

DIRECTOR OF THE DEPARTMENT OF LABOR & INDUSTRIES  
STATE OF WASHINGTON

IN RE: SMOKIAM RV RESORT AND  
CAMPGROUND LLC, AND ALANNA  
AND BRADLEY ELLIS,

Citation and Notice of Assessment Nos. W-  
730-15

OAH No. 10-2015-LI-00243

NO. 2016-013-WPA

DIRECTOR'S ORDER

RCW 49.48.084(4); RCW 34.05

Joel Sacks, Director of the Washington State Department of Labor & Industries, having considered the Initial Order served on May 25, 2016, having considered the petition for administrative review filed by Smokiam RV Resort and Campground LLC, and Alanna and Bradley Ellis (Smokiam) with the Director's Office on June 23, 2016, briefing submitted to the Director's Office, and having reviewed the record created at hearing and the record herein, issues this Director's Order. This Order intends to resolve the contested issue of whether Smokiam failed to pay all the wages due to Denise Ard in violation of the wage payment laws. **Smokiam is ordered to pay wages to Ard in the amount of \$14,166.92. Smokiam is also ordered to pay interest in the amount of one percent per month under RCW 49.48.083(2) for these wages. Smokiam is ordered to pay the Department a penalty in the amount of \$1,416.69.**

The parties in this matter are the Department of Labor & Industries, Ard, and Smokiam.

The Director makes the following Findings of Fact, Conclusions of Law, and Final Decision and Order.

## I. FINDINGS OF FACT

By a preponderance of the evidence, the Director finds the following:

1. At all times relevant to this matter, Alanna and Bradley Ellis owned and operated Smokiam RV Resort and Campground, located near Soap Lake, Washington. The business includes RV lots, tent sites, and rental cabins, as well as a hot tub, swimming pool, sauna, bathrooms, laundry, store, and a recreational hall.
2. In June 2014, Ard applied for a groundskeeper position with Smokiam, but was hired to work in the resort office and perform housekeeping duties. Ard began working for Smokiam in July 2014 and lived off-site. Ard worked for then manager Diane Chaulk.
3. Chaulk quit working for Smokiam in early August 2014. Smokiam hired Ard to replace Chaulk on August 7, 2014. Smokiam issued Ard a letter offering terms of employment. According to the letter, Ard would receive \$48,000 per year in annual “compensation of \$4,000 monthly including housing allowance/credit for use of the manager’s residence on site.” Ard’s Ex. I-14. However, neither Smokiam nor Ard intended the letter to reflect the actual terms of Ard’s employment. The purpose of the letter was to allow Ard to use it to obtain a bank loan to purchase a trailer.
4. Ard began working as a “park manager” on August 15, 2014. Ard worked with, but did not directly supervise, other employees. Smokiam did not establish that Ard supervised Cynthia Piedra, who worked part-time starting in September and ended her employment October 12, 2014. Smokiam’s other employees, such as the maintenance staff, recognized Bradley Ellis as their supervisor and primarily took direction from him and not Ard. Due to the slowing of the tourist season, Smokiam laid off the other employees except for Ard in October

or November 2014. There was one or two “work campers” remaining. A work camper is someone who performs some chores on a part-time basis for a waiver or reduction in the RV rental fee. Ard did not supervise the work campers. Ard was Smokiam’s only full-time employee starting in Fall 2014, through April 11, 2015. Ard would have potential employees or work campers fill out applications and forward them to Alanna Ellis; she did not have authority to hire or fire employees or work campers.

5. Ard performed tasks such as taking reservations, accepting rental payments, cleaning, answering telephone calls, checking-in guests, testing water, making sure water was in the hot tub, marketing the business, and scheduling social events. Smokiam would arrange for vendors to work at the park, and Ard would escort them to the location of the work. Ard spent 50 to 75 percent of her time making reservations for guests. Ard spent 25 percent of her time cleaning and doing water testing and monitoring the hot tub water level. Water testing and monitoring is a janitorial duty. During the relevant time frame, taking reservations, performing janitorial duties, and interacting with guests were her primary duties. Ard was engaged in the performance of active duties throughout her employment.

