

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

In re:

GREGORY BELL,

Appellant,

Determination of Compliance No.
DOC - 124-22,

OAH Docket No. 05-2022-LI-01777

No. 2023-012-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 Gregory Bell (Appellant), 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 January 27, 2023.
2. The Director received a timely filed petition for review from the Appellant.
3. The Director adopts and incorporates all the Order's Findings of Fact: Nos. 4.1 to 4.36.

NO. 2023-012-WPA

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DIRECTOR'S ORDER

RCW 49.48.084(4); RCW 34.05

4. There is no credible evidence to show that for every day from November 19, 2018, to March 17, 2020, the Appellant worked a half an hour extra before his shift began.

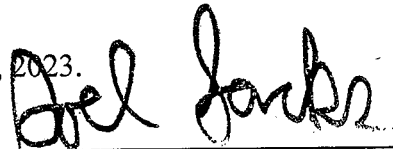
II. CONCLUSIONS OF LAW

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 the Order as well as the Conclusions of Law: No. 5.1 to 5.18
3. The Appellant did not prove by a preponderance of the evidence that he had unpaid wages due to him either as an agreed wage under RCW 49.52.050 or under the Minimum Wage Act, RCW 49.46.020.

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 January 27, 2023, is incorporated by reference herein.

DATED at Tumwater this 5 day of September, 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 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 5 day of September 2023, to the following via regular, postage prepaid:

Gregory Bell
9016 A Bong Loop
Moses Lake, WA 98837
Appellant

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Counsel for Department

DATED this 5 day of September, 2023, at Tumwater, Washington.



LISA DECK

**WASHINGTON STATE
OFFICE OF ADMINISTRATIVE HEARINGS**

In the matter of:

Gregory Bell,

Appellant/Wage Claimant.

Docket No. 05-2022-LI-01777

INITIAL ORDER

Agency: Labor and Industries
Program: Wage Payments
Agency No. DOC - 124-22

1. ISSUES:

- 1.1. Did J&M Electric fail to pay agreed wages to Gregory Bell, in violation of Revised Code of Washington (RCW) 49.52.050? (The Appellant/Wage Claimant, Gregory Bell, alleges he is owed \$6,624.00, in unpaid wages for 184 hours of work, from November 19, 2018 to March 17, 2020).
- 1.2. If the Appellant/Wage Claimant establishes the allegation, should the Department of Labor and Industries' 'Determination of Compliance No. 124-22', dated February 10, 2022, be set aside, modified, or affirmed?

2. INITIAL ORDER SUMMARY:

- 2.1. J&M Electric **did not fail to pay agreed wages** to Gregory Bell, for 184 hours of work, from November 19, 2018 to March 17, 2020, in violation of RCW 49.52.050.
- 2.2. The Department of Labor and Industries' 'Determination of Compliance No. 124-22', dated February 10, 2022, is **affirmed**.

3. EVIDENTIARY HEARING:

- 3.1. Hearing Date: November 29, 2022 and December 1, 2022
- 3.2. Appellant: Gregory Bell
 - 3.2.1. Representative: The Appellant represented himself.
 - 3.2.2. Witnesses: The Appellant did not call any witnesses.
- 3.3. Agency: Department of Labor and Industries
 - 3.3.1. Representative: Jessica So, Assistant Attorney General
 - 3.3.2. Witnesses: Jerei Bargabus, Industrial Relations Agent
Dustin Swartz, J&M Electric Co-Owner
- 3.4. Court Reporters: Rachel Hall, Connie Church, and Phyliss Lykken,
Central Court Reporting
- 3.5. Observer: Rachel Thorton, Department Legal Assistant

3.6. Exhibits: Appellant's Exhibits 1 through 54 (listed as pages) were admitted.
Department's Exhibits 1 through 27 were admitted.

