

DIRECTOR OF THE DEPARTMENT OF LABOR & INDUSTRIES
STATE OF WASHINGTON

In re: ALFONSO GARCIA,
Determination of Compliance No. 376-15
OAH Docket No. 09-2015-LI-00214

NO. 2017-003-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 Initial Order served on April 15, 2016, having considered the petition for review filed by Alfonso Garcia (the Appellant), briefing submitted to the Director's Office, and having reviewed the record created at hearing and the records and files herein, issues this Director's Order. This Order intends to resolve the contested issue of whether the Appellant was paid all wages due to him based upon his employment with Frontier Trading, LLC (the Employer). **The Determination of Compliance No. 376-15, issued by the Department on May 29, 2015, is AFFIRMED.**

The parties in this matter are the Department 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 April 15, 2016, following an administrative hearing on February 23, 2016. The Initial Order affirmed the Department's May 29, 2015 Determination of Compliance No. 376-15.

2. On May 13, 2016, the Appellant attempted to file a petition for review by submitting his petition to the Department of Labor and Industries' Kennewick service location. Any appeal is required to be mailed to the Director at PO Box 44001, Olympia, WA 98504 or delivered in person to Linderson Way SW, Tumwater, WA 98501.

3. A copy of the petition for review was received by the Director on May 19, 2016.

4. By letter dated June 21, 2016, the Department acknowledged that the Appellant's appeal should be considered timely because he substantially complied with the appeal requirements by submitting his appeal to the Department's Kennewick service location within the appropriate timeframe.

5. On August 12, 2016, the Department filed a response to the Appellant's petition for review.

6. On September 10, 2016, the Appellant filed a letter that included information and documents that were not part of the administrative record. For example, he claims in the letter that he was owed wages for various axles made in 2012-13 and trailers in 2011. While these claims are unclear and unspecific, they do not appear to relate to any issue that was specifically raised at hearing. He also attached multiple documents to the letter, which were not presented at the hearing, and so I have not considered these exhibits.

7. On January 19, 2017, the record closed when the Department received the remaining exhibits filed in this case. A physical copy of Exhibit 17 was not included within the administrative record that was filed with the Director. Within the hearing transcript, Exhibit 17 is

described as the Appellant's W-2 form for the year 2012. Based on the description of Exhibit 17 within the hearing transcript, and in light of the totality of other evidence and testimony in this case, a physical copy of Exhibit 17 is not necessary for my decision in this case.

8. Having found no material errors of inclusion or omission, the Director adopts and incorporates all the Initial Order's Findings of Fact.

9. The Director also adopts and incorporates the Initial Order's "Issue Presented," the "Order Summary" and the "Hearing" summary.

II. CONCLUSIONS OF LAW

1. The Appellant substantially complied with the requirements of RCW 49.48.084(3) and RCW 34.05.010(6) by submitting a petition for review with the Department within the appropriate timeframe. *See Black v. Dep't of Labor & Indus.*, 131 Wn 2d 547, 552, 933 P.2d 1025 (1997). Accordingly, there is authority to review and decide this matter under RCW 49.48.084 and RCW 34.05.

2. The additional evidence submitted by the Appellant, and his claims related thereto, were not part of the administrative hearing record and may not be not be considered here on appeal to the Director. RCW 34.05.464; *see Towle v. Dep't of Fish & Wildlife*, 94 Wn. App. 196, 205-06, 971 P.2d 591 (1999). The Appellant had a full and fair opportunity to present such evidence at the administrative hearing on February 23, 2016.

3. The analysis of this wage claim turns on a credibility determination because the Appellant did not adhere to a set work schedule and there are no precise records to substantiate his claims. The lack of precise records is due at least in part to the Appellant's noncompliance with the Employer's time keeping requirements.

