

**DIRECTOR OF THE DEPARTMENT OF LABOR & INDUSTRIES
STATE OF WASHINGTON**

In re:

HEATHER HAWS,

Appellant,

Determination of Compliance
No. DOC-040-21,

OAH Docket No. 01-2021-LI-01600

NO. 2023-003-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 appeal filed by Heather Haws (the Appellant) and briefing submitted to the Director's Office, and having reviewed the record, issues this Director's Order.

The parties in this matter are the Department of Labor & Industries and the Appellant.

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 June 22, 2021. The Appellant timely appealed.
2. The Director adopts and incorporates all the Order's Findings of Fact.

NO. 2023-003-WPA

DIRECTOR'S ORDER

RCW 49.48.084(4); RCW 34.05

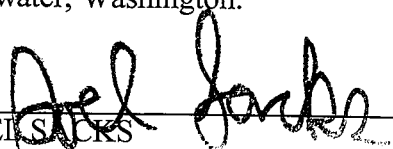
II. CONCLUSIONS OF LAW

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 Appellant claims four minutes in overtime. Department policy ES.D.1 permits employers to use a "7-minute rule" for rounding. Employers are allowed to choose this practice as long as it is administered in a way that results in sometimes rounding the employees' time up and sometimes rounding it down. The Appellant's employer, Washington State Department of Transportation, administers its rounding program consistent with this directive. It administers it in a fair and consistent way.
3. Consistent with the Department's policy, there is no violation because ultimately all hours worked are compensated under WAC 296-126-002(8).
4. The Determination of Compliance is correct and no wages are owed.

III. DECISION AND ORDER

Consistent with the above Findings of Fact and Conclusion of Law, the Determination of Compliance is **AFFIRMED** and the June 22, 2021, is incorporated by reference herein.

DATED this 16 day of March, 2023, in Tumwater, Washington.



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 16 day of March 2023, to the following via E-mail and U.S. Mail, postage prepaid:

Heather Haws
P.O. Box 9493
Spokane, WA 99209

Diana S. Cartwright, AAG
Office of the Attorney General
800 5th Ave Ste. 2000
Seattle, WA 98104
Diana.Cartwright@atg.wa.gov
Shara.Wusstig@atg.wa.gov
lniseaeservice@atg.wa.gov
(Sent via E-mail only)

Washington State Department of Transportation
Attn: Heidi E. Mabbot
P.O. Box 47300
Olympia, WA 98504

Katie Garcia, AAG
1116 West Riverside Ave., Ste.100
Spokane, WA 99201

DATED this 16 day of March, 2023, at Tumwater, Washington.



LISA DECK

**WASHINGTON STATE
OFFICE OF ADMINISTRATIVE HEARINGS**

In the matter of:

Heather Haws,

Appellant/Wage Claimant.

Docket No. 01-2021-LI-01600

INITIAL ORDER

Agency: Labor and Industries

Program: Wage Payments

Agency No. DOC-040-21

1. ISSUES

- 1.1 Did the Department of Labor and Industries properly issue the Determination of Compliance No. 040-21, dated September 25, 2020, which found that the Employer, the Washington State Department of Transportation, did not violate Washington wage laws and did not owe Wage Claimant Heather Haws overtime wages for the period of January 16, 2020 through January 31, 2020?
- 1.2 And if it is found that the Determination of Compliance No. 040-21 was not properly issued, what wages are owed to Wage Claimant Heather Haws?

2. ORDER SUMMARY

- 2.1 The Determination of Compliance No. 040-21 was properly issued. The Washington State Department of Transportation did not violate Washington wage laws and does not owe Wage Claimant Heather Haws overtime wages for the period of January 16, 2020 through January 31, 2020.
- 2.2 The Determination of Compliance No. 040-21 was properly issued, no wages are owed to Wage Claimant Heather Haws.

3. HEARING

- 3.1 Hearing Date: April 21, 2021
- 3.2 Administrative Law Judge: Jennifer Clemens
- 3.3 Appellant: Heather Haws
- 3.4 Agency: Department of Labor and Industries
- 3.41. Representative: Diana Cartwright, Assistant Attorney General

3.5 Witnesses:

Heidi Mabbott, Classification and Compensation Manager, Washington State Department of Transportation

Amy Fermo, Human Resources Program Manager, Washington State Department of Transportation

Irene Davis, Industrial Relations Agent, Department of Labor and Industries
Mike Frucci, Assistant Regional Manager, Eastern Region, Washington State
Department of Transportation

