

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

In re:

RANDALL MOSS,

Appellant,

Determination of Compliance No.
DOC-111-22,

OAH Docket No. 04-2022-LI-01771

No. 2023-009-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 appeal filed by Randall Moss (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 October 24, 2022. The Director received a timely filed petition for administrative review from the Appellant.
3. The Director adopts and incorporates all the Order's Findings of Fact.

NO. 2023-009-WPA

DIRECTOR'S ORDER

RCW 49.48.084(4); RCW 34.05

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

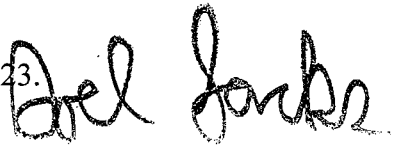
II. CONCLUSIONS OF LAW

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(4) and RCW 34.05.
2. The Director adopts and incorporates Conclusions of Law and Order.
3. Former WAC 296-128-520 as adopted in April through June 2020 governs. The minimum salary threshold has been met. The Appellant regularly directed the work of two or more employees and supervised front-of-house staff. The exclusion in WAC 296-128-520 applies.
4. The Appellant raises several procedural arguments about scheduling conferences, venue, exhibits, the initial order, and hearing time. He has shown no error, and even if he had shown error, he has demonstrated no prejudice as to the outcome of the Director's order is unaffected.

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 October 24, 2022, is incorporated by reference herein.

DATED at Tumwater this 30 day of May, 2023.



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 SERVICE

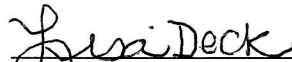
I, Lisa Deck, hereby declare under penalty of perjury under the laws of the State of Washington, that the **DIRECTOR'S ORDER** was mailed on the 30 day of May 2023, to the following via regular, postage prepaid and via e-mail:

Smart Foodservice Stores, LLC
dba US Foods Chef Store
P.O. Box 29291
Phoenix, AZ 85038-9291

Randall Moss
4744 Peony St
West Richland, WA 99353
randymoss743@gmail.com

Elizabeth Fischer, AAG
Office of the Attorney General
P.O. Box 40121
Olympia WA, 98504
elizabeth.fischer@atg.wa.gov
Kat.Moysiuk@atg.wa.gov
lniolyeservice@atg.wa.gov

DATED this 30 day of May, 2023, at Tumwater, Washington.



LISA DECK

**WASHINGTON STATE
OFFICE OF ADMINISTRATIVE HEARINGS**

In the matter of:

Docket No. 04-2022-LI-01771

Randall Moss,

INITIAL ORDER

Appellant/Wage Claimant.

Agency: Labor and Industries
Program: Wage Payments
Agency No. DOC-111-22

1. ISSUES:

- 1.1. Does the Employer, Smart Foodservice Stores, LLC, doing business as (dba) US Foods Chef Store, still owe the Appellant/Wage Claimant, Randall Moss, for any wages for work performed?
- 1.2. Should the Department of Labor and Industries' 'Determination of Compliance No. 111-22', be set aside, modified, or affirmed?

2. INITIAL ORDER SUMMARY:

- 2.1. The Employer, Smart Foodservice Stores, LLC, dba US Foods Chef Store, **does not owe** the Appellant, Randall Moss, any wages for work performed.
- 2.2. The Department of Labor and Industries' 'Determination of Compliance No. 111-22', be **affirmed**.

3. EVIDENTIARY HEARING:

- 3.1. Hearing Date: Wednesday, August 24, 2022
- 3.2. Admin. Law Judge: TJ Martin
- 3.3. Appellant: Randall Moss (Appellant/Wage Claimant)
 - 3.3.1. Representative: The Appellant represented himself.
 - 3.3.2. Witnesses: The Appellant did not call any witnesses.
- 3.4. Agency: Department of Labor and Industries (Department)
 - 3.4.1. Representative: Elizabeth Fischer, Assistant Attorney General
 - 3.4.2. Witnesses: Michael Lewis, Department Industrial Relations Agent
- 3.5. Exhibits: Appellant's Exhibits A through I were admitted.
Department's Exhibits 1 through 35 were admitted.
- 3.6. Court Reporter: Lori Stefano, Capital Pacific Reporting

4. FINDINGS OF FACT:

The following facts are established by a 'preponderance of the evidence':

Jurisdiction-

- 4.1. On January 20, 2022, the Department of Labor and Industries (Department) issued 'Determination of Compliance No. 111-22' (Determination), finding Smart Foodservice Stores, LLC (Employer) did not owe Randall Moss (Appellant/Wage Claimant/Moss) any unpaid agreed and overtime wages for hours worked from July 7, 2022 to September 20, 2020. *Testimony of Michael Lewis (Testimony of Lewis) and Department Exhibit (Dept. Ex.) 1; Page (pg.) 1-2.*
- 4.2. On February 9, 2022, Moss appealed the Department's Determination. *Testimony of Lewis and Dept. Ex. 2.*