4. The Appellant did not present credible evidence of a wage payment violation. I make this determination based on the Appellant's lack of corroborating evidence, his

contradictory claims regarding his worked hours and wages, his history of noncompliance with the Employer's timekeeping requirements, his history of prior fraud against a Washington state agency, and the contradictory evidence presented by the Employer. I also make this determination giving due regard to the Administrative Law Judge's opportunity to observe the witnesses, each of whom testified in person at the hearing. *See* RCW 34.05.464(4).

5. Generally, employees are not required to prove with precision the amount of hours they worked when their employer fails to keep adequate records. *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687-88, 66 S. Ct. 1187, 90 L. Ed. 1515 (1946). However, the Appellant bears the initial burden to establish prima facie evidence of a wage payment violation. *Anderson*, 328 U.S. at 687-88; *MacSuga v. Cty. of Spokane*, 97 Wn. App. 435, 445, 983 P.2d 1167 (1999); *see also Pugh v. Evergreen Hosp. Med. Ctr.*, 177 Wn. App. 363, 368, 312 P.3d 665 (2013). To satisfy his initial burden, the Appellant must (1) prove that he has in fact performed work for which he was not properly compensated and (2) produce sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. *Anderson*, 328 U.S. at 687. If this burden is satisfied, then the burden shifts to the Employer to produce evidence of the precise amount of work performed or evidence to negate the reasonableness of the inference to be drawn from the employee's evidence. *Id.* at 687-88. Without precise evidence from the Employer, the Appellant may be awarded the claimed wages, even though the award is merely approximate. *Id.*

6. The Appellant failed to carry his initial burden to establish prima facie evidence of a wage payment violation. While he is not required to produce precise evidence of his claimed wages, he is nevertheless required to produce sufficient evidence from which reasonable inferences can be made. *Anderson*, 328 U.S. at 687. For all of the credibility issues described above, the evidence does not establish, even under a relaxed standard, that the Appellant has in

fact performed uncompensated work or that the amount of his work can be discerned by any just and reasonable inference. There is simply no way to calculate an amount of unpaid wages based on any credible evidence. While the Employer should have maintained more detailed and hourly records, this failure is mitigated at least in part by the Appellant's noncompliance with the Employer's timekeeping requirements. Accordingly, on this record, I do not believe it is warranted to shift the burden onto the Employer to produce the precise amount of work performed by the Appellant.

7. The Director adopts and incorporates the Initial Order's Conclusions of Law and Initial Order.

III. DECISION AND ORDER

Consistent with the above Findings of Fact and Conclusion of Law, the Determination of Compliance No. 376-15 is AFFIRMED and the Initial Order of April 15, 2016, is incorporated by reference herein.

DATED at Tumwater this 28 day of February, 2017.



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 by emailing to DirectorAppeal@LNI.WA.GOV, 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 Rodriguez, hereby declare under penalty of perjury under the laws of the State of Washington, that the DIRECTOR'S ORDER was mailed on the 28 day of February 2017, via certified mail, postage prepaid, and by regular mail to the following:

Alfonso Garcia
4815 West Clearwater Lot 127
Kennewick, WA 99336

Amanda Goss, Senior Counsel
Assistant Attorney General
800 Fifth Avenue, Suite 2000
Seattle, WA 98104

Frontier Trading, LLC-1
4712 N. Capital Avenue
Pasco, WA 99301

DATED this 28 day of February, 2017, at Tumwater, Washington.



Lisa Rodriguez

**WASHINGTON STATE
OFFICE OF ADMINISTRATIVE HEARINGS**

In the matter of:

Docket No. 09-2015-LI-00214

Alfonso Garcia,

INITIAL ORDER

Wage Claimant.

Agency: Labor and Industries
Program: Wage Payments
Agency No. DOC -376-15

For translation of this document, please call OAH, 1-800-583-8271. Para la traducción de este documento, por favor llame a la OAH, 1-800-583-8271.