6. Ard’s discretion was limited to making relatively minor decisions, such as how to spend petty cash or organize movie nights. She did not have authority to write checks or pay bills. She could not implement policies regarding late fees. She did not have authority to offer sales or discounts to visitors without getting approval from Bradley or Alanna Ellis. Even something such as offering a 20 percent discount on cabin fees had to be approved by Bradley or Alanna Ellis. Her job promoting sales was a small part of her duties and she would attend RV shows with the owners and other staff.

7. Ard performed the tasks assigned to her by Smokiam as directed. Ard was allowed to leave the business location and she would forward the phones to her cell phone.



Ard received almost daily direction regarding the details of her job and what duties were to be performed when and how via text messages and phone calls from Alanna and Bradley Ellis. The owners were frequently present on the property, and Bradley Ellis lived on site for several months. Bradley and Alanna Ellis controlled the operations of the RV park, such as paying bills and running the business.

8. Ard's job duties did not require her to reside on the premises. Ard and Smokiam did not enter into a contract requiring that Ard reside at the RV park. Ard did not live in the manager's residence that was located at Smokiam's physical location until mid-December 2014, due to construction and remodeling of the cottage. Before that time, Ard lived off-site in a nearby rental home. She was able to perform her job even though she lived off-site. When she lived off-site, other people, including Bradley Ellis, would check guests in at night. When she lived on-site, her cottage was nearest to the area where the RVs pulled in, so people would come to her cottage to get checked in. She often performed the check-ins, though there was little business during the off season. It was not necessary that she be there as there were other options for late check-ins. Alanna Ellis's testimony that Ard was not really performing her job unless she was on-site is not credible given the long period of time that Ard was able to successfully perform the job as Ard's more credible testimony establishes.

9. Ard and Smokiam agreed that Ard would be paid \$1,153.85 every two weeks. Ard's regular wage rate was \$14.42 per hour and overtime wage was \$21.63 per hour. The number of hours Ard was required to work was not agreed upon.

10. Ard received the following wages from Smokiam via check: \$970.80 on September 5, 2014; \$1,153.85 on September 19, 2014; \$1,153.85 on October 3, 2014; \$1,153.85 on October 17, 2014; \$807.52, on October 31, 2014; \$735.82 on November 3, 2014; \$1,049.70 on November 17, 2014; \$1,049.75 on December 3, 2014; \$796.01 on December 18,



2014; \$1,049.00 on December 31, 2014; and \$916.00 on January 14, 2015. The payments were not made according to the agreed two week pay period schedule, but were paid to Ard at random intervals.

11. Ard received a check from Smokiam in the amount of \$1,049.00 on January 25, 2015, but it was returned for insufficient funds. Ard received the following wage payments from Smokiam from petty cash: \$700.00 on February 16, 2015; \$900.00 on February 20, 2015; and \$576.93 on April 11, 2015. Ard did not receive \$1,000.00 from petty cash on March 17, 2015, because she returned the funds to petty cash after being promised by Smokiam that she would be paid by other means.

12. Ard requested pay stubs for her period of employment from Smokiam. Ard never received pay stubs from Smokiam.

13. Smokiam failed to keep records of the hours Ard worked or was expected to work for the period at issue.

14. During the period of October 18, 2014, through April 11, 2015, Ard worked 411.7 regular hours and 380.5 overtime hours for which she did not receive payment. Ard kept contemporaneous records of the hours she worked. These records show her hours worked and that she worked over 40 hours a week. These records are credible and she did not fabricate these records.

15. Despite the opportunity to do so, Smokiam did not present evidence that proved that Ard worked only 40 hours a week or less.

16. Smokiam concedes that it owes final wages to Ard. Smokiam admits it did not mail or otherwise attempt to contact Ard regarding her final wage check. Ard ended her employment with Smokiam on April 11, 2015.

17. Ard did not receive or assent to the job description for the “park manager”

position. Ard was not directed to perform the duties in the job description, and did not actually perform all the job duties in the job description.

18. The testimony of the parties and the documentation presented conflicted on material points, particularly the job duties actually performed by Ard. Based upon the evidence presented, and having carefully considered and weighed all the evidence, including the demeanor and motivations of the parties, the reasonableness of the testimony and the totality of the circumstances presented, the Administrative Law Judge found that Ard's testimony regarding the hours worked and the rate of pay agreed upon more credible and corroborated by documentary evidence and the testimony of other witnesses than the testimony of Alanna Ellis. Giving due regard to this assessment, the Director concurs with this assessment. The veracity of Alanna Ellis is also called into question by the pattern of creating documents after the fact, by the questionable practices in delaying payment of wages, by issuing bad checks, and by using illegal electrical contracting services.

