

DIRECTOR OF THE DEPARTMENT OF LABOR & INDUSTRIES
STATE OF WASHINGTON

In re: David Koenig,

Determination of Compliance No. 106-21

OAH Docket No. 06-2021-LI-01656

No. 2022-009-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 October 15, 2021, the petition for review filed by David Koenig, briefing submitted to the Director's Office and having reviewed the record created at hearing and the records and files herein, 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 October 15, 2021
2. The Appellant timely filed a petition for review with the Director.
3. The Appellant submitted a response to the summary judgment motion as well as a complaint, and they were considered in evaluating this appeal.
4. The Director adopts and incorporates all the Initial Order's findings of facts.

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. I have considered the findings and conclusions of the Initial Order, which correctly analyze the legal issues in this appeal and adopt and incorporate all the Initial Order's conclusions of law and "initial order" section.

III. DECISION AND ORDER

Consistent with the above Findings of Fact and Conclusion of Law, the Determination of Compliance is affirmed. The Initial Order of October 15, 2021 is incorporated by reference herein.

DATED at Tumwater this 15 day of March 2022.



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 mailing, or by emailing to DirectorAppeal@LNI.WA.GOV, 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 15 day of March 2022, via U.S. Mail, postage prepaid, and email to the following:

David Koenig
32124 32nd Ave SW
Federal Way, WA 98023
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Pacific Maritime Association
301 W. Republic
Seattle, WA 98113

DATED this 15 day of March 2022, at Tumwater, Washington.



LISA DECK

**WASHINGTON STATE
OFFICE OF ADMINISTRATIVE HEARINGS**

In the matter of:

David Koenig,

Appellant.

Docket No. 06-2021-LI-01656

**INITIAL ORDER ON SUMMARY
JUDGMENT MOTION**

Agency: Labor and Industries

Program: Wage Payments

Agency No. DOC - 106-21

1. ISSUES

1.1. Did Pacific Maritime Association violate RCW 49.52.050 by failing to pay four hours of wages to David Koenig for a medical exam on August 6, 2019, as addressed in Determination of Compliance No. 106-21?

1.1.1. If so, what is the total amount of unpaid wages?

1.1.2. If so, what is the appropriate amount of interest?

1.1.3. If so, what is the appropriate penalty?

2. ORDER SUMMARY

2.1. No. Pacific Maritime Association was not David Koenig's employer, and therefore was not subject to RCW 49.52.050 in its relationship with David Koenig. The Department's Determination of Compliance No. 106-21 is **AFFIRMED**.

2.2. Labor and Industries' unopposed Motion for Summary Judgment is **GRANTED**.

3. DOCUMENTS CONSIDERED

3.1. I considered the following documents:

Doc. No.	Document Name	Document Date	No. Pages
1	Determination of Compliance No. 106-21	02/25/21	3
2	Request for Hearing	03/06/21	1
3	Labor and Industries' Motion for Summary Judgment	07/23/21	37
4	Declaration of Ruth Castro, with associated Exhibits A-G	07/23/21	32
5	Declaration of Carl Baken	07/22/21	5

6	Declaration of Aileen Pick, with associated Exhibits A-B	07/22/21	423
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3.2 I did not consider the Appellant’s Response to State’s Motion for Summary Judgment, dated September 22, 2021 and filed with the Office of Administrative Hearings on September 27, 2021. The Prehearing Conference Order in this matter established that the deadline for filing and serving responses to the other party’s dispositive motions was September 10, 2021. Because the Appellant’s Response was untimely, I have not considered it.

4. FACTS FOR PURPOSE OF SUMMARY JUDGMENT

On a motion for summary judgment, the decision maker only considers those facts for which the parties establish “no genuine issue as to any material fact”.¹ “Summary judgment is appropriate only where the undisputed facts entitle the moving party to judgment as a matter of law.”² Only evidence in the record and inferences from that evidence establish facts. If evidence in the record points to more than one possible finding of fact, then summary judgment may not rest on the moving party’s version of that fact.³ Admissions, stipulations, procedural history, and uncontested declarations and affidavits establish facts for summary judgment. The record here supports the following facts for the purposes of summary judgment:

Jurisdiction

4.3. On February 25, 2021, Labor and Industries (“Department”) issued Determination of Compliance No. 106-21 to Pacific Maritime Association (“Pacific Maritime”) and David Koenig (“Appellant”). Ex. 1, pg. 1-3. The Department determined that Pacific Maritime did not owe the Appellant \$125.36 in wages as he alleged in his Worker Rights Complaint. *Id.* at 1.