1. ISSUES PRESENTED

1. Whether the Department of Labor and Industries' May 29, 2015, Determination of Compliance concluding that Frontier Trading, LLC does not owe Alfonso Garcia wages for hours worked between April 2011 and October 2013, should be affirmed or reversed.

2. ORDER SUMMARY

1. The Department of Labor and Industries' May 29, 2015, Determination of Compliance is AFFIRMED.

3. HEARING

1. Hearing Date: February 23, 2016
2. Administrative Law Judge: Courtney Beebe
3. Wage Claimant: Alfonso Garcia
 1. Witnesses: Gonzalo Garcia
4. Agency: Dept. of Labor and Industries
 1. Representative: Amanda J. Goss, Assistant Attorney General
 2. Witness: Ana Sanchez, Compliance Specialty Supervisor
 3. Witness: Philip Hill, Manager, Frontier Trading, LLC
 4. Witness: Henry Kidwell, Owner, Frontier Trading, LLC.
5. Exhibits: The Department's Exhibits 1 through 19 were admitted. The Appellant's Exhibit A was admitted.
6. Interpreter: Jose Chavez

4. FINDINGS OF FACT

The Administrative Law Judge finds the following facts by a preponderance of the evidence:

Investigation of Wage Complaint

1. Frontier Trading, LLC ("Employer") fabricates large agricultural trailers and hires individuals to build, refurbish and repair the trailers. During the period at issue, Employer paid some of its employees by the piece and some of its employees hourly depending on the kind of work performed. However, between 2012 and 2013 the Employer was transitioning to a system of paying all employees an hourly wage regardless of the kind of work performed.
2. Alfonso Garcia ("Wage Claimant") began working as a fabricator / welder for Employer for some years prior to 2011. The Employer paid the Wage Claimant and his personally selected crew of six to eight workers by the piece for fabricating trailers. Wage Claimant and his crew were highly productive, very skilled, and performed well. As a result Wage Claimant and his crew worked largely unsupervised and at their own pace. However, Wage Claimant and his crew worked only during the Employer's business hours and did not work weekends.
3. Employer struggled with recordkeeping and tax reporting requirements and issued Wage Claimant a 1099 and considered him and his crew independent contractors for the period of January 2011 through March 2011. However, beginning in April 2011 through October 2013, the Employer treated Wage Claimant and his crew as employees for recordkeeping and tax reporting purposes.
4. The Wage Claimant and his crew netted wages of \$2,300 to \$2,900 per fabricated trailer, depending on the kind of trailer built.
5. In 2012, the Employer began requiring all employees to utilize time cards and began communicating to employees, including the Wage Claimant, that they would be paid an hourly rate for work, instead of by the piece.
6. The Wage Claimant refused to fully comply with the administrative time keeping changes when the Employer imposed the requirement on him during the summer of 2013. The Wage Claimant quit his position with Employer at the end of

October 2013 because he rejected the Employer's imposition of an hourly wage and desired to continue to work by the piece.

7. The Employer retained records of all payments made to Wage Claimant for the period of April 2011 through October 2013. The Employer's records show that the Wage Claimant received regular wage payments when he completed 25% of a trailer, 50% of a trailer, 75% of a trailer, and 100% of a trailer. This payment method allowed the Wage Claimant to receive regular and consistent payment as he performed work, and ensured that the work was fully completed to the benefit and standards of Employer.
8. Adding all of the payments to the Wage Claimant as recorded by the Employer and dividing the amount by the average number of hours expended by the Wage Claimant and his crew to fabricate the trailers, results in the Wage Claimant being paid at or above the minimum wage rate for 2011, 2012, and 2013.