- 3.6 Exhibits: Department Exhibits 1 through 13 were admitted. Appellant's Exhibits A through I were admitted.
- 3.7 Court Reporter: Court Report Dani White 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 June 5, 2020, the Department of Labor and Industries ("Department" or "L&I") received a Worker Rights Complaint Form filed by Heather Haws ("Appellant" or "Ms. Haws"). *Exhibit 4.*
- 4.2 On September 25, 2020, the Department issued Determination of Compliance No. 040-21. *Exhibit 1.*
- 4.3 On October 9, 2020, Ms. Haws appealed Determination of Compliance No. 040-21. *Exhibit 2.* This matter was referred to the Office of Administrative Hearings on January 13, 2021. *OAH File.*

Claimant's Employment with the Washington State Department of Transportation

- 4.4 Ms. Haws is employed by the Washington State Department of Transportation ("DOT") as a Secretary Senior in the Spokane office. *Testimony of Mabbott.*
- 4.5 Ms. Haws is a member of the maintenance office administrative group, and responsible for the regional headquarters' reception area. *Testimony of Frucci.*
- 4.6 Ms. Haws's position is overtime-eligible for work in excess of 40 hours per work week. *Exhibit 7, pages 18, 20; Testimony of Mabbott.*
- 4.7 Ms. Haws earns \$17.94 per hour. *Exhibit 4, page 2.*
- 4.8 As a current, full-time employee of DOT, Ms. Haws is covered by a Collective Bargaining Agreement ("CBA") reached by the State of Washington and the Washington Federation of State Employees. *Testimony of Frucci.*

The Department of Transportation's Timekeeping System

- 4.9 All employees at the DOT report their time using DOT Time. When using DOT Time, employees do not clock in and out in the traditional sense. Instead, each employee individually tracks and enters time worked. Time is tracked in 6 minute increments, or 1/10 of an hour, and rounded both up and down. This policy

applies to all time tracked, including regular work hours, leave, and overtime.
Exhibit 12, pages 6, 7; Testimony of Mabbott, Fermo.

- 4.10 DOT's practice of rounding is allowed under Department policy number ES.D.1, which allows employers to record employees' time to the nearest 5 minutes, or to the nearest one-tenth or quarter of an hour. Employers are allowed to choose this practice as long as it is administered in a way that results in sometimes rounding the employees' time up and sometimes rounding it down. *Exhibit 13, page 5.*

The Department of Transportation's Overtime Policy

- 4.11 To be eligible for overtime pay from the DOT, an employee must first work 40 hours in that employee's defined work week. *Testimony of Fermo.*
- 4.12 If an overtime eligible employee at DOT works overtime, that employee is entitled to either overtime pay, at one and one-half times that employee's usual rate of pay, or "comp time," for one and one-half times the amount worked in additional paid time off. *Testimony of Mabbott.*
- 4.13 The CBA includes the following policy regarding overtime, under the section 6.3 entitled "Overtime-Eligible Employees (Excluding Law Enforcement Employees):
- H. An overtime-eligible employee, including an employee on standby status, will be compensated for all time worked, other than de minimis time, for receiving or responding to work related calls, unless otherwise provided for in this Agreement.

Exhibit 11, page 5.

- 4.14 The CBA also includes, under section 7.3 entitled "Overtime Computation," a policy stating that "Computation of overtime will be rounded upward to the nearest one-tenth (1/10th) of an hour." *Exhibit C, page 16.*
- 4.15 When applying section 7.3, the DOT does not apply it to de minimis time. For example, if an employee works 4 minutes of overtime, the Department considers that de minimis. If an employee works 8 minutes of overtime, the Department rounds up to two-tenths of an hour. *Testimony of Fermo.*

The January 17, 2020 Claim for Overtime

- 4.16 Ms. Haws works a non-traditional schedule. Based on that schedule, she began a new work week 4 hours into her shift, at 11:30 AM, on January 17, 2020.
Testimony of Mabbott; Exhibit 4, page 8.
- 4.17 Ms. Haws' shift on January 17, 2020, was scheduled to end at 4:30 PM.
Testimony of Haws.
- 4.18 At 4:29 PM, a customer stopped by to visit Ms. Haws' supervisor, Susan Dawood. Ms. Haws informed the customer that Ms. Dawood was not in the office, and the

customer indicated he would call next week. Ms. Haws then sent an email to Ms. Dawood stating that the customer had stopped by, would call next week, and she “worked over 4 minutes for the day.” The email was sent at 4:33 PM. *Testimony of Haws; Exhibit 1, page 1.*