19. Ard filed a Worker's Rights Complaint with the Department on April 14, 2015, seeking agreed, overtime, and final wages.

20. The Department issued Smokiam a Citation and Notice of Assessment on June 30, 2015, assessing agreed, overtime and final wages in the amount of \$18,072.66, plus interest, and a penalty of \$1,807.21. The time period at issue is October 18, 2014, through April 11, 2015.

21. Smokiam filed a request for hearing and appeal on July 29, 2015.

22. The Office of Administrative Hearings received the request for hearing from the Department on October 21, 2015.

23. The Department amended the assessment of wages to \$14,166.55 at the March 18, 2016 hearing in this matter.

24. The Office of Administrative Hearings served the Initial Order on May 25, 2016, that affirmed as modified the Citation and Notice of Assessment.

25. On June 23, 2016, Smokiam timely filed a petition for administrative review with the Director.

26. The Director accepted briefing and the record was completed on October 28, 2016.

## II. CONCLUSIONS OF LAW

Based on the facts above, the Director concludes the following:

1. Based on Smokiam's timely filed petition for review, there is authority to review and decide this matter under RCW 49.48.084 and RCW 34.05.
2. Under the Minimum Wage Act, an employer is required to pay overtime when an employee works over 40 hours in a work week. RCW 49.46.130(1). The overtime rate is not less than one and a half times the regular rate at which the worker is employed. *Id.*
3. An employer, however, is not required to pay overtime to any person exempted from the Minimum Wage Act by RCW 49.46.010(3). It is the employer's burden to show that an exemption under the Minimum Wage Act applies. *Drinkwitz v. Techsys., Inc.*, 140 Wn.2d 291, 301, 996 P.2d 582 (2000). Individuals "employed in a bona fide executive, administrative, or professional capacity" are exempt from Minimum Wage Act requirements. RCW 49.46.010(3)(c). If Ard meets the definition of an exempt employee, she would not be entitled to overtime wages. However, if she is not an exempt employee, then Ard is entitled to overtime wages for hours worked over forty hours per week.
4. Ard is not an exempt executive employee under WAC 296-128-510. This rule provides:



The term “individual employed in a bona fide executive . . . capacity” in RCW 49.46.010(5)(c) shall mean any employee:

(1) Whose primary duty consists of the management of the enterprise in which he is employed or of a customarily recognized department or subdivision thereof; and

(2) Who customarily and regularly directs the work of two or more other employees therein; and

(3) Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring or firing and as to the advancement and promotion or any other change of status of other employees will be given particular weight; and

(4) Who customarily and regularly exercises discretionary powers; and

(5) Who does not devote more than 20 percent, or, in the case of an employee of a retail or service establishment who does not devote as much as 40 percent, of his hours worked in the work week to activities which are not directly and closely related to the performance of the work described in paragraphs (1) through (4) of this section: Provided, That this paragraph (5) shall not apply in the case of an employee who is in sole charge of an independent establishment or a physically separated branch establishment, or who owns at least a 20 percent interest in the enterprise in which he is employed; and

(6) Who is compensated for his services on a salary basis at a rate of not less than \$155 per week exclusive of board, lodging, and other facilities: Provided, That an employee who is compensated on a salary rate of not less \$250 per week (exclusive of board, lodging, or other facilities), and whose primary duty consists of the management of the enterprise in which he is employed or of a customarily recognized department or subdivision thereof, and includes the customary and regular direction of the work of two or more other employees therein, shall be deemed to meet all of the requirements of this section.

5. Smokiam does not show the elements of the executive exemption either under the long test in WAC 296-128-510(1)-(6) or under the short test in the proviso in WAC 296-128-510(6). Because Smokiam cannot meet the elements of the short test, it is unnecessary to engage in the long test.

5.1. **Primary duty:** Ard’s primary duty was not management of the enterprise, the owners did this. “Primary duty” means the principal, major, or most important duty that the employee performs. *Schryvers v. Coulee Cmty. Hosp.*, 138 Wn. App. 648, 659, 158 P.3d 113

(2007). Ard’s primary duty was to perform tasks such as greeting guests, making reservations, and janitorial duties such as cleaning and testing water. These were tasks necessary to the business, but performance of these tasks did not mean that she was managing an enterprise.

