonable, and will be accepted, given a number of factors. The most significant reason is that if Respondent had provided the evidence of average miles driven, a different construct may have been used, but in light of Respondent's intentional destruction of such evidence, some reasonable number must be used. Even including very occasional use by Claimant's mother and sister, and the non-existent commute (until moving to the San Marcos store, when roundtrip was only 7.8 miles, and a slightly longer commute for the two months before the hearing), 5,000 miles per year for personal use seems reasonable, but as modified below for the Sentra, when commuting became more of a factor.

To the extent Respondent contends that there is no evidentiary support for the use of 5,000 miles per year for business use, that number, while not only reasonable as outlined above, may also be considered a sanction against Respondent for disposing of the information necessary to calculate business use under a different construct.[1]

Claimant calculates 64,610 miles driven for Respondent in the Versa and Lumina over a period of 67 months (Claimant's Post Hearing Brief pgs. 23, 28). Respondent contends (assuming 5,000 miles per year personal use), 67,671 miles over the same period, and 66,216 miles, if accounting for the San Marcos commute (Respondent's Post Arbitration Opening Brief, Exs F & H). As noted above, Respondent's expert calculated total miles driven from the repair bills as 17,257 miles per year for all business and personal use (Ex. 14. P. 12), and subtracting 5,000 miles per year for business use, puts the expert's calculation at 69,774 for 67 months. Given these estimates within a very close range, **66,216 miles** driven by the Versa and the Lumina for business use for Respondent will be used, which includes a slight adjustment for the San Marcos commute, resulting in personal use of greater than 5,000 miles per year during that commute period.

Claimant contends the Sentra was driven 15,912 miles between August 2018 when purchased, and November 14, 2019, with 9,462 of those miles driven for Respondent (Claimant's Post Hearing Brief, Pg. 29.) Respondent contends the Sentra was used 8,337 miles with the San Marcos commute added to personal use, and 10,002 miles without the commute deducted. Looking at the data points available, odometer readings of 2,195 on Feb. 1, 2019, and 15,912 on Nov. 10, 2019, results in a use of approximately 13,717 miles over approximately 9.3 months, or 1,474.95 miles per month, and subtracting personal use of 5,000 miles per year[2], or 416 miles

[1] In its latest briefing, Respondent vigorously argues, again, there is no evidentiary support for 5,000 miles per year personal use, and also that it is unfair that sanctions for spoiliation were imposed against one party and not the other. The former argument violates AAA Rule 40, and will not be further addressed, however it should be noted that this Revised Iterim Award finds one *party* acted intentionally, while the other party's inappropriate behavior was questionable judgment of *counsel*. The latter issue, quite certainly, will be raised in further briefing regarding attorney's fees to be awarded.

[2] Typographical error corrected

per month, equals 1,058.95 business miles per month for 9.3 months or a total of 9,848.23 miles. Given that Claimant's commute to San Marcos was greater (and also since he moved to Escondido), additional 1,758 commute miles will be factored above the 5,000 annual personal miles (See, Reps. Reply to Claim. Post Arb Brf. Ex. N, pg. 7-8). The Sentra will be deemed to have been driven **8,100** miles for pizza delivery.

The actual expenses of using an employee's personal automobile for business purposes include fuel, maintenance, repairs, insurance, registration, and depreciation. *Gattuso, Id*. at 568.

Fuel

To determine fuel usage, the car's EPA sticker will be used, and gas prices for the area. It is not necessary, practical or reasonable to have experts start arguing whether old cars get more or less mileage, or the amount of such change. If the employee has kept track of actual fuel consumption, the employee may, of course, use the actual usage or mpg. Unfortunately, while Claimant could have done so, he did not. While Claimant was extremely credible, there is insufficient support for his claim that the Versa only achieved 22 mpg. The EPA sticker of 27 mpg will be used. The dashboard information on the 2018 Sentra, of 25.1 mpg, which is an actual reflection of the mileage Claimant obtained based on his driving (and presumably the start and stopping of frequent deliveries), will be used rather than the EPA sticker for the Sentra.

The cost of fuel from January 2013 to June 2018 is based on the information from the Runzheimer report. Ex. 8. Thereafter, the price of gas is based on the Gasbuddy report, Ex. 21, because that appears most reliable for the area Claimant was driving. The average cost for a gallon of gas was 3.42/gal. from July 2013 to August 2016, and $3.19/gal. from September 2016 through January 2019 (or an average of $3.32/gal. from July 2013 through January 2019.) Cost of fuel was $3.70/gal. from February 2019 through November 2019.