4. FINDINGS OF FACT:

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

Jurisdiction-

4.1. On February 10, 2022, the Department of Labor and Industries (Department) issued 'Determination of Compliance No. 124-22', finding J&M Electric, Inc. (J&M Electric/Employer) did not violate Washington State Wage Payment and/or the Minimum Wage Act, relating to Gregory Bell (Appellant/Wage Claimant). *Testimony of Jerei Bargabus (Testimony of Bargabus) and Department Exhibit (Dept. Ex.) 1.*

4.2. On February 22, 2022, the Department received Gregory Bell's appeal of the Department's 'Determination of Compliance No. 124-22'. *Dept. Ex. 2.*

J & M Electric and Gregory Bell-

4.3. J&M Electric, Inc. is a licensed general electrician contractor, located in Moses Lake, Washington. Don Swartz II, Carolann Swartz, and Dustin Swartz serve as 'governing people'. *Dept. Ex. 26; pg. 1-5.*

4.4. Dustin Swartz serves as J&M Electric's Electrical Administrator as well as supervises employees. *Testimony of Dustin Swartz (Testimony of Swartz).*

4.5. J&M Electric pays employees an agreed hourly rate, with variable hours. Employees are not guaranteed eight hours per day. Rather, they are paid for work performed on various projects. *Testimony of Swartz.*

4.6. J&M Electric employees are not required to be at work unless they are given a job assignment. *Testimony of Swartz.*

4.7. Gregory Bell's work schedule was 'highly variable', dependent on his job assignments. He usually worked 7:30 a.m. to 4:00 p.m., five days per week, when he was assigned to a job. However, job start times varied. *Testimony of Swartz and Dept. Ex. 3; pg. 4.*

4.8. J&M Electric does not have a schedule board. As per company policy, employees 'call-in' to see if there's work. *Testimony of Swartz.*

4.9. Employees were not required to come into work if there was no work available. *Testimony of Swartz.*

4.10. Work was not always available, but Bell understood he would call in or be called by J&M Electric if work became available. *Testimony of Gregory Bell (Testimony of Bell).*

- 4.11. 'Prep work' and 'shop time', such as getting a job assignment, loading tools and equipment, and preparing work vehicles, were billed to specific jobs. *Testimony of Swartz.*
- 4.12. Gregory Bell is an active, non-union journey electrician. His starting rate of pay at J&M Electric was \$36.00 per hour. His ending rate of pay was \$37.50 per hour. *Testimony of Bell and Dept. Ex. 26; pg. 9.*
- 4.13. J&M Electric does not have time clocks. Rather employees, like Bell, were paid weekly, by check, for all work performed, based on their timecards submitted, which included each work project and hours spent on each job. *Testimony of Swartz.*
- 4.14. Bell never complained of not being paid for work, while employed at J&M Electric. *Testimony of Swartz.*
- 4.15. Bell's last day of employment was March 17, 2020, not March 16, 2020, as listed in his wage complaint. *Testimony of Bell.*
- 4.16. On September 28, 2021, the Office of Administrative Hearings (OAH) Administrative Law Judge (ALJ) Scott Mills held an evidentiary hearing regarding Bell's unemployment claim from J&M Electric. ALJ Mills found Bell's job separation occurred on March 17, 2020, due to 'lack of work'. (OAH Docket No. 197246). Appellant Exhibit/Pages (*App. Ex./Pg.*) 1-22, 29-40, 47-54.
- 4.17. J&M Electric has no previous wage complaints. *Dept. Ex. 26; pg. 7-8.*

Department Investigation-

- 4.18. On October 11, 2021, Gregory Bell filed a 'Workers Rights Complaint' (wage complaint) with the Department. In his complaint, Bell alleged his former employer, J&M Electric, failed to pay him for 75 hours, a rate of pay of \$36.00 per hour, from November 18, 2018 to March 16, 2020. *Testimony of Bargabus and Dept. Ex. 4.*
- 4.19. Attached to his 'Wage Complaint', Bell included an 'Hours Breakdown from August 1, 2019 to May 31, 2021'. *Testimony of Bargabus and Dept. Ex. 5 (same as App. Ex. 42).*
- 4.20. From October 12, 2021 to January 27, 2022, Department Industrial Relations Agent Jerei Bargabus (Agent Bargabus) investigated Bell's wage complaint. As a part of the Department's investigation, Agent Bargabus requested employment records from Bell and J&M Electric. *Testimony of Bargabus and Dept. Exs. 3-27.*
- 4.21. Between October 23, 2021 and October 26, 2021, Bell provided copies of his paychecks, paystubs and job assignments while working for J&M Electric. *Testimony of Bargabus and Dept. Ex. 8 (same as App. Ex./Pg. 23-28, 41-46).*