5.2. **Supervises two or more employees:** Ard did not direct the work of two or more other employees as required by WAC 296-128-510. Two or more employees mean two full-time employees or their equivalent. 29 C.F.R. § 541.104(a); *see Innis v. Tandy Corp.*, 141 Wn.2d 517, 524, 7 P.3d 807 (2000) (Washington looks to federal Fair Labor Standards Act (FLSA) standards when construing comparable provisions under the Minimum Wage Act). For the majority of the time Ard worked at Smokiam, she was the only full-time employee. Even if Smokiam had established that Ard supervised Cynthia Piedra, she worked part-time starting in September and ended in October, before the relevant time frame. Ard did not supervise the maintenance staff or work campers. Because Ard did not customarily and regularly direct the work of two or more employees during the relevant time frame, she is not an exempt executive employee.

5.3. **Salary:** Because this case is resolved on other grounds, it is unnecessary to address Ard’s arguments that the salary basis element was not met.

6. Ard is not an “exempt administrative employee” under WAC 296-128-520(4)(b). This rule provides:

The term “individual employed in a bona fide . . . administrative . . . capacity” in RCW 49.46.010 (5)(c) shall mean any employee:

(1) Whose primary duty consists of the performance of office or nonmanual field work directly related to management policies or general business operations of his employer or his employer’s customers;

....

[and]

(3) Who customarily and regularly exercises discretion and independent judgment; and

(a) Who regularly and directly assists a proprietor, or an employee employed in a

bona fide executive or administrative capacity (as such terms are defined in this regulation),

(b) Who performs under only general supervision work along specialized or technical lines requiring special training, experience or knowledge, or

(c) Who executes under only general supervision special assignments and tasks; and

(4) Who does not devote more than 20 percent, or, in the case of an employee of a retail or service establishment who does not devote as much as 40 percent of his hours worked in the work week to activities which are not directly and closely related to the performance of the work described in paragraphs (1) through (3) of this section; and

(a) Who is compensated for his services on a salary or fee basis at a rate of not less than \$155 per week exclusive of board, lodging, or other facilities; or

(b) Who, in the case of academic administrative personnel is compensated for his services as required by paragraph (4)(a) of this section, or on a salary basis which is at least equal to the entrance salary for teachers in the school system, educational establishment, or institution by which he is employed: Provided, That an employee who is compensated on a salary or fee basis at a rate of not less than \$250 per week (exclusive of board, lodging, or other facilities), and whose primary duty consists of the performance of office or nonmanual work directly related to management policies or general business operations of his employer or his employer's customers; which includes work requiring the exercise of discretion and independent judgment, shall be deemed to meet all of the requirements of this section.

7. Either under the long test, (1), (3), and (4)(a), or under the short test, (4)(b), Ard is not exempt under the administrative employee exemption. The short test in (4)(b) applies to all employees, not just academic administrative personnel. Ard's title was park manager, but a job title alone is of little or no assistance in determining the employee's exempt status.

Administrative Policy ES.A.9.4., *Exemption from Minimum Wage and Overtime Requirements for Administrative Positions*, 3 (July 15, 2014).

8. Smokiam did not demonstrate all the elements of this regulation in applying the long test or short test and Ard is not an exempt administrative employee.

8.1. **WAC 296-128-520(1)**: To qualify under this prong, the employee's "primary duty [must consist] of the performance of office or nonmanual field work directly



related to management policies or general business operations of his employer or his employer's customers." "Work directly related to management or general business operations includes, but is not limited to, work in functional areas such as tax; finance; accounting; budgeting; auditing; insurance; quality control; purchasing; procurement; advertising; marketing; research; safety and health; personnel management; human resources; employee benefits; labor relations; public relations, government relations; computer network, internet and database administration; legal and regulatory compliance; and similar activities." 29 C.F.R. § 541.201(b); *see also* ES.A.9.4 at 4-5. Of this list, Ard only performed some marketing and placed advertisements; however, this work was not her primary duty and was a small part of her job duties. Because it was not her primary duty, this work does not exempt her. The above list is not exclusive, so it must be considered whether other duties meet the exemption.