The Versa (and Lumina) driven 66,216 miles for work over 67 months from July 2013 through January 2019, at 27 mpg, results in 36.6 gals/month, or 2452.2 gals., at $3.32 gal., totaling **$8,141.30.**

The Sentra, driven 8,100 miles for work from February 2019 through November 10, 2019 (9.3 months) at 25.1 mpg results in 34.7 gals/month, at $3.70/gal., totaling **$1,194.03.**

Maintenance and Repairs

For maintenance and repairs, actual expenses shown by Claimant will be used. Fortunately, he had most receipts. Expenses incurred on a vehicle shortly after termination of employment, or after termination of business use of the car, which can be attributable to the wear and tear as a result of business use, are recoverable.

Claimant incurred **$3,880.31** in repairs and maintenance on the Versa from October 11, 2013 to February 8, 2019. Ex. 19-10. Claimant has provided no repair bills for the Sentra, and as a new car, and given his diligence in saving repair bills for the Versa and Lumina, it is more likely that no repairs or maintenance were actually incurred on the Sentra. Any implied expenses not yet incurred, above any depreciation factor, such as replacement of tires and oil changes, may be taken into account when incurred, or at the time of Claimant's termination, because at least as of

the Post Arbitration briefs, Claimant was still working for Respondent, and any further claims for business use above the amount paid would take such charges into account.

Claimant asserts maintenance and repairs based on estimates in May 2019, which would have been necessary to restore the inoperable Versa to operational condition. That is inappropriate, and such costs are "baked into" depreciation, based on the car's value when it was taken out of service. It would be inappropriate to add the cost of expenses that were never incurred, and would never be incurred, to charge Respondent. It would also to some extent, "double dip" with the depreciation analysis.

Insurance and Registration

For insurance and registration, the premium paid by Claimant will be used, and for the periods that no receipts are available, that amount is extrapolated.

Claimant testified he paid about $105.00 per month for insurance for the Versa. R.T. 33, 35. That appears reasonable, and is not inconsistent with the monthly insurance paid for the Sentra in the amount of $118.28 paid for the Sentra. Ex. 96-2. Respondent argues that Ex. 96-2 is incomplete, and may not have been monthly payments. It is more probable than not that the payments were monthly, and coupled with Claimant's testimony, $118.28 per month is used as the cost of insurance for the Sentra.

For registration, Claimant paid $116.00 annually for the Versa in 2014, and $107.00 in 2017. Ex. 95-1, 2. Assuming a relatively straight-line reduction in the cost of registration as the car ages, a rough average of $112.00 per year will be used, including accounting for the Lumina. In 2018, Claimant paid $283.00 for registration for the Sentra. Ex. 95-4.

Insurance for the Versa at $105.00/mo. for 67 months totals **$7,035.00**. Insurance for the Sentra at $118.28/mo. for 9.3 months totals **$1,100.00.**

Registration for the Versa totaled $112.00 per year, or $9.33 per month for 67 months or **$625.33.** Registration for the Sentra at $283 per year, or $23.58/mo. for 9.3 months totaled **$219.32.**

Depreciation

Depreciation cost is typically going to be the cost of the vehicle, or its value, from the time of entering service to the time it no longer is used for business, multiplied by the percentage of business use.

Claimant testified he purchased the Versa in 2008 for $5,000.00. The car had a residual value of $350.00 when it was no longer used for Respondent, which is the amount Claimant sold it for. R.T. 26, 23, 48. Of the 89,188 miles driven in the Versa, 66,216 were for business use, or 74.2%. The depreciation of the Versa (and Lumina) for that period totals $4,650.00 x 74.2% or **$3,450.30**. This, of course, includes the rough calculation that depreciation of the Lumina for two months was at the same rate as the Versa depreciated. Any difference for those two months would be a rounding error.