Randall Moss' employment with Smart Foodservice Stores-

- 4.3. Smart Foodservice Stores, LLC dba US Foods Chef Store, is a limited liability company, with headquarters located in Phoenix, Arizona. It operates supermarkets in the United States, including a grocery store in Richland, Washington, which the Appellant used to work at. *Dept. Exs. 4-7.*
- 4.4. From May 4, 2011 to April 29, 2021, the Appellant, Randall Moss, worked for the Employer, US Foods Chef Store. *Dept. Ex. 8.*

Department's Investigation of Randall Moss' Wage Complaint-

- 4.5. On June 16, 2021, Randall Moss filed a 'Worker Rights Complaint' with the Department of Labor and Industries, alleging he was still owed wages for unpaid hours worked from US Foods Chef Store, from June 16, 2018 to June 16, 2021. *Testimony of Lewis and Dept. Ex. 8 (same as Dept. Ex. 12; pg. 2-6)(Same as Appellant Exhibit (App. Ex.) B; pg. 1-2 and App. Ex. H; pg.6-10).*
- 4.6. From June 18, 2021 to December 17, 2021, Department Industrial Relation Agent Michael Lewis (Agent Lewis) investigated Moss' Wage Complaint. *Testimony of Lewis and Dept. Exs. 3, 9-10 & 16-17.*
- 4.7. From July 19, 2021 to July 22, 2021, Moss sent employment documentation to the Department supporting his wage complaint. Moss' documentation, included: (a) Scanned photographs of his work schedule; (b) Reconstruction of 'hours worked'; and (c) Paystubs from US Foods Chef Store. *Testimony of Lewis and Dept. Ex. 11; Dept. Ex. 12; pg. 7-20; Dept. Ex. 13; App. Ex. B; pg. 3-4 and App. Ex. C.*
- 4.8. On August 23, 2021 and August 24, 2021, Moss also sent the Department information from his EEOC Whistleblower complaint and from his Federal Department of Labor complaint. *Testimony of Lewis; Testimony of Moss and Dept. Exs. 14 & 15 and App. Ex. B; pg. 5-9.*

- 4.9. The Appellant also pursued claims against US Foods Chef Store through the Washington State Attorney General's Office and through the Washington State Department of Employment Security. *Testimony of Moss and App. Exs. D-I.*
- 4.10. On December 17, 2021, Department Agent Lewis issued an 'Agent Summary', outlining his investigation of Moss' Wage Complaint. *Testimony of Lewis and Dept. 1; pg. 3-6.*
- 4.11. On September 1, 2021, Department Agent Lewis sent notice to US Foods Chef Store regarding Moss' original wage complaint alleging \$30,479.54 in unpaid wages, from June 16, 2018 to September 20, 2020. *Dept. Ex. 17 (Same as App. Ex. A; pg. 1-3).*
- 4.12. On the same day, September 1, 2021, Moss sent the Department documentation regarding his federal U.S. Department of Labor wage complaint, which included a retaliation allegation against his former employer. However, the Department lacked jurisdiction to investigate Moss' retaliation complaint. *Testimony of Moss and Dept. Exs. 18-21 (Same as App. Ex. F).*
- 4.13. On September 21, 2021, Moss sent an email to the Department with his signed wage calculation worksheet, alleging he was still owed \$30,479.54 in unpaid wages, from August 30, 2020 to October 4, 2020. *Testimony of Lewis and Dept. Ex. 22 (Same as App. Ex. A; pg. 4-6).*
- 4.14. On September 24, 2021 and October 4, 2021, Moss sent several emails to Agent Lewis requesting an update on his wage complaint. However, Agent Lewis was unable to provide any updates since he was still attempting to contact Moss' former employer. *Testimony of Lewis and Dept Exs. 23 & 24.*
- 4.15. After reviewing the documentation provided by Moss, covering the wage complaint period of June 16, 2018 to June 16, 2021, Agent Lewis determined a settlement agreement between the Employer and Moss precluded any wages prior to April 26, 2020. In addition, for the period of April 27, 2020 to June 30, 2020, Moss qualified as an overtime exempt, salaried executive employee. However, Agent Lewis determined the Employer still owed wages to Moss for the period of July 1, 2020 to September 20, 2020, in the amount of \$3,835.93. *Testimony of Lewis and Dept. Ex. 3.*
- 4.16. On October 11, 2021, Department Agent Lewis sent a demand letter to US Foods Chef Store requesting \$3,835.93 in unpaid wages, for July 1, 2020 to September 19, 2020. Agent Lewis notified Moss the demand letter had been sent. However, Moss emailed Agent Lewis, disagreeing with the Department's requested amount. He further disputed classification as a salaried, exempt executive employee, while working for Smart Foodservice. *Testimony of Lewis and Dept. Exs. 25-27 (Same as App. Ex. A; pg. 7-10).*