4.4. On or about March 10, 2021, the Appellant timely appealed the Determination of Compliance. Ex. 2, pg. 1.

Summary Judgment

4.5. The Department filed a Motion for Summary Judgment on July 23, 2021.

¹ WAC 10-08-135. In Superior Court matters, CR 56 governs summary judgment. Where the relevant procedural rules do not conflict with CR 56, it and the cases interpreting it serve as persuasive authority in the management of summary judgment under WAC 10-08-135.

² *Verizon NW, Inc. v. Employment Sec. Dep’t*, 164 Wn.2d 909, 916 (2008), citing *Alpine Lakes Prot. Soc’y v. Dep’t of Natural Res.*, 102 Wn. App. 1, 14 (1999).

³ *Verizon NW*, 164 Wn.2d 916.

4.6. The Appellant did not file a timely response to the Department's Motion for Summary Judgment.

Pacific Maritime Association

- 4.7. Pacific Maritime is a non-profit collective bargaining agent and payroll agent for approximately 70 independent member companies in the shipping industry. Ex. 4, pg. 17-18; Ex. 6, pg. 1. Some of these member companies employ longshore workers (also known as dockworkers) at ports in Washington. Ex. 4, pg. 18; Ex. 6, pg. 1-2. Pacific Maritime does not utilize dockworkers itself. Ex. 6, pg. 3, 5.
- 4.8. Pacific Maritime negotiated the Pacific Coast Longshore Contract Document between its members and the International Longshore and Warehouse Union, which governs the terms and conditions of dockworkers across the West Coast. Ex. 4, pg. 18; Ex. 6, pg. 2. The organization's primary purpose is to negotiate, enter into, and administer collective bargaining agreements on behalf of its members. Ex. 6, pg. 5.
- 4.9. Pacific Maritime also serves as a payroll agent for its member companies. Ex. 4, pg. 18; Ex. 6, pg. 5. It does so by collecting time card information and funds from member companies for their payroll obligations, then issuing weekly paychecks to the dockworkers those companies employ. *Id.* Pacific Maritime does not pay the dockworkers until the member company transfers funds for payroll. Ex. 6, pg. 5. Pacific Maritime also maintains some personnel records for its members and administers certain trainings required under the collective bargaining agreement. Ex. 4, pg. 18; Ex. 6, pg. 6.
- 4.10. When a Pacific Maritime member company has work, the member company contacts the union and the union dispatcher offers the work to its eligible longshore workers. *Id.* at 20; Ex. 6, pg. 2; Ex. 5, pg. 4. Pacific Maritime is not involved in this process. Ex. 6, pg. 2. If the union dispatcher offers a union member a shift and the union member accepts the shift, the member company provides the dockworker an orientation and direction on how to perform the work. *Id.* at 4. Again, Pacific Maritime is not involved in supervision, direction, or any management whatsoever with respect to the dockworker's performance of his or her work. *Id.* at 4, 6. Pacific Maritime does not hire, fire, or discipline dockworkers. *Id.* at 6; Ex. 5, pg. 4. The dockworkers do not work on Pacific Maritime's premises, nor does Pacific Maritime supply the tools and equipment dockworkers use in performing their duties. Ex. 6, pg. 6-7; Ex. 5, pg. 4.
- 4.11. Once a dockworker completes his or her shift for the member company, the company reports the hours worked to Pacific Maritime for payroll processing and Pacific Maritime issues the paycheck. Ex. 6, pg. 4; Ex. 5, pg. 4. The paycheck a dockworker receives from Pacific Maritime may be for work performed for multiple

member companies during the pay period. *Id.* The rate of pay is directed by the collective bargaining agreement. Ex. 4, pg. 18; Ex. 5, pg. 4; Ex. 6, pg. 2.

David Koenig

4.12. The Appellant, David Koenig, is a dockworker who performed some work at the Port of Seattle. *Id.* His status is that of a longshore “casual” under the Pacific Coast Longshore Contract Document, which is the applicable collective bargaining agreement. Ex. 4, pg. 20; Ex. 6, pg. 2.

4.13. The Appellant accepted a limited number of dispatches as a casual. He worked 15 shifts in 2017, 15 shifts plus five special skills training shifts in 2018, and 20 shifts plus three training shifts in 2019. Ex. 4, pg. 20; *see also* Ex. 6, pg. 422-423.

Wage Complaint

4.14. On or about April 13, 2020, the Appellant filed a worker rights complaint with the Department. Ex. 4, pg. 10-12. The Appellant alleged in his complaint and in subsequent discussions with Department representatives that, on or about August 6, 2019, he attended a drug and alcohol screening test for which Pacific Maritime did not pay him. *Id.* at 11, 13. He alleged that Pacific Maritime Association owes him \$125.36 for four hours of work at the rate of \$31.34. *Id.* at 13.