Credibility Finding

9. The testimony of the parties and the documentation presented conflicted on material points. Based upon the evidence presented, and having carefully considered and weighed all the evidence, including the demeanor and motivations of the parties, the reasonableness of the testimony and the totality of the circumstances presented, the Administrative Law Judge finds that the Wage Claimant's testimony regarding the hours worked lacks credibility.
10. The Administrative Law Judge makes this finding based on several observations. First, the Appellant did not present any evidence to corroborate his self-serving testimony, except that of his brother, who was clearly biased in favor of the Wage Claimant and therefore his testimony cannot be given much, if any, weight.
11. Second, the Wage Claimant presented at least four inconsistent accounts of the number of hours worked and the payment he believed he was entitled to receive from the Employer, despite multiple opportunities to provide correct and consistent information and documentation. (Deposition of Wage Claimant, Ex. 18; Worker's Rights Complaint and Attachments, Ex. 5; Handwritten Calendars from Wage Claimant January 2011 through December 2013, Ex. 8; Additional Documents submitted by Alfonso Garcia alleging what Frontier Trading owes him, Ex. 9; Testimony of Alfonso Garcia)
12. Third, the Wage Claimant engaged in a practice of manipulating how and when he punched his time cards in 2013, and therefore the information does not

support his testimony regarding the hours worked during the period the time cards were used by Employer.

13. Fourth, the Wage Claimant has at least one instance of documented fraud perpetrated against a State of Washington government agency and this fact supports the possibility that the Wage Claimant's motivation in making this wage claim is not to recover wages, but to potentially enrich himself to the detriment of his Employer.
14. Lastly, the testimony of Phillip Hill regarding the hours necessary to completely fabricate a trailer and the payments made to the Wage Claimant and his crew is highly credible given the detail and precision with which it was offered and the records that corroborate the testimony.

Jurisdiction

15. The Wage Claimant filed a Worker's Rights Complaint on March 5, 2014.
16. The Department issued its Determination of Compliance on May 29, 2015, concluding that the Employer did not owe the Wage Claimant wages for the period of April 2011 through October 2013.
17. The Wage Claimant filed his request for hearing and appeal on June 29, 2015.
18. The Department forwarded the matter to the Office of Administrative Hearings on September 23, 2015.

5. CONCLUSIONS OF LAW

Based on the facts above, the Administrative Law Judge makes the following conclusions:

Jurisdiction

1. The Office of Administrative Hearings has jurisdiction over the persons and subject matter of this case under RCW.34.05 and RCW 49.48.084.

Applicable Law

2. The Fair Labor Standards Act of 1938 ("FLSA") deals with overtime and minimum wage requirements for employees. The Washington Minimum Wage Act

("WMWA"), RCW 49.46 and the Wage Payment Act, RCW 49.48 ("WPA") are based on the FLSA, but not identical.

3. Wage Payment Act, RCW 49.48 (WPA) authorizes administrative enforcement of wage payment requirements. Upon receipt of a wage complaint that alleges a violation of a wage payment requirement, the Department "shall investigate" and, unless otherwise resolved, "shall" issue either a citation (when finding a wage law violation) or a determination of compliance (when finding no violation) within sixty days. RCW 49.48.083. The Department may extend the time period by providing advance written notice to the employee and the employer setting forth good cause for an extension of the time period. (Id.)
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. RCW 49.52.050(2) provides that it is 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." The provisions of RCW 49.52.050(2) include oral or written agreements for hourly wages in excess of the minimum wage.
6. Under the WPA, 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, 687-688, S.Ct. 1187, 90 L.Ed. 1515 (1946) (federal minimum wage law under Fair Labor & Standards Act); *MacSuga v. County of Spokane*, 97 Wn.App. 435, 445-446, 983 P.2d 1167 (1999). The *prima facie* showing must be supported by a preponderance of the evidence. A preponderance of the evidence is that evidence which, when fairly considered, produces the stronger impression, has the greater weight, and is the more convincing as to its truth when weighed against the evidence in opposition thereto. *Yamamoto v. Puget Sound Lbr. Co.*, 84 Wash. 411, 146 Pac. 861 (1915).
7. RCW 49.46.010(7) defines "wage" as:

[C]ompensation due to an employee by reason of employment, payable in legal tender of the United States or checks on banks convertible into cash on demand at full face value, subject to such deductions, charges, or allowances as may be permitted by rules by director.

