

DIRECTOR OF THE DEPARTMENT OF LABOR & INDUSTRIES  
STATE OF WASHINGTON

In re:

CREATIVE TOUCH AUTO  
SOLUTIONS, LLC,

APPELLANT,

Citation and Notice of Assessment No. W-  
288-16; W-289-16; W-290-16,

OAH Docket No. 06-2016-LI-00158

No. 2016-011-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 Order Denying Petition To Vacate Order of Dismissal served on July 7, 2016, having considered the appeal filed by Creative Touch Auto Solutions, LLC (the Appellant) with the Director's Office on July 25, 2016, 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 Appellant appealed three citations and notices of assessment issued by the Department: No. W-288-16; W-289-16; W-290-16. The Office of Administrative Hearings

scheduled a pre-hearing conference for June 14, 2016. The Appellant failed to appear at the pre-hearing conference.

2. Because of the Appellant's failure to appear at the conference, the Presiding Officer held the Appellant in default and dismissed the Appellant's appeal to the citations. The Office of Administrative Hearings served the Order of Dismissal on June 15, 2016.

3. The Order of Dismissal provided two methods to contest the default order. First, the Appellant could file a petition to vacate the Order of Dismissal with the Office of Administrative Hearings. The Order of Dismissal provided that the Office of Administrative Hearings must receive the petition within seven days of service. It indicated that the Appellant could file by fax, and directed the Appellant to WAC 10-08-110(1)(a) and (b). These regulations provide that any faxed documents must be received within office hours, 8:00 a.m. to 5:00 p.m. If a petition is received after these office hours, it is deemed filed the next day. WAC 10-08-110(1)(b)(ii). Second, the Appellant could appeal directly to the Director, provided the appeal was filed within 30 days.

4. On June 22, 2016, at 6:14 p.m., the Office of Administrative Hearings received a faxed petition to vacate from the Appellant.

5. The Office of Administrative Hearings also received a mailed petition to vacate on June 27, 2016.

6. Because the faxed petition and because the mailed petition were not timely received by the Office of Administrative Hearings, the Presiding Officer denied the petition to vacate on July 7, 2016.

6. The Office of the Director received the Appellant's appeal on July 25, 2016.

## II. CONCLUSIONS OF LAW

1. The Director has the authority to review and decide this matter under RCW 49.48.084 and RCW 34.05.

2. The Presiding Officer correctly denied the petition to vacate the dismissal order. RCW 34.05.440 requires the petition to be received by the Office of Administrative Hearings within seven days of service of the order. Although a party may fax a petition to contest a dismissal order, such petition must be received by the Office of Administrative Hearings during office hours, which conclude at 5:00 p.m. WAC 10-08-110(1). Because the Office of Administrative Hearings properly advised the Appellant of the requirements regarding fax filing and because the rule regarding fax filing was not complied with, the faxed petition to vacate the dismissal order was not timely received. *Pal v. Dep't of Social & Health Servs.*, 185 Wn. App. 775, 783, 342 P.3d 1190 (2015). Likewise, the petition to vacate mailed on June 27 was also untimely because it was not received by the Office of Administrative Hearings within seven days of service of the Order of Dismissal.

3. The Appellant did not appeal to the Director within 30 days of the June 15, 2016 Order of Dismissal as the appeal was received on July 25, 2016. This means that the Director is without authority to consider the appeal. RCW 49.48.084.

4. Both the Order Denying Petition to Vacate Order of Dismissal and the briefing of the Department characterized the appeal requirements as jurisdictional. The Director takes this opportunity to clarify this issue. Failure to comply with the seven-day deadline and the 30-day appeal deadline does not constitute a matter of subject matter jurisdiction. An agency does not lack subject matter jurisdiction solely because it may lack authority to enter a given order. *Marley v. Dep't of Labor & Indus.*, 125 Wn.2d 533, 539, 886 P.2d 189 (1994). Instead, subject matter jurisdiction is the power to decide the “type of controversy,” and the “type” means “the

general category without regard to the facts of the particular case.” *Dougherty v. Dep’t of Labor & Indus.*, 150 Wn.2d 310, 317, 76 P.3d 1183 (2003). The Department has the authority to issue citations under the Wage Payment Act, the Office of Administrative Hearings is delegated to hearing appeals of those citations, and the Director has authority to review those initial orders. RCW 34.05.413, .461, .464; RCW 49.48.083, .084. In other words, the agency through the Office of Administrative Hearings and the Director has the authority to consider this type of controversy—Wage Payment Act cases. The cases cited by the Department for the proposition that the time limits under the Administrative Procedure Act are a matter of subject matter jurisdiction involve appeals to the superior court where the court acts in appellate capacity. *See Skagit Surveyors & Eng’rs, LLC v. Friends of Skagit Cty.*, 135 Wn.2d 542, 555, 958 P.2d 962 (1998); *Union Bay Pres. Coal. v. Cosmos Dev. & Admin. Corp.*, 127 Wn.2d 614, 617, 902 P.2d 1247 (1995). The courts have found that compliance with filing and service requirements to appeal a final agency order is necessary to invoke the appellate jurisdiction of the courts. *Fay v. Nw. Airlines, Inc.*, 115 Wn.2d 194, 201, 796 P.2d 412 (1990). This goes to the constitutional authority of the Legislature to shape the appellate jurisdiction of the superior court. *ZDI Gaming, Inc. v. Gambling Comm’n*, 173 Wn.2d 608, 619-20, 268 P.3d 929 (2012). But appeals at the agency level do not involve appellate jurisdiction, so the question is whether the agency had the authority to hear the appeal when there is not a timely appeal, not whether there is jurisdiction to hear the appeal.

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### III. DECISION AND ORDER

Consistent with the above Findings of Fact and Conclusions of Law, the Order of Dismissal, Order Denying Petition to Vacate Order of Dismissal, and the Citations and Notices of Assessment are AFFIRMED.

DATED at Tumwater this 24 day of October, 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 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. It also may be emailed to the Director at [directorappeal@lni.wa.gov](mailto:directorappeal@lni.wa.gov). 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 Rodriguez, hereby declare under penalty of perjury under the laws of the State of Washington, that the DIRECTOR'S ORDER was mailed on the 24 day of October 2016, to the following via regular and certified mail, postage prepaid.

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DATED this 24 day of October, 2016, at Tumwater, Washington.