

DIRECTOR OF THE DEPARTMENT OF LABOR & INDUSTRIES
STATE OF WASHINGTON

In re:

JULIE BROWN,

APPELLANT,

Determination of Compliance
No. DOC-072-21

OAH Docket No. 02-2021-LI-01618

DIRECTOR'S ORDER

NO. 2021-019-WPA

Joel Sacks, Director of the Washington State Department of Labor & Industries, having considered the appeal filed by Julie Brown (the Appellant) and briefing submitted to the Director's Office, and having reviewed the record, issues this Director's Order.

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

I. FINDINGS OF FACT

1. The Office of Administrative Hearings issued and served the Initial Order on July 26, 2021, and the Appellant timely appealed from this order.
2. The Director adopts and incorporates all the Order's Findings of Fact.

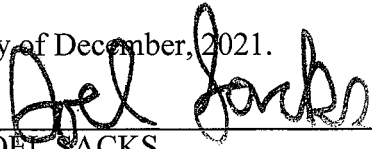
II. CONCLUSIONS OF LAW

1. Based on the Appellant'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. The Director adopts and incorporates all the Conclusions of Law and the Initial Order as the Final Order.

III. DECISION AND ORDER

Consistent with the above Findings of Fact and Conclusion of Law, the Determination of Compliance is AFFIRMED and the Initial Order of July 26, 2021, is incorporated by reference herein.

DATED at Tumwater, Washington this 16th day of December, 2021.



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 it to 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 Deck, hereby declare under penalty of perjury under the laws of the State of Washington, that the DIRECTOR'S ORDER was mailed on the 16th day of December, 2021, to the following via U.S. Mail, postage prepaid:

Julie Brown
3636 E Howe Street, #1
Tacoma, WA 98404
browngirlsx3@gmail.com

Vickie O'Brien
Excell Marketing, LLC
Des Moines, IA 50305
vobrien@excellmktg.com

Shawn Gordon, AAG
Office of the Attorney General
PO Box 40121
Olympia, WA 98504
shawn.gordon@atg.wa.gov
lniolyeservice@atg.wa.gov

DATED this 16 day of December, 2021, at Tumwater, Washington.



LISA DECK

**WASHINGTON STATE
OFFICE OF ADMINISTRATIVE HEARINGS**

In the matter of:

Docket No. 02-2021-LI-01618

Julie Brown,

INITIAL ORDER

Appellant/Wage Claimant.

Agency: Labor and Industries
Program: Wage Payments
Agency No. DOC-072-21

1. ISSUES

- 1.1. Did the Department of Labor and Industries properly issue the Determination of Compliance No. 072-21, dated October 30, 2020, which found that the Employer, Excell Marketing, LLC, did not violate Washington wage laws and the Employer did not owe Wage Claimant Julie Brown wages for the period of May 12, 2017 through November 2, 2019?
- 1.2. And, if it is found that the Determination of Compliance No. 072-21 was not properly issued, what wages are owed to Wage Claimant Julie Brown?

2. ORDER SUMMARY

- 2.1. The Determination of Compliance No. 072-21 was properly issued. Excell Marketing, LLC did not violate Washington wage laws and does not owe Wage Claimant Julie Brown wages for the period of May 12, 2017 through November 2, 2019.
- 2.2. The Determination of Compliance No. 072-21 was properly issued; no wages are owed to Wage Claimant Julie Brown.

3. HEARING

- 3.1. Hearing Date: May 26, 2021
- 3.2. Administrative Law Judge: Jennifer Clemens
- 3.3. Appellant: Julie Brown
- 3.4. Agency: Department of Labor and Industries
 - 3.4.1. Representative: Shawn W. Gordon, AAG
 - 3.4.2. Witnesses:
 - 3.4.2.1. Vickie O'Brien, Employer, Excell Marketing LLC
 - 3.4.2.2. Brenda Fay, Industrial Relations Agent, Department of Labor and Industries

- 3.5. Exhibits: Department of Labor and Industries Exhibits 1 through 16 were admitted. Appellant's Exhibits A through I were admitted.
- 3.6. Court Reporter: Court Reporter Laura Stewart, of Capital Pacific, appeared by telephone and provided stenographic reporting services.