The evidence shows that Ard worked with other employees and performed specific duties as directed by the owners of Smokiam's business. Primarily, her duties were to take reservations, interact with guests, and perform janitorial work. Because the vast majority of work she performed was not related to management policies or business operations, she is not an exempt administrative employee. This case is not analogous to *Schryvers*. In that case the plaintiffs were the sole managers of the day to day operations of an adult family home, including paying bills and taking care of all the other requirements to run an adult family home. 138 Wn. App. 660. Here the owners had control over the operations of the RV park, such as paying bills and running the business. Smokiam argues that the "Claimant was the face of the company, she marketed for the company, worked with vendors, maintained client relationships, and facilitated the scheduling and locating of future guests." Smokiam's Reply Br. 3-4. Placing advertisements and accompanying her employers to RV shows does not subject her to exemption under the circumstances here and moreover they were not her primary duties. Smokiam points to testimony

that she escorted vendors to worksites, which does not establish Smokiam's premise that she was the face of the company or "worked with vendors." Smokiam's Reply Br. at 3. Her work taking guest reservations was more akin to receptionist work and was clerical work not subject to the exemption. Smokiam concedes that this was a significant portion of her time. Smokiam's Br. in Support of Appeal at 10. Additionally, providing customer service does not exempt Ard because she is producing the product of the business (guest services). *See* Administrative Policy ES.A.9.4, at 4 ("**Directly Related to Management Policies or General Business Operations of the Employer or Employer's Customers.** This phrase describes those types of activities relating to the administrative operations of a business as distinguished from production or, sales work in a retail or service establishment."). Smokiam also pointed to approval of petty cash withdrawals, but again this was not a primary duty. Smokiam's Br. in Support of Appeal at 8.

8.2. **WAC 296-128-520(3)**: "[T]he primary duty of the employee must involve the exercise of *discretion and independent judgment on matters of significance.*" *Schryvers*, 138 Wn. App. at 659 (emphasis added). Ard did not exercise the discretion or independent judgment on matters of significance to trigger this exemption. Ard received almost daily direction regarding the details of her job and what duties were to be performed when and how via text messages and phone calls from Alanna and Bradley Ellis. This level of control shows the lack of discretion. Smokiam points to her work scheduling guests as requiring "independent judgment." Smokiam's Br. in Support of Appeal at 10. This work is more akin to receptionist work and was clerical work not subject to the exemption. Many employment positions require scheduling, which requires that an employee assess availability on a calendar, but that does not prove the exemption. It is work related to the production of the business (guest services), and not directly related to management policies or general business operations. *See* Administrative Policy ES.A.9.4 at 4. Smokiam argues that Ard had duties that required

independent problem solving: “Claimant proposed discounts, organized functions, and performed other tasks requiring her to use independent problem solving.” Smokiam’s Reply Br. at 7. But organizing a game night is not a matter of significance and is a relatively minor exercise in discretion, as is suggesting discounts. Smokiam claims that an “administrative employee typically has no such power to even *suggest* such changes or discounts.” Smokiam’s Reply Br. at 2.<sup>1</sup> Smokiam cites no authority for this proposition, and in any event providing suggestions is not limited to those employees exempt from Minimum Wage Act requirements and shows no basis here to apply the administrative exemption. Smokiam points to the requirement that Ard test the water for safety, as an exercise of discretion. This is a janitorial task that does not implicate the kind of discretion required under any exemption.

8.3. **WAC 296-128-520(4)**: even if the elements of (1) and (3) were established, Ard spent the vast majority of her time taking reservations and performing janitorial tasks. This element was not met.

9. Ard is not an exempt employee under RCW 49.46.010(3)(j). This statute provides:

Any individual whose duties require that he or she reside or sleep at the place of his or her employment or who otherwise spends a substantial portion of his or her work time subject to call, and not engaged in the performance of active duties[.]

