

DIRECTOR OF THE DEPARTMENT OF LABOR & INDUSTRIES  
STATE OF WASHINGTON

In re: ONK & KSK CORP DBA  
HARBOR SUSHI and Ok Nam Kim,

Appellants.

Citation and Notice of Assessment No. W-  
102-21

OAH Docket No. 01-2021-LI-01602

NO. 2022-013-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, the petition for review filed by the Department of Labor and Industries (Department) with the Director's Office, the briefing submitted to the Director's office by the parties, and the record developed at the Office of Administrative Hearings, issues this Director's Order.

The parties are the Department, ONK & KSK Corp dba Harbor Sushi (Harbor Sushi), Ok Nam Kim, and Heesoon Song.

**Harbor Sushi and Ok Nam Kim (Appellants) are ordered to pay wages to Heesoon Song in the amount of \$3,345.63. The Appellants are also ordered to pay interest of one percent per month under RCW 49.48.083(2) for these wages (except for the period of September 20, 2021, to the date this order is served). The Company is ordered to pay the Department a penalty in the amount of \$1,000.00. The Department will waive the penalty upon confirmation that the Appellants have paid the unpaid wages and interest to Ms. Song within 30 days of service of this Director's order.**

DIRECTOR'S ORDER

1

2022-013-WPA

RCW 49.48.084(4); RCW 34.05

OFFICE OF THE DIRECTOR  
DEPARTMENT OF LABOR & INDUSTRIES  
P.O. BOX 44001  
OLYMPIA, WA 98504-4001

The Director makes these 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 September 20, 2021. The Initial Order set aside the Department's Citation and Notice of Assessment No. W-102-21, finding that Harbor Sushi and Ok Nam Kim were not liable for unpaid wages, interest, or penalties.
2. On October 20, 2021, the Department timely filed a petition for review with the Director.
3. The Director adopts and incorporates the Initial Order's "Issues" section, except the footnote. In addition to the issues identified in the Initial Order, the Director will consider whether Ok Nam Kim is personally liable for unpaid wages, interest, or penalties.<sup>1</sup>
4. The Director adopts and incorporates the Initial Order's "Hearing" summary.
5. The Director adopts and incorporates the Initial Order's findings of facts 4.1 through 4.21, 4.24 through 4.27, 4.29 through 4.37, 4.39 through 4.55, 4.58, and 4.61 through 4.65.
6. The Director has given due regard to the administrative law judge's opportunity to observe the witnesses at hearing. The Director has carefully considered Ms. Song's testimony regarding lunch breaks and finds it credible. Ms. Song testified that Ho Youn Myung would cover for her when he was working and available. But lunch breaks were frequently interrupted by customers coming into the restaurant when there was no coverage.
7. Ms. Song's set work shifts were 10:00 a.m. to 9:00 p.m. She arrived around 10 a.m. and usually left at 9:15 p.m. (and as late as 9:30 p.m. when customers placed orders late). On a few days, she arrived later than usual. Mr. Myung confirmed that Ms. Song was scheduled to work six days per week, from 10:00 a.m. to 9:00 p.m.
8. For the first month of employment, Ms. Song clocked in and clocked out on the employer's point of sale (POS) system. When Harbor Sushi changed Ms. Song from

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<sup>1</sup> The Initial Order did not consider this issue, finding that it was not raised in the notice of appeal. But the Department's citation and notice of assessment found Ms. Kim personally liable for the unpaid wages, interest, and penalty, and Harbor Sushi and Ms. Kim plainly challenged this aspect of the citation. It is therefore properly before the Director for review.

hourly to salary in mid-September 2019, Ms. Song stopped clocking in and out because Ms. Kim told her that she no longer needed to record her time in the POS system. Ms. Song continued to clock in out of habit, but she was no longer accurate.