- 4.19 On January 23, 2020, Ms. Haws again emailed Ms. Dawood, stating “I worked 4 minutes over for the day on Friday 1/17/2020 helping [customer]. Would you like me to enter this as overtime, or comp time? If you say that I can choose, I would like to submit it as comp time.” Ms. Dawood replied, “Yes, comp time would be fine, Heather.” *Exhibit 1, page 1.*
- 4.20 Ms. Dawood then sought additional input from Mr. Frucci, the Assistant Regional Manager for the Eastern Region, who initially agreed with Ms. Dawood’s decision. *Testimony of Frucci.*
- 4.21 Mr. Frucci then reached out to human resources for additional guidance, because the amount of time worked was so minimal. Mr. Frucci was informed that DOT requires employees to work a minimum of one-tenth of one hour over their scheduled start/end times to begin assessment of overtime. Mr. Frucci shared this information with Ms. Haws. *Testimony of Frucci; Exhibit 4, page 9.*
- 4.22 Ms. Haws continued to pursue the matter. Ms. Fermo, the Human Resources Program Manager, eventually sought guidance from the Washington State Office of Financial Management (“OFM”), which “owns” the CBA. *Testimony of Fermo.*
- 4.23 The OFM confirmed that time in increments of less than 6 minutes is considered de minimis under the CBA, and advised DOT to maintain its practice. Ms. Haws was informed of this decision. *Testimony of Fermo.*

Investigation of Wage Compliant

- 4.24 Ms. Haws submitted a Worker Rights Complaint Form (“Complaint”) to the Department on June 5, 2020. In the Complaint, she alleged that she was employed by the DOT, and that the DOT did not pay her for 4 minutes of overtime worked on January 17, 2020. *Testimony of Davis; Exhibit 4; Exhibit A.*
- 4.25 The Department assigned Industrial Relations Agent Irene Davis to investigate the claim. *Testimony of Davis; Exhibit 1, page 1; Exhibit 3.*
- 4.26 To conduct her investigation, Ms. Davis requested records from Ms. Haws and the DOT. Ms. Haws submitted copies of her pay statements, a time log showing time worked, and a letter explaining her wage claim. The DOT submitted payroll records documenting hours worked and the amounts paid to Ms. Haws, proof of payment, a written response to the Complaint, and other documentation in support of its position, including copies of email communications and an electronic copy of

the Code of Federal Regulations, Title 29. *Testimony of Davis; Exhibit 3, pages 2-3; Exhibit 4; Exhibit 7.*

- 4.27 Ms. Haws earns \$17.94 per hour. Her overtime rate, at one and one-half times pay, is \$26.91 per hour. If Ms. Haws worked one-tenth of an hour at her overtime rate, she would earn \$2.70 in overtime. *Exhibit 4, page 2.*
- 4.28 Ms. Davis reviewed the submitted documentation and determined that Ms. Haws was not owed overtime, because she had not worked 6 or more minutes of overtime and was therefore not eligible under DOT's overtime compensation policy. *Testimony of Davis; Exhibit 3, page 3.*
- 4.29 The Department concluded its investigation and issued Determination of Compliance No. 040-21. *Testimony of Davis; 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. Haws 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 1% 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. Haws filed her complaint alleging a violation of RCW 49.46.130, for overtime wages.

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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), reviewed on other grounds, 155 Wn.2d 1001 (2005).
- 5.9 In this matter, Ms. Haws must establish by a preponderance of the evidence that she was owed overtime wages for the period of January 16, 2020 through January 31, 2020.

Wage Payment Laws, FLSA, and the CBA

- 5.10 Employers are required to pay at least minimum wage for all work performed. RCW 49.46.020.
- 5.11 When an employee works more than 40 hours per week, employers are generally required to pay that employee, for the work performed in excess of 40 hours, at the rate of one and one half times their regular rate of pay. RCW 49.46.130. This requirement does not apply to employees exempt under RCW 49.46.010(3).
- 5.12 In addition to Washington State wage payment laws, there are federal minimum standards. Those standards are generally set by the Fair Labor Standards Act (“FLSA”), and include both a minimum wage and the requirement that certain employees who work more than a specified number of hours per week receive overtime compensation. 29 C.F.R. § 785.5.
- 5.13 Applicable to this matter, the FLSA defines de minimus time as “insubstantial or insignificant periods of time beyond the scheduled working hours, which cannot as a practical administrative matter be precisely recorded for payroll purposes.” The FLSA allows de minimis time to be disregarded as long as it is only applied to periods of a few minutes’ duration where “the failure to count such time is due to considerations justified by industrial realities.” 29 C.F.R. § 785.47.
- 5.14 The FLSA also allows for rounding practices, such as recording employee’s starting and stopping time to the nearest 5 minutes, or to the nearest one-tenth or

quarter of an hour, as long as the practices are facially neutral and allow employees to gain time as easily as lose it. 29 C.F.R. § 785.48(b); *Corbin v. Time Warner Entm't-Advance/Newhouse P'ship*, 821 F.3d 1069 (9th Cir.) (2016).