10. RCW 49.46.010(3)(j) exempts employees whose job duties require that the employee reside or sleep at the place of his or her employment. *Berrocal v. Fernandez*, 155 Wn.2d 585, 588, 121 P.3d 82 (2005). The availability of free lodging does not necessarily trigger application of this exemption. This provision focuses on the requirements of the job

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<sup>1</sup> The reference to an “administrative employee” may be a typographical error, and Smokiam may have meant to say non-administrative employee.



duties. Additionally, this exemption is not necessarily triggered if the employer wants the employee to live on-site. It is not an employer's subjective wish to have an on-site employee that is determinative; it is whether the employee's "duties require that he or she reside or sleep at the place of his or her employment." RCW 49.46.010(3)(j). Ard's job duties did not require her to reside at the place of employment. For several months, she lived off-site, and she was able to perform her duties. There were others available to check guests in, as demonstrated by the fact that she lived off-site for a significant portion of the time. That others were available to check in people establishes that it was not Ard's job to do this exclusively. Department Administrative Policy ES.A.1, *Minimum Wage Act Applicability* (July 15, 2014), notes that this exemption often includes "apartment managers" and "hotel/motel managers." The policy provides:

Employees whose job duties require them to reside at the place of employment [are] exempt from both the minimum wage and overtime requirements. Merely residing or sleeping at the place of employment does not exempt individuals from the Minimum Wage Act. In order for individuals to be exempt, their duties must require that they sleep or reside at the place of their employment. An agreement between the employee and employer for the employee to reside or sleep at the place of employment for convenience or merely because housing is available at the place of their employment would not meet the exemption.

Typical examples of this exemption if their duties require them to reside or sleep at the place of their employment may include apartment managers, maintenance personnel, hotel/motel managers, managers of self-storage facilities, and agricultural workers such as shepherders.

ES.A.1. at 5. Key to this policy is that the job duties must require the employee to reside or sleep at the place of employment. Here, unlike *Berrocal*, Ard's job duties did not necessitate this. 155 Wn.2d at 588-89. Moreover, unlike *Berrocal* where the shepherders entered into contract requiring that they reside on the ranch, no such contract existed here.

11. RCW 49.46.010(3)(j) exempts an employee who otherwise spends a substantial portion of his or her work time subject to call, and not engaged in the performance of active duties. As demonstrated by the hours Ard worked, she was engaged in the performance of active duties throughout her employment. Additionally, she was not subject to call in the evenings because it was not mandatory that she be available to check in guests as others were available to do this.

12. Because Ard does not meet the definition of an exempt employee, she is entitled to payment of overtime wages in the amount of time and a half for work performed over forty hours per week.

13. There is no dispute regarding the number and amount of wage payments Smokiam made to Ard between October 18, 2014, and April 11, 2015. (The only exception whether she was paid \$1,000 on March 17, 2015, from petty cash, and it is found above that Ard properly accounted for the payment and it was not received as wages.). Additionally, Smokiam has conceded that it owes Ard final wages. As found above, Ard's pay rate was \$1,153.85 per bi-weekly pay period, or \$14.42 per hour for the regular rate and \$21.63 for the overtime rate.

14. The remaining issue is the amount of hours worked. Hours worked means all hours that the employer authorized or requires the employee to be on the premises or at a prescribed work place. WAC 296-126-002(8).

15. Smokiam did not keep the required payroll records of Ard's hours. Special rules apply to evaluating the evidence and the burden of proof when an employer has failed to keep adequate records. *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 66 S. Ct. 1187, 90 L. Ed. 1515 (1946), is the seminal case addressing the effect of an employer's failure to keep adequate records and is followed in Washington. *MacSuga v. Cty. of Spokane*, 97 Wn. App.

435, 445, 983 P.2d 1167 (1999); *see also Pugh v. Evergreen Hosp. Med. Ctr.*, 177 Wn. App. 363, 368, 312 P.3d 665 (2013). Washington, like federal law, requires employers to keep records about the hours worked by its employees. RCW 49.46.040, .070; WAC 296-128-010; *Anderson*, 328 U.S. at 687. Under *Anderson*, employees should not be punished for the inability to prove with precision the amount of hours worked by the employees because the employer failed to keep adequate records:

Due regard must be given to the fact that it is the employer who has the duty under [FLSA] to keep proper records of wages, hours and other conditions and practices of employment and who is in position to know and to produce the most probative facts concerning the nature and amount of work performed. Employees seldom keep such records themselves; even if they do, the records may be and frequently are untrustworthy. It is in this setting that a proper and fair standard must be erected for the employee to meet in carrying out his burden of proof.