9. Harbor Sushi did not keep records of all Ms. Song's hours worked.
10. Ms. Song notified the Department that she was paid \$12.00 per hour for the time periods of August 15, 2019 through September 15, 2019, and December 1, 2019 through December 19, 2019. She was paid \$12.50 per hour for the time period of September 16, 2019 through November 30, 2019. Harbor Sushi's records likewise reflect this pay rate. Ex. 20 at 12-20.
11. The Department based the citation and notice of assessment in part on Ms. Song's reconstruction of her estimated hours. At hearing, Ms. Song testified that some of her estimated hours were incorrect, and the Department adjusted the overtime wages owed accordingly. Tr. at 242; *see* Department letter dated August 10, 2021.
12. Harbor Sushi admitted that Ms. Song worked more than 40 hours per week. In the company's answer to claim for wages, the employer was asked, "Number of hours employee worked per week?" Tr. at 209; Ex. 20 at 7. Harbor Sushi answered, "60 HRS/WEEK." Tr. at 209; Ex. 20 at 7. Ms. Song testified that she worked around 66 hours per week.
13. Based on the evidence at hearing, the Director finds that the Department's letter dated August 10, 2021, correctly lists Ms. Song's overtime hours and wages owed.
14. Ms. Kim is the sole owner of Harbor Sushi. She made financial decisions for the business, had authority over day-to-day operations, and controlled compensation to Ms. Song. Ms. Kim also is the sole governing agent and corporate officer for Harbor Sushi.
15. Ms. Kim was aware that Harbor Sushi was not paying Ms. Song overtime. Harbor Sushi and Ms. Kim's decision not to pay Ms. Song overtime was a knowing and intentional action that was not accidental or the result of a bona fide dispute.

## II. CONCLUSIONS OF LAW

1. The Director adopts and incorporates the Initial Order's conclusions of law 5.1 through 5.28.
2. Harbor Sushi did not keep accurate records of Ms. Song's hours. Washington courts impose special burdens of proof when an employer does not keep records. *MacSuga v. Cty. of Spokane*, 97 Wn. App. 435, 445, 983 P.2d 1167 (1999). In its initial case, the

party seeking unpaid 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 v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 (1946). When this initial burden is met, “[t]he burden then shifts to the employer to show the precise number of hours worked or to present evidence sufficient to negate the reasonableness of the inference to be drawn from the employee's evidence.” *Anderson*, 328 U.S. at 687; see *MacSuga*, 97 Wn. App. at 446. Where an employer’s records are absent, unreliable or incomplete, and the employee establishes that he or she performed uncompensated work, “the fact of damage is certain[,]” and “the only uncertainty is the amount of damage.” *Brock v. Seto*, 790 F.2d 1446, 1448 (9th Cir. 1986).

3. Courts do not deny “recovery [to an unpaid employee] on the ground that [the employee] is unable to prove the precise extent of uncompensated work.” *Anderson*, 328 U.S. at 687. An employee’s own recollection about hours worked is enough to shift the burden to the employer. *Kuebel v. Black & Decker, Inc.*, 643 F.3d 352, 362 (2nd Cir. 2011). The court may “award damages to the employee, even though the result be only approximate.” *Id.* “[A]n award of back wages will not be barred for imprecision where it arises from the employer’s failure to keep records as required by the FLSA.” *Sillah v. Command Int’l Sec. Svcs.*, 154 F. Supp. 3d 891 (N.D. Cal. 2015). Courts permit estimated damages because to do otherwise would “be a perversion of fundamental principles of justice and [would] deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts.” *Id.* (quoting *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 563 (1931)).
4. These principles apply here. Harbor Sushi did not keep adequate records that showed the hours worked by Ms. Song. It would be improper to deny recovery of unpaid wages based on imprecision in her estimation of hours.
5. The Department carried its burden to show that Ms. Song performed work for which she was not properly compensated. Ms. Song and other witnesses detailed the tasks she performed as a server and provided a reasonable estimate of her hours worked. She worked shifts from 10:00 a.m. to 9:00 p.m., six days a week, with a few days off, for more than 40 hours per week. Even setting aside Ms. Song’s testimony, Mr. Myong testified that Ms. Song was scheduled to work six days per week, 11 hours per day. The Department was not required to prove the precise hours Ms. Song worked, just that she worked additional time and was not properly compensated. The Department met this burden.
6. In addition, interrupted meal periods in the interest of the employer constitute hours worked. WAC 296-126-092(1) states: “Employees shall be allowed a meal period of at least thirty minutes which commences no less than two hours nor more than five hours from the beginning of the shift. Meal periods shall be on the employer’s time when the

employee is required by the employer to remain on duty on the premises or at a prescribed work site in the interest of the employer.” *See also* E.S.C.6.1. Because Ms. Song’s lunch breaks were frequently interrupted by customers entering the restaurant, these breaks constitute hours worked for purposes of RCW 49.46 and RCW 49.48.