The depreciation cost for the Sentra is hotly contested. Claimant has presented evidence by using a 2014 Sentra and showing the amount of depreciation for five years of use with the same amount of mileage. That is a very questionable assumption, but if the only information available, would be allowed under the "just and reasonable" inference above. But Respondent need not accept Claimant's asserted cost if it can show a more reasonable approach. Respondent contends that the Edmonds "cost of ownership" found on-line is a more reasonable estimate of depreciation expense, but which is based on a "per mile" cost. The cost of the vehicle is disputed, because Claimant contends the cost of financing should be included in the purchase price, while Respondent disagrees, contending that financing is not appropriate for depreciation calculations. Claimant prevails on this issue, because no actual costs of repairs are factored into the Sentra, however, the financing is a very "real" cost to Claimant (and to other minimum wage workers who, as a practical matter, would have to pay financing costs for their cars.) The depreciation for the Nissan Sentra, therefore, is based on a purchase price of $26,720.00, and the current value is the current Kelly Blue Book Private Party value in Escondido (zip code 92025), which totals $14,494 for "good" condition (any discrepancy between the November hearing and the date of this award should be *de minimis*, and furthermore, can be attributed to both parties, neither of which provided any evidence of "value" on the date of hearing.)

The 2018 Nissan Sentra was driven a total of 15,912 miles between its purchase in August 2018 and November 14, 2019, a period of 14½ months.[3] Of that amount, 8,100 miles were used for business, or 51%. The value of the car depreciated $12,226.00, or $430.02 for business use per month. For the 9½ months depreciation expense was **$4,085.19.**

Claimant's Cost of Use

Given the above, determining Claimant's damage claim is simply based on the costs incurred for business mileage, minus the amount paid to Claimant by Respondent.

It bears repeating that under the circumstances of this case, that a two–way, ***good faith*** interaction between Claimant and Respondent should have taken place to discuss appropriate reimbursement. In such a conversation, Respondent could have shown the actual miles driven to support its position that reimbursement was sufficient, or what a reasonable reimbursement should have been; that apparently never happened.

Based on the above, the following expenses are attributable to Claimant's business use of his cars for Respondent:

2008 Nissan Versa (including extrapolated expenses for Chevy Lumina for two months)

Total mileage driven: 89,188 plus two months for Lumina:
Business miles driven: 66,216
Number of months: 67
Percentage of business use: 74.2%

[3] In its Opposition to a Revised Interim Award, Respondent argues that there was no evidence of the date in August the Nissan Sentra was put in service, and argues the appropriate time frame is 15 ½ months. Not only does this violate AAA Rule 40, but August 1 is reasonable, given the factors to be determined. If a mid-month date was used, the difference would be $215.01. For a multitude of reasons, August 1 for purposes of this calculation is reasonable.

Fuel expense:	$8,141.30
Maintenance and Repairs:	$3,880.31 x 74.2% = $2,879.10
Insurance	$7,035.00 x 74.2% = $5,219.97
Registration:	$625.33 x 74.2% = $ 463.99
Depreciation:	$3,450.30
Total:	$20,154.66

2018 Nissan Sentra

Total mileage driven: 15,912
Business miles driven: 8100
Number of months: 9.3
Percentage of Business Use 51%

Fuel expense:	$1,194.03
Maintenance and Repairs:	$0
Insurance:	$1,100.00 x 51% = $561.00
Registration:	$219.32 x 51% = $111.85
Depreciation:	$4,085.19
Total:	$5,952.07

Total Expenses incurred by Claimant to drive for Respondent: $26,106.73
Minus payments made to Claimant under Respondent per delivery policy: $19,165.41
Amount owed to Claimant: **$6,941.32**

Minimum Wage Claim

Claimant argues that because Claimant was a minimum wage worker, unreimbursed business expenses should be considered a minimum wage violation, primarily citing scores of federal cases under the FLSA. Respondent strenuously disagrees, and points out that California has a different construct than other states under the FLSA. Respondent's argument is that in California, Labor Code 2802 is unique, and provides the sole remedy for non-reimbursed business expenses, while the FLSA has no such protection. Of interest, there is no published California state case on the issue, and no mention of this theory in any DLSE Opinions or in its manual. In fact, neither the Arbitrator, nor any of the *scores* of California employment attorneys the Arbitrator asked about this theory since it was first raised by Claimant's counsel in this case (needless to say, only discussing the theory and not the facts of the case or the names of the parties), had ever even heard of the possibility of bringing a minimum wage claim due to unreimbursed expenses in California. Given the different construct in California, the out of state FLSA cases offer little guidance, other than the logic that if a minimum wage worker is asked to bear the business expenses of the employer, it takes away the bare minimum wage required by law.

DeRosa v. Cal. Unemploy. Ins. Appeals Bd., 2005 Cal.App. Unpub. LEXIS 1460 (Cal.App. Feb. 17, 2005), is an unpublished California case, but its logic is sound. While not binding, courts may follow the analysis of unpublished decisions. *Grist Creek Aggregates, LLC v. Superior Court* (2017) 12 Cal. App.5th 979. 992, ftnt. 6.