4. FINDINGS OF FACT

The undersigned finds the following facts by a preponderance of the evidence:

Jurisdiction

- 4.1. On November 2, 2019, the Department of Labor and Industries ("Department" or "L&I") received a Worker Rights Compliant Form filed by Julie Brown ("Appellant" or "Ms. Brown"). *Exhibit 2.*
- 4.2. On October 30, 2020, the Department issued Determination of Compliance No. 072-21. *Exhibit 1.*
- 4.3. On November 19, 2020, Ms. Brown appealed Determination of Compliance No. 072-21. *Exhibit B.* This matter was referred to the Office of Administrative Hearings ("OAH") on February 16, 2021. *OAH File.*

Julie Brown's Employment with Excell Marketing, LLC

- 4.4. Excell Marketing, LLC ("Excell") is primarily a toy distribution company, though it also manufactures some of the toys it distributes. *Testimony of O'Brien.*
- 4.5. Ms. Brown began working for Excell on July 14, 2014. During the time period at issue in this matter, Ms. Brown worked as a Territory Account Manager ("TAM"). TAMs are responsible for retrieving inventory and placing it on store shelves for purchase. *Testimony of O'Brien; exhibit 7.*
- 4.6. When she began working as a TAM, Ms. Brown received a salary, plus commission, but was exempt from overtime pay. *Testimony of O'Brien.*
- 4.7. Commission for TAMs is calculated based on monthly sales at all stores the TAM services. Commissions are considered taxable income. *Testimony of O'Brien.*
- 4.8. On April 22, 2017, Excell moved all of its TAMs to an hourly, overtime eligible, compensation structure. *Testimony of O'Brien; exhibit 6, page 1.*
- 4.9. Under the new compensation structure, Ms. Brown was guaranteed 40 hours of work at her hourly pay rate, plus 10 hours of overtime. Because the overtime was guaranteed, if Ms. Brown worked any amount of time over 40 hours per week, she was paid as if she worked 10 hours of overtime. So 42 hours of work would be paid as 40 hours of regular pay and 10 hours of overtime. *Testimony of O'Brien; exhibit 7.*

- 4.10. Ms. Brown worked an average of 44 to 48 hours per week. *Exhibit 15, pages 1-32; testimony of O'Brien.*
- 4.11. Ms. Brown continued to receive commission under the new compensation structure, and Excell began to "guarantee" \$6,000 per year of commissions for its TAMs and \$500 of that amount to each of its TAMs bi-weekly paychecks. No other changes were made to the commission structure, and monthly commissions over \$500 continued to be paid to TAMs in a separate, monthly commission check. *Testimony of O'Brien; exhibit 5, page 2, exhibit 6, page 1.*
- 4.12. Excell provided its TAMs with a written explanation of the changes. *Testimony of O'Brien; Exhibits 6-7.*
- 4.13. This change slightly increased the amount of Ms. Brown's bi-weekly paycheck. *Testimony of O'Brien.*
- 4.14. Ms. Brown found the change in compensation structure to be very confusing. *Testimony of Fay, Brown.*
- 4.15. Ms. Brown's base hourly wage, which included her commissions, changed every year. *Testimony of Fay.*
- 4.16. When calculating her own hourly compensation, Ms. Brown did not include her commissions, and instead used only her hourly rate. *Testimony of Fay, Brown.*
- 4.17. Ms. Brown was frustrated with Excell's rate of compensation, and always felt she was underpaid. *Testimony of Brown.*

2017 Compensation

- 4.18. In 2017, Washington's state minimum wage was \$11.00. *Testimony of Fay.*
- 4.19. In 2017, Ms. Brown's hourly rate, without commission, was \$9.78 and, as of June 1, 2017, \$10.10. Including commission, Ms. Brown earned \$11.15 per hour in base wages in 2017. *Exhibit 14, page 1, exhibit 16, page 1; testimony of Fay, O'Brien.*

2018 Compensation

- 4.20. In 2018, Washington's state minimum wage was \$11.50. *Testimony of Fay.*
- 4.21. In 2018, Ms. Brown's hourly rate, without commission, was \$10.10 and, as of May 19, 2018, \$10.45. Including commission, Ms. Brown earned \$12.00 per hour in base wages in 2018. *Exhibit 14, page 1, exhibit 16, page 41; testimony of Fay, O'Brien.*

2019 Compensation

- 4.22. In 2019, Washington's state minimum wage was \$12.00. *Testimony of Fay.*

4.23. In 2019, Ms. Brown's hourly rate, without commission, was \$10.45 and, as of May 18, 2019, \$10.90. Including commission, Ms. Brown earned \$12.35 per hour in base wages in 2019. *Exhibit 14, page 1, exhibit 16, page 74; testimony of Fay, O'Brien.*

The 2019 Overpayment

4.24. On January 18, 2019, Excell accidentally paid Ms. Brown an additional \$3,100 in commission. *Testimony of O'Brien; exhibits 8, 9, and 10.*

4.25. On February 11, 2019, Ms. Brown agreed to repay the overpayment, and authorized Excell to withhold future commissions until the overpayment was paid in full. *Testimony of O'Brien; exhibit 8.*

4.26. Ms. Brown usually received approximately \$400 in extra commission, above the guaranteed commission, in an additional monthly commission check. Excell withheld only the additional commission for repayment of the overpayment, not the guaranteed commission that was included on her bi-weekly paychecks. *Testimony of O'Brien.*