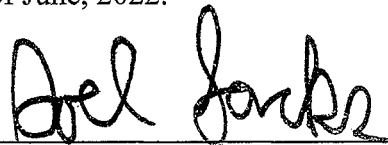
7. Harbor Sushi failed to rebut the Department’s evidence of hours worked. To contest the estimate of hours worked, Harbor Sushi needed either to provide the precise number of hours that Ms. Song worked or to produce evidence negating the reasonableness of the estimated hours. *See Anderson*, 328 U.S. at 687. Harbor Sushi did neither. As noted above, the company did not track and preserve accurate hours and wages as required by law. And it admitted that Ms. Song worked more than 40 hours per week and that it did not compensate her for all overtime hours.
8. The Director adopts the reasonable estimate of hours worked and unpaid overtime wages reflected in the Department’s August 10, 2021 letter. Ms. Song is owed unpaid overtime wages in the amount of \$3,345.63.
9. The Director will not consider the Appellants’ argument that the unpaid overtime wages should be offset by interest payments allegedly collected by Ms. Song from Ms. Kim’s husband. RCW 19.52.030 provides no authority for the Director to take such action.
10. Ok Nam Kim meets the definition of an “employer” under RCW 49.48.082(6) and RCW 49.46.010(4). As an employer, Ms. Kim is personally liable for payment of overtime wages to Ms. Song totaling \$3,345.63 during the period of August 15, 2019 through December 19, 2019.
11. An employer who willfully violates a wage payment requirement may be ordered to pay a civil penalty. RCW 49.48.083(3). “Willful” means “a knowing and intentional action that is neither accidental nor the result of a bona fide dispute, as evaluated under the standards applicable to wage payment violations under RCW 49.52.050(2).” RCW 49.48.082(13). The Department may waive or reduce at any time a civil penalty assessed under this section if the Director determines that the employer paid all wages and interest owed to an employee. RCW 49.48.083(3)(d).
12. Harbor Sushi and Ms. Kim’s decision not to pay Ms. Song overtime was a knowing and intentional action that was not accidental. Nor was this decision the result of a bona fide dispute. Given Ms. Song’s duties, no reasonable employer would believe that she was an “individual employed in a bona fide executive . . . capacity.” *See* RCW 49.46.010(3)(c); WAC 296-128-510. A \$1,000 civil penalty is therefore appropriate.

### III. DECISION AND ORDER

1. Consistent with the above Findings of Fact and Conclusions of Law, the Initial Order dated September 20, 2021, is MODIFIED. Citation and Notice of Assessment No. W-102-21 is MODIFIED.
2. Harbor Sushi and Ok Nam Kim violated RCW 49.46.130 by failing to pay overtime wages to Heesoon Song totaling \$3,345.63 during the period of August 15, 2019 through December 19, 2019. The Appellants are liable for these unpaid wages.
3. Harbor Sushi and Ok Nam Kim do not owe tips and/or service charges to Heesoon Song for the period of August 15, 2019 through December 19, 2019.
4. Harbor Sushi and Ok Nam Kim are liable for payment of 1% monthly interest on the unpaid wages, except for the period of September 20, 2021, to the date this order is served.
5. Harbor Sushi and Ok Nam Kim are liable for a \$1,000 civil penalty pursuant to RCW 49.48.083(2). However, the Department will waive the penalty if the Appellants pay Ms. Song the unpaid wages and interest within 30 days of service of this Director's order. *See* RCW 49.48.083(3)(d).
6. Payment of wages and interest. *See* Citation and Notice of Assessment for payment information and the effect of failing to pay wages and interest. Harbor Sushi and Ok Nam Kim are ordered to pay wages to Heesoon Song in the amount of \$3,345.63. The Appellants are also ordered to pay interest of one percent per month under RCW 49.48.083(2) for these wages (except for the period of September 20, 2021, to the date this order is served). The Appellants are ordered to make these payments within thirty days of service of this Director's Order.
7. Payment of Penalty. The Company is ordered to pay the Department a penalty in the amount of \$1,000.00. *See* Citation and Notice of Assessment for payment information.

The Department will waive the penalty upon confirmation that the Appellants have paid Ms. Song the unpaid wages and interest within 30 days of service of this Director's order. *See* RCW 49.48.083(3)(d).

DATED at Tumwater, Washington this 21 day of June, 2022.



JOEL SACKS  
Director

DIRECTOR'S ORDER

2022-013-WPA

RCW 49.48.084(4); RCW 34.05

6

OFFICE OF THE DIRECTOR  
DEPARTMENT OF LABOR & INDUSTRIES  
P.O. BOX 44001  
OLYMPIA, WA 98504-4001

## 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 Deck, declare under penalty of perjury under the laws of the State of Washington, that the DIRECTOR'S ORDER was mailed on the 21 day of June 2022 to the following via e-mail and U.S. Mail, postage prepaid, to:

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DATED this 21 day of June, 2022, at Tumwater, Washington.

  
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LISA DECK