4.15. The Department assigned Ruth Castro, Industrial Relations Agent, to investigate the Appellant’s complaint. Ex. 4, pg. 1. Ms. Castro and her colleague, Carl Backen, a Wage and Hour Technical Specialist with the Department, determined that Pacific Maritime was not the Appellant’s employer. *Id.* at 2-3. Therefore, Ms. Castro concluded that the Minimum Wage Act protections did not apply to the Appellant in this matter. *Id.* at 3. She recommended that the Department issue a Determination of Compliance. *Id.*

4.16. On February 25, 2021, the Department issued Determination of Compliance No. 106-21 to the Appellant and Pacific Maritime. Ex. 1, pg. 1-3. The Determination of Compliance indicated that Pacific Maritime did not violate the Wage Payment Act or the Minimum Wage Act concerning the Appellant on August 6, 2019. *Id.* at 1. The Citation and Notice of Assessment advised the parties of their right to appeal within 30 days. *Id.* at 2.

4.17. On or about March 10, 2021, the Appellant appealed the Determination of Compliance. Ex. 2, pg. 1.

5. CONCLUSIONS OF LAW

Based upon the facts above, I make the following conclusions:

Jurisdiction

- 5.1. I have jurisdiction over the persons and subject matter of this case under RCW 49.48.084 and Chapter 34.05 RCW.

Burden of Proof, Standard of Proof, and Standard of Review

- 5.1. In appealing a Citation and Notice of Assessment or Determination of Compliance, the party challenging the Department's decision has the burden of proof, by a preponderance of the evidence. See RCW 34.05.570(1)(a).
- 5.2. 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).
- 5.3. 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, 104 P.3d 29 (2005), reviewed on other grounds, 155 Wn.2d 1001, 122 P.3d 185 (2005).
- 5.4. The standard of review by the administrative law judge is de novo. RCW 49.48.084(3).

Wage Payment Laws

- 5.5. Employers must comply with wage payment requirements and are liable for wage payment violations. RCW 49.48.083(2).
- 5.6. When an employee files a wage complaint, the Department must investigate. RCW 49.48.083(1). If the Department determines that the employer violated one or more wage payment requirements, the Department shall issue a Citation and Notice of Assessment. *Id.* If the Department determines that the employer complied with the law, the Department shall issue a Determination of Compliance. *Id.*
- 5.7. Pursuant to RCW 49.52.050(2), it is unlawful for any employer or agent of any employer to "[w]ilfully and with intent to deprive the employee of any part of his or her wages . . . pay any employee a lower wage than the wage such employer is obligated to pay such employee by any statute, ordinance, or contract."
- 5.8. Any employer who pays an employee less than the wages to which the employee is entitled shall be liable to the employee for the full amount of such wage rate. RCW 49.46.090(1).
- 5.9. Under Chapter 49.46 RCW, formerly known as the Minimum Wage Act, and Chapter 49.48 RCW, the Wage Payment Act, the term "employer" includes "any individual, partnership, association, corporation, business trust, or any person or

group of persons acting directly or indirectly in the interest of an employer in relation to an employee.” RCW 49.46.010(4); RCW 49.48.082.

5.10. The term “employee” is defined as “any individual employed by an employer.” RCW 49.46.010(3); RCW 49.48.082.

5.11. To “employ” means “to permit to work.” RCW 49.46.010(2).

Economic Realities Test

5.12. In *Becerra v. Expert Janitorial, LLC*, the Washington Supreme Court adopted an “economic realities test” to determine whether an employment relationship exists between parties. 181 Wn.2d 186 (2014). The first five factors are “formal” or “regulatory”:

- (1) The nature and degree of control of the workers;
- (2) The degree of supervision, direct or indirect, of the work;
- (3) The power to determine the pay rates or the methods of payment of the workers;
- (4) The right, directly or indirectly, to hire, fire, or modify the employment conditions of the workers; and
- (5) Preparation of payroll and the payment of wages.

Id. at 196-197 (internal quotation marks and parentheticals omitted).

5.13. In addition, the *Becerra* court identified eight “functional” factors with a basis in common law:

- (1) Whether the work was a specialty job on the production line;
- (2) Whether responsibility under the contracts between a labor contractor and an employer pass from one labor contractor to another without material changes;
- (3) Whether the premises and equipment of the employer are used for the work;
- (4) Whether the employees had a business organization that could or did shift as a unit from one worksite to another;
- (5) Whether the work was piecework and not work that required initiative, judgment or foresight;
- (6) Whether the employee had an opportunity for profit or loss depending upon the alleged employee’s managerial skill;
- (7) Whether there was permanence in the working relationship;

- (8) Whether the service rendered is an integral part of the alleged employer's business;
- (9) Whether the putative employer knew of the wage and hour violation;
- (10) Whether the alleged employer paid sufficient amounts to the subcontractors to allow for a lawful wage; and
- (11) Whether the subcontracting arrangement is a subterfuge or sham.