4.27. In July of 2019, Ms. Brown notified Excell that the extra withholding was causing her financial difficulty, and proposed that she pay a flat \$150 per month toward the overpayment. Excell acknowledged the financial difficulty, and proposed to instead withhold one third of her additional commission, with a minimum rate of \$100. Ms. Brown agreed to Excell's proposal. *Testimony of O'Brien; exhibit 11.*

The Wage Complaint

4.28. As stated above, Ms. Brown filed a wage complaint in November of 2019. Upon receiving Ms. Brown's complaint, Excell performed an audit of her compensation. In making its calculations, Excell used both Ms. Brown's hourly rate and her commissions toward determining her total hourly compensation rate. *Testimony of Fay, O'Brien.*

4.29. Excell determined that Ms. Brown made at least minimum wage during the entirety of 2017 and 2019. In 2018, Excell found a shortfall of \$245.00. Excell immediately issued a check to Ms. Brown for the amount of the shortfall. *Testimony of O'Brien.*

4.30. Brenda Fay, an industrial relations agent with the Department, was assigned to investigate Ms. Brown's complaint. In the course of her investigation, Ms. Fay reviewed the information provided with the complaint, as well as time records and Excell's written compensation plan. *Testimony of Fay; exhibit 1, page 1.*

4.31. Ms. Fay reviewed the submitted documentation and determined that Ms. Brown was not owed additional compensation, because Excell did not violate the Washington State Wage Payment Act and/or the Minimum Wage Act during the period at issue. *Testimony of Fay; exhibit 1, page 1.*

- 4.32. The Department was not concerned by the \$245 underpayment in 2018, because it was immediately corrected by Excell. *Testimony of Fay*.
- 4.33. The Department concluded its investigation and issued Determination of Compliance No. 072-21. *Testimony of Fay; exhibit 1*.

5. CONCLUSIONS OF LAW

Based upon the facts above, the undersigned makes the following conclusions:

Jurisdiction

- 5.1. The Office of Administrative Hearings has jurisdiction over the persons and subject matter of this case under RCW 34.05, RCW 49.46, RCW 49.48, and WAC 296-128.

Wage Complaints

- 5.2. If an employee files a wage complaint, the Department must investigate. RCW 49.48.083(1). Here, Ms. Brown filed a wage complaint and the Department was required to investigate that wage complaint. RCW 49.48.082(11).
- 5.3. If the Department determines an employer violated one or more wage payment requirements, a Citation and Notice of Assessment identifying the unpaid wages and assessing interest of one percent per month of unpaid wages issues. RCW 49.48.083. If the Department determines no violation occurred, a Determination of Compliance issues. RCW 49.48.083(1).
- 5.4. Wage payment requirements are those "set forth in RCW 49.46.020, 49.46.130, 49.48.010, 49.52.050, or 49.52.060, and any related rules adopted by the department." RCW 49.48.082(10). These wage payment requirements include, but are not limited to, requirements to pay minimum wages, overtime wages, agreed wages, and wages for final pay periods. RCW 49.48.082(12).
- 5.5. Here, Ms. Brown filed her complaint alleging a violation of RCW 49.46.020, for underpayment of minimum wage.

Burden of Proof

- 5.6. Under the Wage Payment Act ("WPA"), RCW 49.48, the wage claimant has the initial burden of showing prima facie evidence of a wage payment law violation. *See, Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946) (federal minimum wage law); *MacSuga v. County of Spokane*, 97 Wn.App. 435, 445 (1999). The prima facie showing must be supported by a preponderance of the evidence.
- 5.7. A preponderance of the evidence is that evidence which, when fairly considered, produces the stronger impression, has the greater weight, and is more convincing as to its truth when weighed against the evidence in opposition to it. *Yamamoto v. Puget Sound Lumber Co.*, 84 Wash. 411, 146 P. 861 (1915).

- 5.8. Substantial evidence must be presented and must be "sufficient to persuade a fair-minded person of the truth or correctness of the matter." *Ongom v. Dept. of Health*, 124 Wn. App. 935, 948-49 (2005).
- 5.9. In this matter, Ms. Brown must establish by a preponderance of the evidence that Excell violated Washington wage laws and owe her wages for an underpayment of minimum wage during the period of May 12, 2017 through November 2, 2019.

Minimum Hourly Wage

- 5.10. Employers are required to pay at least minimum wage for all work performed. RCW 49.46.020.
- 5.11. Beginning January 1, 2017, minimum wage in Washington was \$11.00 per hour. RCW 49.46.020(1)(a).
- 5.12. Beginning January 1, 2018, minimum wage in Washington was \$11.50 per hour. RCW 49.46.020(1)(b).
- 5.13. Beginning January 1, 2019, minimum wage in Washington was \$12.00 per hour. RCW 49.46.020(1)(c).
- 5.14. When employees are also paid commission, the amount of commission earned may be included as part of the total wage paid to the employee for that period, calculated based on the total hours worked. WAC 296-126-021.