328 U.S. 687; *see also Brock v. Seto*, 790 F.2d 1446, 1448 (9th Cir. 1986) (“an award of back wages will not be barred for imprecision where it arises from the employer’s failure to keep records . . .”).

16. The *Anderson* Court provided for a shifting burden of proof in the event the employer does not keep adequate records:

[W]e hold that 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.

328 U.S. at 687-88. The *Anderson* Court developed the burden-shifting standard because of FLSA’s remedial nature and the “great public policy which it embodies” and because lack of



evidence is within the control of the employer. 328 U.S. at 687. Placing responsibilities on the employer when it fails to keep adequate records is “a result consistent with Washington’s long and proud history of being a pioneer in the protection of employee rights.” *Drinkwitz*, 140 Wn.2d at 300.

10. Under *Anderson*, although the preponderance of the evidence standard applies, the burden of proof is relaxed when an employer does not keep adequate records. *Lamonica v. Safe Hurricane Shutters, Inc.*, 711 F.3d 1299, 1315 (11th Cir. 2013) (FLSA places upon the employee “the burden of proving that he performed work for which he was not properly compensated. . . . However, if the employer failed to keep time records, as in this case, that burden is relaxed.”) (citation omitted); *Reich v. Gateway Press, Inc.*, 13 F.3d 685, 701 (3d Cir. 1994) (“The Secretary’s burden in these cases, however, is merely to present a prima facie case. Indeed, it is settled that the burden (with respect to a given employee) is met if it is proved that the employee has in fact performed work for which he was improperly compensated and if the employee produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference.”); *Sec’y of Labor v. DeSisto*, 929 F.2d 789, 793 (1st Cir. 1991) (the “initial burden in these cases is minimal.”); *McLaughlin v. Ho Fat Seto*, 850 F.2d 586, 589 (9th Cir. 1988) (“burden is not on the employees to prove the precise extent of uncompensated work.”).

11. In its prima facie case, the party seeking wages must (1) prove that the employee has performed work that he or she was not properly compensated for and (2) provide evidence to show the amount of such work by reasonable inference. *Anderson*, 328 U.S. at 687. If the initial burden is met, “The employer must then rebut the inference that the employee worked the number of hours required to accomplish this amount of work.” *MacSuga*, 97 Wn. App. at 446.

12. *Anderson* applies here. Smokiam did not keep adequate records that showed the hours worked. The Department and Ard met their burden of proof. First, they proved that Ard

performed work that she was not properly compensated for. She provided credible evidence that she worked uncompensated regular and overtime hours. Notably, Smokiam through its primary witness never denied that Ard worked more than 40 hours a week. Second, Ard and the Department provided evidence to show the amount of her work by reasonable inference. Ard produced a contemporaneous and credible record of the hours she worked. This is a reasonable source to infer hours from and this evidence satisfies the burden to show her hours by a “just and reasonable inference.” *See Anderson*, 328 U.S. at 687. Smokiam questions some of the entries in her records, but presented no proof that she was not working remotely at those times.

17. Smokiam did not negate the Department’s and Ard’s claims. Smokiam conceded that she worked after hours at times, such as checking in guests at night. Smokiam’s Br. in Support of Appeal at 13. An employer must do more than point out alleged minor discrepancies in the employee’s records to meet its burden. Smokiam says Ard’s records did not account for meal breaks, but Smokiam put on no evidence about the amount or frequency of such breaks. *See Smokiam’s Br. in Support of Appeal at 14.*

18. Ard worked 411.7 uncompensated regular hours and 380.5 uncompensated overtime hours during the period of October 18, 2014, through April 11, 2015. Ard’s regular hours of 411.7 multiplied by the regular rate of pay of \$14.42 per hour equals \$5,936.71. Ard’s overtime hours multiplied by the overtime rate of pay of \$21.63 per hour equals \$8,230.21.

19. The Initial Order determined that there was no authority to assess and collect withheld taxes. Ard has not contested this determination.