- 4.22. In addition, on October 26, 2021, Bell provided a reconstruction of hours, from November 2018 to March 2020, for work he alleges he was not paid for. Namely, he included half an hour each day from the time he appeared for work until the time he was assigned job projects. *Testimony of Bargabus and Dept. Ex. 9.*
- 4.23. On November 10, 2021 Bell provided the Department with an 'Hours Worked and Wage Computation Sheet', reconstructing the 184 hours of 'Pre task scheduling' he believed he worked, from November 19, 2018 to March 16, 2020, for a total of \$6,624.00. *Testimony of Bargabus and Dept. Ex. 11; pg. 12-17.*
- 4.24. On November 15, 2021, Agent Bell contacted Dustin Swartz (Swartz), Co-Owner and Electrical Administrator for J&M Electric, regarding Bell's Wage Complaint. Schwartz agreed to provide the Department with all of Bell's employment records. *Testimony of Bargabus & Dept. Exs. 11 & 12.*
- 4.25. At that time, on November 15, 2021, Swartz told Agent Bargabus, Bell was paid for all hours he put on his weekly timecards and submitted for payment. *Testimony of Bargabus, Testimony of Swartz and Dept. Ex. 3; pg. 17.*
- 4.26. In addition, Swartz told Agent Bargabus, as per company policy, employees would call in each morning to see if there was work. They were not required to come in until such time as work was assigned to them. *Testimony of Schwartz and Dept. 3; pg. 17.*
- 4.27. J&M Electric's handbook, 'Section 4' establishes, 'Employees must begin their shift no earlier than five (5) minutes prior to their starting time'. There was no requirement for employees to show up early for work. *Testimony of Schwartz and Dept. Ex. 14; pgs. 3 & 5-6.*
- 4.28. On November 30, 2021, Swartz provided Agent Bargabus with the employer's documents, including all paystubs from Bell's employment. *Testimony of Bargabus and Dept. Exs. 13, 14 & 21.*
- 4.29. Bell's 'hours worked', as recorded on his timecards, included any 'shop time' or 'warranty time' such as time used to prepare for various job assignments. Work beyond such time would need to be pre-approved. *Testimony of Swartz and Dept. Ex. 14; pg. 3-4.*
- 4.30. If Bell came in early, prior to any job assignments, he would have done so by his own choice, knowing he would not be paid for such time. J&M Electric does not have a policy or pay for 'waiting time'. *Testimony of Swartz and Dept. Ex. 14; pg. 4.*
- 4.31. The 'hours worked' by Bell matched up with his weekly paychecks. Bell was paid for all hour listed on his timecard. *Testimony of Swartz and Dept. Ex. 14; pg. 3.*

- 4.32. During Bell's wage complaint investigation, he never raised any issue about water breaks or other breaks, only that he was not paid for half an hour each day of 'prep time', prior to job assignments. *Testimony of Bargabus.*
- 4.33. On January 3, 2022, Swartz provided additional employer documents to Agent Bargabus. These employer documents included Bell's weekly timecards and pay stubs, from November 19, 2018 to March 16, 2020. *Dept. Exs. 22-23.*
- 4.34. On January 15-16, 2022, Bell provided a response to the employer's records. Bell maintained he should have been paid for 'prep or shop time'. *Dept. Ex. 24.*
- 4.35. On January 28, 2022, Agent Bargabus, issued a 'Determination of Compliance Agent Summary'. Agent Bargabus found, based on the evidence provided by the employer and the wage claimant, J&M Electric had paid Bell for all hours worked. As such, J&M Electric did not fail to pay any agreed wages, in the amount of \$6,624.00, from November 19, 2018 to March 16, 2020. *Testimony of Bargabus and Dept. Ex. 27.*
- 4.36. On February 10, 2022, the Department issued 'Determination of Compliance No. 124-22', finding Gregory Bell's former employer, J&M Electric did not violate Washington State Wage Payment and/or Minimum Wage Act laws. *Testimony of Bargabus and Dept. Ex. 1.*

5. CONCLUSIONS OF LAW:

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

Jurisdiction-

- 5.1. The Office of Administrative Hearings has jurisdiction over the persons and subject matter of the present appeal, based on 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 of Labor and Industries' 'Determination of Compliance', the appealing party has the burden to establish by a 'preponderance of the evidence', a 'more likely than not' standard of proof, the Department's Determination of Compliance is in error. *MacSuga v. County of Spokane*, 97 Wn. App. 435, 445-446, 983 P.2d 1167 (1999).
- 5.3. In the present case, the Appellant/Wage Claimant, Gregory Bell, has the burden of proof to establish, by a 'preponderance of the evidence', the Department's 'Determination of Compliance No. 124-22' is in error.