Analysis

- 5.15. The parties do not dispute the total amounts that Ms. Brown received on her paychecks. The matter at issue is whether Ms. Brown's total hourly wage was in compliance with Washington's state minimum wage rates.
- 5.16. Employers in Washington are allowed to include commissions earned by employees in calculations of total hourly wages paid to an employee. Ms. Brown's calculations of her hourly rate, which excluded her commissions, are based on a misunderstanding of this policy.
- 5.17. As set forth above, including her commissions, Ms. Brown's base wages were as follows: in 2017, \$11.15; in 2018, \$12.00; in 2019, \$12.35. Each of those base wage rates is in compliance with that year's state minimum wage.
- 5.18. Accordingly, Ms. Brown has failed to meet her burden of proof and establish, by a preponderance of the evidence, that she was owed for an underpayment of minimum wage during the period of May 12, 2017 through November 2, 2019.
- 5.19. Because Excell paid Ms. Brown at least minimum wage during the time period in question, Excell is not in violation of Washington wage laws. Determination of Compliance No. 072-21 should be AFFIRMED.

6. INITIAL ORDER

IT IS HEREBY ORDERED THAT:

- 6.1. The Employer, Excell Marketing, LLC, did not violate Washington wage laws and does not owe Wage Claimant Julie Brown wages for the period of May 12, 2017 through November 2, 2019.
- 6.2. The Department's Determination of Compliance, No. 072-21 issued October 30, 2020, is **AFFIRMED**.

Issued from Tacoma, Washington on the date of mailing.



Jennifer Clemens
Administrative Law Judge
Office of Administrative Hearings

CERTIFICATE OF SERVICE ATTACHED

PETITION FOR REVIEW

Any party that disputes this Initial Order may file a Petition for Administrative Review with the Director of the Department of Labor and Industries.¹ You may e-mail your Petition for Administrative Review to the Director at directorappeal@lni.wa.gov. You may also mail or deliver your Petition for Administrative Review to the Director at the Department's physical address listed below.

Mailing Address:

Director
Department of Labor and Industries
PO Box 44001
Olympia, WA 98504-4001

Physical Address:

7273 Linderson Way SW
Tumwater, WA 98501

If you e-mail your Petition for Administrative Review, please do not mail or deliver a paper copy to the Director.

Whether you e-mail, mail or deliver the Petition for Administrative Review, the Director *must actually receive* the Petition for Administrative Review during office hours at the Director's office within 30 days of the date this Initial Order was mailed to the parties. You must also provide a copy of your Petition for Administrative Review to the other parties at the same time.

If the Director does not receive a Petition for Administrative Review within 30 days from the date of the Initial Order, the Initial Order shall become final with no further right to appeal.²

If you timely file a Petition for Administrative Review, the Director will conduct an administrative review under chapter 34.05 RCW.

¹ RCW 49.48.084 and RCW 34.05.464.

² RCW 49.48.084 and Chapter 34.05 RCW.

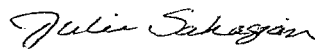
CERTIFICATE OF SERVICE FOR OAH DOCKET NO. 02-2021-LI-01618

I certify that true copies of this document were served from Tacoma, Washington via Consolidated Mail Services upon the following as indicated:

<p>Julie Brown 3636 E Howe St, #1 Tacoma, WA 98404 <i>Appellant/Wage Claimant</i></p>	<p><input checked="" type="checkbox"/> First Class Mail <input checked="" type="checkbox"/> Certified Mail, Return Receipt 9489 0090 0027 6102 1672 96 <input type="checkbox"/> Campus Mail <input type="checkbox"/> E-mail</p>
<p>Vickie O'Brien Excell Marketing, LLC PO Box 1297 Des Moines, IA 50305 <i>Intervenor/Employer</i></p>	<p><input checked="" type="checkbox"/> First Class Mail <input type="checkbox"/> Certified Mail, Return Receipt <input type="checkbox"/> Campus Mail <input type="checkbox"/> E-mail</p>
<p>Shawn W. Gordon, AAG Office of the Attorney General PO Box 40121 MS: 40121 Olympia WA 98504 <i>Agency Representative</i></p>	<p><input type="checkbox"/> First Class Mail <input type="checkbox"/> Certified Mail, Return Receipt <input type="checkbox"/> Campus Mail <input checked="" type="checkbox"/> E-mail: shawn.gordon@atg.wa.gov Mary.Street@atg.wa.gov LI01yCE@ATG.WA.GOV</p>

Date: Monday, July 26, 2021

OFFICE OF ADMINISTRATIVE HEARINGS



Julie Sahagian
Legal Assistant 2