- 5.15 The Department, as set forth above, has adopted similar policies on the state level. Specifically, Administrative Policy number ES.D.1 also allows for rounding practices, as long as the rounding “works both ways” and sometimes results in rounding up and sometimes results in round down. *Administrative Policy ES.D.1; Exhibit 13, page 5.*
- 5.16 As set forth above, Ms. Haws’ employment with the DOT, and her compensation, is partially governed by a CBA. The CBA contains two provisions applicable to this matter. First, Article 6.3(H) of the CBA states: “An overtime-eligible employee, including an employee on standby status, will be compensated for all time worked, **other than de minimis time**, for receiving or responding to work related calls, unless otherwise provided for in this Agreement.” *Ex. 11, p. 5 (emphasis added).* Next, Article 7.3 states “Computation of overtime will be rounded upward to the nearest one-tenth (1/10th) of an hour.” *Exhibit C, page 16.*

Analysis

- 5.17 The parties do not dispute that Ms. Haws worked 4 minutes passed her scheduled shift end on January 17, 2020. The matter at issue is whether Ms. Haws is entitled to overtime compensation for those 4 minutes.
- 5.18 As an overtime eligible DOT employee, and based on her position description, Ms. Haws is eligible for overtime after she has met a 40-hour work week threshold.
- 5.19 On January 17, 2020, when she stayed 4 minutes after her scheduled shift end, the claimant was only 4 hours into her new work week. Accordingly, based on the policies set forth above, Ms. Haws would not be eligible for overtime on January 17, 2020, because she had not yet worked 40 hours during that work week.
- 5.20 Additionally, even if Ms. Haws had already worked 40 hours during that work week, she would not be eligible because DOT policy, which rounds time worked to the nearest one-tenth of an hour, considers time in increments of less than 6 minutes to be de minimis. DOT’s position on rounding and de minimus time is compatible with Washington State wage laws, the FLSA, and the CBA at issue in this matter. If the claimant works less than 6 minutes of overtime, the time is de minimus and may be disregarded. If the claimant works more than 6 minutes of overtime, her work would be rounded up to the nearest one-tenth of an hour.
- 5.21 Regarding this issue, Ms. Haws argues that because the work she performed was meaningful work, it should not be considered to be de minimis. Ms. Haws’ argument is based on a misunderstanding of the policy in question. The fact that

the work may have been meaningful does not change the requirement that a minimum of 6 minutes must be worked in order to pass the de minimis threshold.

5.22 Accordingly, Ms. Haws has failed to meet her burden of proof and establish, by a preponderance of the evidence, that she was entitled to overtime pay for the period of January 16, 2020 through January 31, 2020.

5.23 Because DOT was not required to pay Ms. Haws overtime for the 4 additional minutes she worked on January 17, 2020, DOT is not in violation of Washington wage laws. Determination of Compliance No. 040-21 should be **AFFIRMED**.


6. INITIAL ORDER

IT IS HEREBY ORDERED THAT:

6.1 The Employer, the Washington State Department of Transportation, did not violate the Washington State wage laws by failing to pay overtime wages to Heather Haws for the period of January 16, 2020 through January 31, 2020.

6.2 The Department's Determination of Compliance, No. 040-21 issued September 25, 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. 01-2021-LI-01600

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

<p>Heather Haws PO Box 9493 Spokane, WA 99209 <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 1671 28 <input type="checkbox"/> Campus Mail <input type="checkbox"/> E-mail</p>
<p>Diana S. Cartwright, AAG Office of the Attorney General MS: TB-14 800 5th Ave Ste 2000 Seattle, WA 98104 <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: Diana.Cartwright@atg.wa.gov Shara.Wusstig@atg.wa.gov Iniseaeservice@ATG.WA.GOV</p>
<p>Washington State Department of Transportation Attn: Heidi E. Mabbot P.O. Box 47300 Olympia, WA 98504 <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>

Date: Tuesday, June 22, 2021

OFFICE OF ADMINISTRATIVE HEARINGS



Mallory Jordan
Legal Assistant 2