Department's Legal Requirements-

- 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. In the present case, the Department investigated Gregory Bell's Wage Compliant, including gathering employment records from both Bell and J&M Electric.

Gregory Bell's Prep/Shop Time-

- 5.8. RCW 49.52.050 makes it unlawful to willfully withhold an agreed wage, which includes any wage an 'employer is obligated to pay such employee by any statute, ordinance, or contract'. RCW 49.52.050(2).
- 5.9. RCW 49.48.082(13) defines "willful" as a "[K]nowing 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)."
- 5.10. Any employer who pays an employee less than wages to which such employee is entitled shall be liable to such employee for the full amount of such wages. RCW 49.46.090(1).
- 5.11. WAC 296-126-002(8) mandates employers must pay for all hours work, defined as:
All hours during which the employee is authorized or required, known or reasonably believe by the employer to be on duty on the employer's premises or at a prescribed workplace.
Department's Administrative Policy E.S.C. 2.
- 5.12. In the present case, the Appellant/Wage Claimant, Gregory Bell, does not dispute his former employer, J& M Electric, paid him for all hours he reported on his timecard and submitted for weekly payment.

- 5.13. Rather, Bell alleges he should have been paid for a half an hour each day, for 'prep/shop time' during the course of his employment at J&M Electric. However, he never raised the issue during his employment.
- 5.14. The Appellant/Wage Claimant, Gregory Bell, has the burden to prove, by a 'preponderance of the evidence', the payment of such 'prep/shop time', consisting of half an hour of wages each day, was a 'knowing' and 'willful' violation by J&M Electric to pay such wages.
- 5.15. At the evidentiary hearing, the Department and the employer provided evidence demonstrating J&M Electric has a policy, which only allows employees to start their shifts five minutes before their job assignment start times. Any work prior to such time requires pre-approval. Bell never obtained such pre-approval. Therefore, the half an hour of work is not an 'agreed wage'. Rather, it is a 'bona fide dispute' whether such wages are owed.
- 5.16. Gregory Bell, who has the burden to prove the Department's Determination of Compliance is in error, failed to prove, by a 'preponderance of the evidence', he should have been paid for 'prep/shop time' since such time was not agreed upon between J&M Electric and himself. The Appellant has not met his burden.
- 5.17. Therefore, J&M Electric **did not fail to pay agreed wages** to Gregory Bell, for 184 hours of work, from November 19, 2018 to March 17, 2020, in violation of RCW 49.52.050.
- 5.18. As a result, the Department of Labor and Industries' 'Determination of Compliance No. 124-22', dated February 10, 2022, is **affirmed**.

6. INITIAL ORDER:

THIS ADMINISTRATIVE TRIBUNAL ORDERS;

- 6.1. J&M Electric **did not fail to pay agreed wages** to Gregory Bell, for 184 hours of work, from November 19, 2018 to March 17, 2020, in violation of RCW 49.52.050.
- 6.2. The Department of Labor and Industries' 'Determination of Compliance No. 124-22', dated February 10, 2022, 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.

[Continued]

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. 05-2022-LI-01777

I certify that true copies of this document were served on those listed below, from Tacoma, Washington via Consolidated Mail Services by one of the following: First Class Mail, Certified Mail, Hand Delivery via Messenger, Campus Mail, Facsimile, or by email.

<p>Gregory Bell 9016 A Bong Loop Moses Lake, WA 98837 Appellant/Wage Claimant</p>	<p><input type="checkbox"/> First Class Mail <input checked="" type="checkbox"/> Certified Mail, Return Receipt 9489 0090 0027 6305 4641 30 <input type="checkbox"/> Campus Mail <input type="checkbox"/> E-mail</p>
<p>J & M Electric, Inc. 500 S Lasco Ln, Ste 224 Moses Lake, WA 98837 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>Jessica So, AAG Office of the Attorney General MS: TB-14 800 5th Ave Ste 2000 Seattle, WA 98104 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 Jessica.So@atg.wa.gov Rachel.Thornton@atg.wa.gov Iniseaeservice@ATG.WA.GOV</p>

Date: Friday, January 27, 2023

OFFICE OF ADMINISTRATIVE HEARINGS

Larissa Smith

Larissa Smith
Legal Assistant 2