

DIRECTOR OF THE DEPARTMENT OF LABOR & INDUSTRIES  
STATE OF WASHINGTON

In re:  
Hubert Gilmore,  
Wage Claimant/Appellant,  
v.  
Department of Labor & Industries,  
Respondent,  
and  
Benton County,  
Employer/Cross-Appellant.

DIRECTOR'S ORDER  
RCW 49.48.084(4); RCW  
34.05

Determination of Compliance No. DOC-206-15,  
OAH Docket No. 06-2015-LI-00096

Joel Sacks, Director of the Washington State Department of Labor & Industries, having considered the petitions for administrative review filed by Hubert Gilmore and by Benton County, having reviewed 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, Mr. Gilmore, and Benton County. The Director issues the following Findings of Fact, Conclusions of Law, and final Decision and Order.

## **I. FINDINGS OF FACT**

1. On February 13, 2015, the Department issued a Determination of Compliance that concluded that employer Benton County did not owe Mr. Gilmore unpaid wages. Mr. Gilmore appealed and the Office of Administrative Hearings conducted a hearing.

2. The Office of Administrative Hearings issued and served the Initial Order on February 18, 2016.

3. On March 21, 2016, the Director received timely filed petitions for administrative review from Mr. Gilmore and from Benton County.

4. Mr. Gilmore has waived any claim for unpaid meal breaks.

5. Mr. Gilmore claims he should be compensated for allegedly missed rest breaks arising out of his employment with Benton County for the time period of November 8, 2011, through November 8, 2014. He raised this issue in his November 9, 2014 complaint to the Department.

6. At times Mr. Gilmore refused to take rest breaks when offered. Beyond this, Mr. Gilmore offers no credible evidence that he had missed rest breaks during the relevant time period. Mr. Gilmore provides no credible quantification of the frequency of the refused breaks during this time period.

## **II. CONCLUSIONS OF LAW**

1. Based on the timely filed petitions for administrative review, the Director may review this matter under RCW 49.48.084 and RCW 34.05.

2. WAC 296-126-092 entitles all employees covered by the Industrial Welfare Act,

RCW 49.12, to rest breaks. *See also* RCW 49.12.091; *Wingert v. Yellow Freight Sys., Inc.*, 146 Wn.2d 841, 847, 50 P.3d 256 (2002). Because Mr. Gilmore proves no rest break violation, the Director need not reach the question as to whether the Department may enforce rest breaks under the Wage Payment Act, RCW 49.48.082-.087.

3. In order to show a failure to pay wages, an employee must (1) prove that he or she has performed uncompensated work and (2) produce evidence to show the work's amount. *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687, 66 S. Ct. 1187, 90 L. Ed. 1515 (1946).<sup>1</sup> Although Mr. Gilmore shows the first requirement, he does not prove the second. First, Mr. Gilmore showed he performed uncompensated work when he refused to take rest breaks. *See Wash. State Nurses Ass'n v. Sacred Heart Med. Ctr.*, 175 Wn.2d 822, 831, 287 P.3d 516, 520 (2012) (“Employees may not waive their right to a rest period.”) (quoting Wash. Dep’t of Labor & Indus., Admin. Policy ES.C.6 § 9, at 4). Second, applying the preponderance of the evidence standard, however, Mr. Gilmore did not produce credible evidence sufficient to show the amount of uncompensated work. He thus shows no violation of the rest break regulation.

4. In its appeal, Benton County argues the Director should not consider evidence submitted by Mr. Gilmore about rest breaks as a sanction for the late submission of evidence. The County provides no authority to support such a sanction under the circumstances of this case. In the absence of citation to authority that specifies what factors a tribunal must consider to exclude such evidence as a sanction, and whether such factors were demonstrated in this case, the Director will assume there is none and will deny the County’s request. A tribunal may generally assume that where no authority is cited, counsel has found none after a diligent search. *DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962).


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<sup>1</sup> Mr. Gilmore does not allege that the employer failed to keep records such that burden-shifting applies under *Anderson*. *See* RCW 49.46.040, .070; WAC 296-128-010.

**III. DECISION AND ORDER**

Consistent with the above Findings of Fact and Conclusions of Law, the Determination of Compliance is AFFIRMED.

DATED at Tumwater this 29 day of July, 2016.

  
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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](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 RCW 34.05, Part V, Judicial Review and Civil Enforcement.

**DECLARATION OF MAILING**

I, Lisa Rodriguez, hereby declare under penalty of perjury under the laws of the State of Washington, that the DIRECTOR'S ORDER was mailed on the 29 day of July 2016, to the following via regular and certified mail, postage prepaid:

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DATED this 29 day of July, 2016, at Tumwater, Washington.

Lisa Rodriguez  
Lisa Rodriguez