- 4.17. Department Agent Lewis excluded the period of April 27, 2020 to June 30, 2020, in the demand letter since Moss qualified as an salaried employee exempt from overtime during the period. Agent Lewis lacked authority to enforce any federal regulations regarding overtime. *Testimony of Lewis.*
- 4.18. On October 22, 2021, US Foods Chef Store, located out-of-state, responded to the Department's demand letter, contending Moss' past wages had been paid, via an agreed settlement. Moss disputed the referenced settlement applied to the present wage complaint. *Testimony of Lewis and Dept. Exs. 28 & 29.*
- 4.19. On October 29, 2021, US Foods Chef Store offered to pay the Department's demand of \$3,835.93 in wages to Moss to resolve his wage complaint. *Testimony of Lewis and Dept. Ex. 30.*
- 4.20. On November 1, 2021, Moss sent the Department a revised wage calculation worksheet of the wages he believed he was still owed. *Dept. Ex. 31.*
- 4.21. On December 8, 2021, US Foods Chef Store sent proof of a \$3,835.93 check, minus taxes, equaling \$3,125.11, to the Department for the unpaid wages. *Dept. Ex. 33.*
- 4.22. On December 13, 2021, the Department allowed US Foods Chef Store, additional time to provide requested employment and wage documentation. *Dept. Ex. 32 (Same as App. Ex. 1; pg. 13).*
- 4.23. On December 17, 2021, the Department notified Moss it had received the employer's check of \$3,125.11 (\$3,835.93 minus taxes). The Department offered the check could be picked up by Moss. *Testimony of Lewis and Dept. Exs. 33 & 34.*
- 4.24. On January 20, 2022, the Department issued 'Determination of Compliance No. 111-22', finding Smart Foodservice did not owe Appellant Moss any unpaid wages since it had paid the \$3,835.93 in wages owed, as requested by the Department in its October 11, 2021, demand letter. *Testimony of Lewis and Dept. Ex. 1; pg. 1-2.*
- 4.25. On February 9, 2022, Moss appealed the Department's Determination. *Dept. Ex. 2.*

[Continued]

5. CONCLUSIONS OF LAW:

Based upon the above 'Findings of Fact', the following 'Conclusions of Law' are made:

Jurisdiction-

5.1. The undersigned administrative law judge has jurisdiction over the persons and subject matter of the present case based on Revised Code of Washington (RCW) 49.48.084(3) and Chapters 34.05 and 34.12 RCW.

Burden and Standard of Proof Challenging a 'Determination of Compliance'-

5.2. In contesting a Department 'Determination of Compliance', the appealing party has the burden of proof, to establish by a 'preponderance of the evidence', a 'more likely than not' standard of proof, the Department's Determination is in error.

5.3. In the present case, the Appellant, Randall Moss, has the burden of proof to establish, by a 'preponderance of the evidence' standard, the Employer, Smart Foodservice Stores, LLC, dba US Foods Chef Store 'willfully failed to pay wages' him wages owed and, as a result, the Department's 'Determination of Compliance No. 111-22' is in error.

Randall Moss' Worker's Rights Complaint-

5.4. The Department of Labor & Industries is responsible for implementing and enforcing the provisions of Chapters 49.46, 49.48 and 49.52 of the RCW and Title 296 Washington Administrative Code (WAC), pertaining to wages, for the purpose of protecting the immediate and future health, safety, and welfare of the people of the State of Washington.

5.5. The Department's authority includes enforcing wage payments such as: (a) Payment of minimum wages (RCW 49.46.020 and Chapter 296-128 WAC); (b) Payment of overtime wages in excess of more than 40 hours of work in a week (RCW 49.46.13); (c) Payment of final wages (RCW 49.48.010); and (d) Withholding of lawful deductions from wages (RCW 49.52.060); and (e) Enforcement of any wages as authorized by statute, ordinance, and/or contract (RCW 49.52.050).

5.6. If an employee files a wage complaint, the Department is required to investigate. RCW 49.48.083(1) and WAC 296-128-820.

5.7. On June 16, 2021, Randall Moss filed a 'Worker Rights Complaint' with the Department of Labor and Industries, alleging he was still owed wages for work performed at Smart Foodservice Stores, dba US Food Chef Store, from June 16, 2018 to June 16, 2021. As a result, the Department, as required by law, investigated Moss' complaint.