20. An employer is required to pay all hours worked under a contract, and failure to pay is enforceable under the Wage Payment Act if the failure to pay was willful. RCW 49.52.050(2) (employer must pay wages owed under contract when employer willfully and with intent to deprive employee of wages); RCW 49.48.082(12) (“wage payment requirement”

includes violations of RCW 49.52.050); RCW 49.48.083(2) (employer must comply with wage payment requirements). Failure to pay wages also results in a penalty if the failure to pay was willful. RCW 49.48.083(3). The same standards found in RCW 49.52.050 are used in determining a penalty amount under RCW 49.48.083. RCW 49.48.082(13). Because Smokiam acted willfully with the intent to deprive Ard of her wages, a penalty in the amount of \$1,416.69 and agreed wages are properly assessed.

21. Smokiam failed to pay Ard's final paycheck as required by RCW 49.48.010 and WAC 296-126-025.

22. Smokiam owes Ard \$14,166.55 in agreed, regular, and overtime wages for the period of October 18, 2014, through April 11, 2015.

23. Because Smokiam failed to pay its employee full wages, the Department correctly ordered Smokiam to pay interest on the wages at one percent per month under RCW 49.48.083(2). The assessment of interest is affirmed. The interest payment obligation is ongoing until paid in full.

### **III. DECISION AND ORDER**

Consistent with the above Findings of Fact and Conclusion of Law, the Citation and Notice of Assessment is **AFFIRMED AS MODIFIED**.



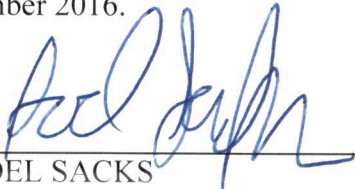
1. Payment of wages: See Citation and Notice of Assessment (June 30, 2015) for payment information and the effect of the failure to pay wages and interest.

Smokiam is ordered to pay wages to Denise Ard in the amount of \$14,665.92. Smokiam is also ordered to pay interest in the amount of one percent per month under RCW 49.48.083(2) for these wages. Smokiam is ordered to make these payments within 30 days of the date of service of this final Director's Order.

2. Payment of Civil Penalty: See Citation and Notice of Assessment (June 30, 2015) for payment information.

Smokiam is ordered to pay the Department a penalty in the amount of \$1,466.69. This penalty shall be paid to the Department within 30 days of the date of service of this final Director's Order.

DATED at Tumwater this 23 day of November 2016.

  
\_\_\_\_\_  
JOEL SACKS  
Director

## SERVICE

This Order was served on you the day it was deposited in the United States mail. RCW 34.05.010(19).

## APPEAL RIGHTS

**Reconsideration.** Any party may file a petition for reconsideration. RCW 34.05.470. Any petition for reconsideration must be filed within 10 days of service of this Order and must state the specific grounds on which relief is requested. No matter will be reconsidered unless it clearly appears from the petition for reconsideration that (a) there is material clerical error in the order **or** (b) there is specific material error of fact or law. A petition for reconsideration, together with any argument in support thereof, should be filed by emailing to [directorappeal@lni.wa.gov](mailto:directorappeal@lni.wa.gov) or by mailing or delivering it directly to Joel Sacks, Director of the Department of Labor and Industries, P. O. Box 44001 Olympia, Washington 98504-4001, with a copy to all other parties of record and their representatives. Filing means actual receipt of the document at the Director's Office. RCW 34.05.010(6).

**NOTE: A petition for reconsideration is not required before seeking judicial review.** If a petition for reconsideration is filed, however, the 30-day period will begin to run upon the resolution of that petition. A timely filed petition for reconsideration is deemed to be denied if, within twenty (20) days from the date the petition is filed, the Director does not (a) dispose of the petition **or** (b) serve the parties with a written notice specifying the date by which it will act on the petition. RCW 34.05.470(3).

**Judicial Review.** Any petition for judicial review must be filed with the appropriate court and served within 30 days after service of this Order. RCW 34.05.542. RCW 49.48.084(5) provides, "Orders that are not appealed within the time period specified in this section and Chapter 34.05 RCW are final and binding, and not subject to further appeal." Proceedings for judicial review may be instituted by filing a petition in superior court according to the procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil Enforcement.

### DECLARATION OF MAILING

I, Lisa Rodriguez, hereby declare under penalty of perjury under the laws of the State of Washington, that the DIRECTOR'S ORDER was mailed on the 23 day of November 2016, to the following via certified mail, postage prepaid.

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Denise Ard  
8801 St Thomas Dr #138  
Pasco, WA 99301

DATED this 23 day of November, 2016 Tumwater, Washington.