DeRosa recognized a minimum wage claim based on unreimbursed expenses for a minimum wage worker. *Id.*, 2005 Cal.App. Unpub. LEXIS 1460, at *32-41 & ftnt. 9. The California Court of Appeal found that "the failure to adequately reimburse the work expenses of a minimum-wage employee can result in the failure to pay that employee the minimum wage." Id. (following *Arriaga v. Florida Pac. Farms, LLC*, 305 F.3d 1228, 1336 (11th Cir. 2002)). *DeRosa* further recognized that "[w]hen an employee is forced to pay his employer's work expenses from his own pocket, his income is reduced below that which the law allows." *Id.*

DeRosa's reasoning is beyond reproach:

> …there is no legal difference between deducting a cost directly from the worker's wages and shifting a cost for the employee to bear; employer may not deduct from employee wages the cost of facilities which primarily benefit the employer if such deductions drive wages below the minimum wage; this rule cannot be avoided by simply requiring employees to make such purchases on their own, either in advance of or during the employment.

Id. (quoting *Arriaga*, supra, 305 F.3d at 1336).

California courts recognize that, "Federal decisions have provided reliable authority to California courts in the interpretation of state labor law provisions which have language that differs from, but parallels that of the federal statutes." *Monzon v. Schaefer Ambulance Service (1990)* 224 Cal.App.3d 16, 31). While there is no direct parallel in the FLSA to Labor Code 2802, there is certainly a virtually identical parallel to the inviolate principal of the minimum wage.

Sanchez v. Aerogroup Retail Holdings, Inc., 2013 U.S. Dist. LEXIS 66571 (N.D. Cal. May 8, 2013) is a federal district court published decision. In *Sanchez*, the employer argued that there was no claim for a minimum wage violation based on unreimbursed job expenses, because a claim under Cal. Lab. Code § 2802 was intended as the sole remedy for recovery of unreimbursed business expenses. *Sanchez* rejected that argument:

> "…the California Legislature "intend[ed] to protect the minimum wage rights of California employees to a greater extent than federally...." (cite) Moreover, intuitively, it makes sense that the Legislature would intend to afford employees protection in these circumstances. An employee who has ostensibly been paid the minimum wage but has been required to make an expenditure which reduces the employee's net income below the minimum wage is, in essence, in the same position as an employee who was paid less than the minimum wage at the outset. Both have been required to satisfy their living expenses with less than the minimum wage. In light of these factors, the Court believes that Sections 1194, 1194.2, 1197, and 1197.1 should be construed as permitting a cause of action where an employee has been required to bear expenses which effectively cause the employee's wages to fall below the minimum wage."

Id. at *30-31.

Sanchez went on to explain:

> "An employer who causes an employee to bear expenses which reduce the employee's net pay below the minimum wage has committed two wrongs. First, the employer has not reimbursed the employee for expenses as required by Section 2802. Second, the employer has caused the employee to have to satisfy the employee's living expenses with less than the minimum wage. Notably, different penalties apply where an employer is alleged have committed the latter wrong. …. Accordingly, the availability of a cause of action for unreimbursed expenses under Section 2802 does not persuade the Court that the Legislature did not also intend that employers would be liable under the minimum wage laws where the employer has caused the employee to bear expenses which cause the employee's net wages to fall below the minimum wage law."

Id. at *31-32.

Despite the "surprising" nature of the theory advocated by Claimant, the logic of these cases is sound and irrefutable. Liquidated damages under Labor code 1194.2 are awarded in the amount of **$6,941.32.**

Interest

A. <u>Interest on expense reimbursement</u>

Claimant contends interest for unpaid business expenses should be calculated under Labor Code 218.6 at ten percent (10%) per year. Respondent disputes that, suggesting that under Labor Code 2802(b), the proper rate of interest is the legal rate, at seven percent (7%). For purposes of interest for the business expense reimbursement, Respondent prevails. Business expense reimbursements are not wages. *Gattuso v Harte Hanks Shoppers, Inc*., supra, at p. 481-82, *Smith v Rae-Venter Law Group* (2002) 29 Cal. 4th 345, 353 [describing claim for business expense reimbursement as "non-wage" claims.] Claimant even acknowledges the distinction of interest for expenses versus wages. *See*, Claim. Post Hearing Brf. pg. 14, l. 21.