[Continued]

- 5.8. After reviewing the documentation provided by the Wage Claimant Moss and the Employer, US Foods Chef Store, covering the wage complaint period of June 16, 2018 to June 16, 2021, Agent Lewis determined a settlement agreement between the Employer and Moss precluded any wages owed prior to April 26, 2020.
- 5.9. In addition, Agent Lewis determined for the period of April 27, 2020 to June 30, 2020, Moss qualified as a salaried executive employee, exempt from overtime. Therefore, based on the documentation, no wages were owed.
- 5.10. Finally, Agent Lewis determined the Employer, US Foods Chef Store, still owed wages to Moss for the period of July 1, 2020 to September 20, 2020, in the amount of \$3,835.93. After receiving the Department's October 11, 2021 demand letter, the Employer paid the requested wages owed.
- 5.11. On January 20, 2022, since no wages were still owed to Wage Claimant Moss, the Department issued 'Determination of Compliance No. 111-22'.
- 5.12. In the present case, Wage Claimant Moss has the burden of proof to establish, by a 'preponderance of the evidence', the Department's 'Determination of Compliance No. 111-22' is in error.
- 5.13. After hearing testimony and considering admitted evidence by the Wage Claimant Moss and the Department, the undersigned administrative law judge finds the Appellant/Wage Claimant Moss has not met his burden of proof.
- 5.14. The Appellant/Wage Claimant has failed to establish the Department was in error by not considering any wages owed prior to April 26, 2020, covered by the settlement agreement between the Employer and the Wage Claimant.
- 5.15. In addition, the Appellant has failed to prove his classification as a salaried exempt employee, was in error for the period of April 27, 2020 to June 30, 2020.
- 5.16. Finally, the Appellant has failed to prove wages, above those requested by the Department, in the amount of \$3,835.93, which were paid by the Employer, are still owed.
- 5.17. Based upon the above 'Finding of Fact' and 'Conclusion of Law', the Employer, Smart Foodservice Stores, LLC, dba US Foods Chef Store, **does not owe** the Appellant, Randall Moss, any wages for work performed.
- 5.18. The Department of Labor and Industries' 'Determination of Compliance No. 111-22', is **affirmed**.

[Continued]

6. INITIAL ORDER:

THIS ADMINISTRATIVE TRIBUNAL ORDERS:

- 6.1. The Employer, Smart Foodservice Stores, LLC, dba US Foods Chef Store, **does not owe** the Appellant, Randall Moss, any wages for work performed.
- 6.2. The Department of Labor and Industries' 'Determination of Compliance No. 111-22', **is affirmed.**

Issued from Tacoma, Washington on the date of mailing.



TJ Martin
Administrative Law Judge
Office of Administrative Hearings

CERTIFICATE OF SERVICE ATTACHED

APPEAL RIGHTS

PETITION FOR REVIEW

Any party that disputes this Initial Order may file a Petition for Review with the Director of the Department of Labor and Industries.¹ You may e-mail your Petition for Review to the Director at directorappeal@lni.wa.gov. You may also mail or deliver your Petition for 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 Review, please do not mail or deliver a paper copy to the Director.

Whether you e-mail, mail, or deliver the Petition for Review, the Director *must actually receive* the Petition for 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 Review to the other parties at the same time.

If the Director does not receive a Petition for 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 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.

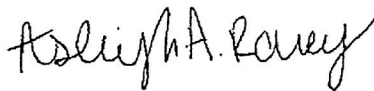
CERTIFICATE OF SERVICE FOR OAH DOCKET NO. 04-2022-LI-01771

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

<p>Randall Moss 4744 Peony St West Richland, WA 99353 Appellant/Wage Claimant</p>	<p><input checked="" type="checkbox"/> First Class Mail <input checked="" type="checkbox"/> Certified Mail, Return Receipt 9489 0090 0027 6101 6151 25 <input type="checkbox"/> Campus Mail <input checked="" type="checkbox"/> E-mail randymoss743@gmail.com</p>
<p>Smart Foodservice Store, LLC dba US Food Chef Store PO BOX 29291 Phoenix, AZ 85038 Intervenor/ Employer</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>Elizabeth Fischer, AAG Office of the Attorney General PO Box 40121 MS 40121 Olympia, WA 98504 Agency Representative</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 Elizabeth.Fischer@atg.wa.gov Kat.Moysiuk@atg.wa.gov lniolyeservice@atg.wa.gov</p>

Date: Monday, October 24, 2022

OFFICE OF ADMINISTRATIVE HEARINGS



Ashleigh Rainey
Legal Assistant 2