Id. at 197-198 (internal quotation marks, parentheticals, and citations omitted). The Court cautioned that these factors are not exclusive, nor are they to be applied mechanically or in a particular order. *Id.* at 198.

Pacific Maritime Association Was Not David Koenig's Employer

- 5.14. In this case, the uncontroverted evidence establishes that Pacific Maritime was not the Appellant's employer. It then follows that because Pacific Maritime was not the Appellant's employer, it was not obligated to pay the Appellant wages.
- 5.15. Applying the *Becerra* factors to this case, Pacific Maritime had no control over the Appellant or his work site, and had no right to direct or supervise his work. It did not hire the Appellant, could not fire or discipline him, nor could it modify his employment conditions. Pacific Maritime did not dispatch the Appellant or set his hours. The Appellant's pay rate was determined by the collective bargaining agreement rather than by Pacific Maritime. Although Pacific Maritime issued the Appellant's paychecks, the Appellant did not work on Pacific Maritime's premises and did not use its equipment. The Appellant's services as a dockworker were not integral to Pacific Maritime's business as a collective bargaining and payroll agent.
- 5.16. These undisputed facts show that Pacific Maritime was not the Appellant's employer. As such, the wage payment laws, including RCW 49.52.050, do not apply to the relationship.
- 5.17. Accordingly, the Department's Determination of Compliance No. 106-21 will be AFFIRMED.

6. INITIAL ORDER

IT IS HEREBY ORDERED THAT:

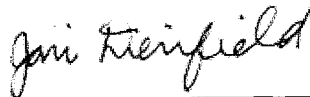
- 6.1. The Department's Determination of Compliance No. 106-21 is AFFIRMED.
- 6.2. Pacific Maritime Association was not David Koenig's employer, and therefore was not subject to RCW 49.52.050 in its relationship with the David Koenig.

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6.3. The Department's Motion for Summary Judgment is GRANTED. The evidentiary hearing scheduled for November 17, 2021, and all other deadlines outlined in the case schedule, are STRICKEN.

SIGNED at Tacoma, Washington on the date of mailing.



Joni Derifield
Administrative Law Judge
Office of Administrative Hearings

CERTIFICATE OF SERVICE IS 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.⁴ 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.⁵

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

⁴ RCW 49.48.084 and RCW 34.05.464.

⁵ RCW 49.48.084 and Chapter 34.05 RCW.


CERTIFICATE OF SERVICE FOR OAH DOCKET NO. 06-2021-LI-01656

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

David Koenig 32124 32nd Ave SW Federal Way, WA 98023 <i>Appellant/Licensee</i>	<input checked="" type="checkbox"/> First Class Mail <input type="checkbox"/> Certified Mail, Return Receipt <input type="checkbox"/> Campus Mail <input type="checkbox"/> E-mail
Pacific Maritime Association 301 W. Republic Seattle, WA 98113 <i>Intervenor/Employer</i>	<input checked="" type="checkbox"/> First Class Mail <input type="checkbox"/> Certified Mail, Return Receipt <input type="checkbox"/> Campus Mail <input type="checkbox"/> E-mail
Susan K Stahlfeld Miller Nash Graham & Dunn LLP Pier 70 2801 Alaskan Way, Suite 300 Seattle, WA 98121 <i>Intervenor/Employer Representative</i>	<input type="checkbox"/> First Class Mail <input type="checkbox"/> Certified Mail, Return Receipt <input type="checkbox"/> Campus Mail <input checked="" type="checkbox"/> E-mail susan.stahlfeld@millernash.com gaye.johnson@millernash.com
Heather Leibowitz, AAG Office of the Attorney General MS: TB-14 800 5th Ave Ste 2000 Seattle, WA 98104 <i>Agency Representative</i>	<input type="checkbox"/> First Class Mail <input type="checkbox"/> Certified Mail, Return Receipt <input type="checkbox"/> Campus Mail <input checked="" type="checkbox"/> E-mail heather.leibowitz@atg.wa.gov Brittney.Valandingham@atg.wa.gov Iniseaeservice@ATG.WA.GOV

Date: Friday, October 15, 2021

OFFICE OF ADMINISTRATIVE HEARINGS


 Shawntá Williams
 Legal Assistant 2