Respondent argues that Clamant is not entitled to damages under his UCL claim. In *Cortez v. Purolator Air Filtration Prods. Co.* (2000), 23 Cal.4th 163 the California Supreme Court held that non-payment of wages required by the Cal. Lab. Code may be recovered as equitable restitution under the UCL, but characterized wages as "property". The Court concluded:

> We conclude that orders for payment of wages unlawfully withheld from an employee are also a restitutionary remedy authorized by section 17203. The employer has acquired the money to be paid by means of an unlawful practice that constitutes unfair competition as defined by section 17200. The employee is, quite obviously, a "person in interest" (§ 17203) to whom that money may be restored. The concept of restoration or restitution, as used in the UCL, is not limited only to the return of money or property that was once in the possession of that person. The commonly understood meaning of "restore" includes a return of property to a person from whom it was acquired (see Webster's New Internat. Dict. (2d ed.

> 1958) p. 2125), but earned wages that are due and payable pursuant to section 200 et seq. of the Labor Code are as much the property of the employee who has given his or her labor to the employer in exchange for that property as is property a person surrenders through an unfair business practice. An order that earned wages be paid is therefore a restitutionary remedy authorized by the UCL. The order is not one for payment of damages.

23 Cal.4th at 1177-78. Given that expense reimbursements are non-wage claims, it is extremely questionable whether the UCL applies to expense reimbursement. However, courts have recognized UCL claims seeking restitution based on unreimbursed job expenses. *See, e.g., Harris v. Best Buy Stores, L.P.*, 2016 U.S. Dist. LEXIS 100538, *27-28 (N.D. Cal. Aug. 1, 2016) (collecting cases). Furthermore, the minimum wage liquidated damages claim, while a penalty, and therefore not subject to restitution, is grounded in a sub-minimum wage (expenses "taken" from the employee's wages), and therefore provides solid support to extend the claim for four (4) years. In this case, that limitations period extends back to July 2013.

Interest on the amount owed shall be calculated at the California legal rate of interest, seven percent (7%). The only logical way to calculate interest without the use of a supercomputer, is to assume – not an unreasonable assumption - the amounts owed are equally owed over the recovery period from July 2013 through November 2019, a period of seventy-six (76) months. The midpoint would be thirty-eight (38) months. The amount owed, $6,941.32 times seven percent (7%) per year equals $485.89 per year, or $40.49 per month. The interest for thirty-eight months totals **$1,538.62.**

B. Interest on minimum wage liquidated damages

Labor Code 1194.2(a) provides, "In any action under Section 98, 1193.6, 1194, or 1197.1 to recover wages because of the payment of a wage less than the minimum wage fixed by an order of the commission or by statute, an employee shall be entitled to recover liquidated damages in an amount equal to the wages unlawfully unpaid and interest thereon." If this is a penalty, the legal rate would apply (supra), but if a reduction from minimum wage, the interest rate reflected in Labor Code 218.6 applies. The court in *Sillah v. Command Int'l Sec. Servs.* (N.D. Cal. 2015) 154 F. Supp. 3d 891, 914, applying California law, stated, "Although the California Labor Code does not permit a plaintiff to recover liquidated damages for failure to pay overtime, [citation] a plaintiff who brings a claim for failure to pay overtime may recover liquidated damages under California Labor Code § 1194.2 if the plaintiff also shows that the plaintiff was paid less than the minimum wage."

As a result of the minimum wage violation, interest on the liquidated damages under 1194.2 shall be at ten percent (10%).

The liquidated damages of **$6,941.32** times ten percent (10%) per year equals $694.13 per year, or $57.84 per month. The interest for thirty-eight months totals **$2,197.92**.

Interim Award and Damages

Claimant has prevailed in the following amounts:

Unreimbursed business expenses (Labor Code 2802):	**$6,941.32**
Liquidated damages (Labor Code 1194.2):	**$6,941.32**
Interest on expense reimbursement:	**$1,538.62**
Interest on liquidated damages:	**$2,197.92**
Total	**$17,619.18**

Claimant's claim for injunctive relief is denied. No evidence has been presented that Respondent's reimbursement to Claimant post-hearing is inadequate. To the extent Claimant raised FLSA liquidated damages in its briefing, such claims are denied; no cause of action was brought under the FLSA.

Claimant is entitled to recover reasonable attorney's fees and costs, to be determined by motion. AAA is requested to schedule a telephonic conference at a mutually convenient time to address a briefing schedule.

Dated: May 5, 2020

By: _____

Harvey C. Berger
Arbitrator