RCW 49.46.010(7).
8. An employer is required to pay overtime when an employee works over 40 hours

in a work week. RCW 49.46.130(1). The overtime rate is not less than one and a half times the regular rate at which the worker is employed. *Id.*

9. Hours worked means all hours which the worker is authorized or required by the business to be on the premises or at a prescribed work place. This could include travel time, training, and meeting time, wait time, on-call time, and time for putting on and taking off uniforms and also may include meal periods. RCW 49.48 and 49.46 and 49.52.
10. The Department's Administrative Policy ES.C.2 states in part:

"Hours Worked" means all hours during which the employee is authorized or required, known or reasonably believed by the employer to be on duty on the employer's premises or at a prescribed work place. An analysis of "hours worked" must be determined on a case-by-case basis, depending on the facts. See WAC 296-126-002(8).

The Department's interpretation of "hours worked" means all work requested, suffered permitted or allowed . . . "Hours worked" includes, for example a situation where an employee may voluntarily continue to work at the end of the shift. The employee may desire to finish an assigned task or may wish to correct errors, prepare time reports or other records. The reason or pay basis is immaterial. If the employer knows or has reason to believe that the employee is continuing to work, such time is working time.

An employer may not avoid or negate payment of regular or overtime wages by issuing a rule or policy that such time will not be paid or must be approved in advance. If the work is performed, it must be paid. It is the employer's responsibility to ensure that employees do not perform work that the employer does not want performed.

11. Under the FLSA, the employer is liable if it knew or should have known the employee was performing uncompensated work. *Forrester v. Roth's I.G.A. Foodliner, Inc.*, 646 F.2d 413, 414 (9th Cir. 1981); *Davis v. Food Lion*, 792 F.2d 1274, 1276 (4th Cir.1986). "If an employer establishes a reasonable process for an employee to report uncompensated work time the employer is not liable for non-payment if the employee fails to follow the established process," because the employee has prevented the employer from "knowing its obligation to compensate the employee and thwarts the employer's ability to comply with the FLSA." *White v. Baptist Memorial Health Care Corporation*, 699 F.3d 869 (6th Cir.2012).
12. A bona fide dispute exists between an employee and employer if there is a "fairly debatable" dispute over whether the employee worked the hours claimed. *Schilling v. Radio Holdings, Inc.*, 132 Wn.2d 152, 162 (1998).

Analysis

13. The primary issue for resolution is whether the Wage Claimant was compensated for all the hours worked, or whether the Wage Claimant did not receive full compensation due to the Employer's utilization of the pay by the piece method and the transition to the hourly method of payment.
14. In cases where there is no set schedule of work and a regular method of time keeping is not utilized by the Employer, the Administrative Law Judge is resigned to relying on the available documentation and the credibility of the witnesses.
15. Here, the as discussed above, the Wage Claimant's testimony was not only uncorroborated, but inconsistent and lacking in credibility such that it cannot be relied upon. Therefore, there is no accounting of the hours the Wage Claimant actually worked or the wages he believes he is entitled to receive from Employer.
16. On the other hand, the Employer presented documentation of the payments to the Wage Claimant, as well as a thorough and credible explanation regarding both the pay by the piece method of wage payment and the hourly wage method of payment that the Employer began to utilize in 2013.
17. Given the posture of the evidence and the circumstances presented, it must be concluded that it is more likely than not that the Employer paid the Wage Claimant all wages due for the work performed.
18. The Department has shown by a preponderance of the evidence that the May 29, 2015, Determination of Compliance concluding that the Wage Claimant is not owed the wages claimed should be affirmed.

6. INITIAL ORDER

1. The Department of Labor and Industries' May 29, 2015, Determination of Compliance is AFFIRMED.

Dated: April 15th, 2016.



Courtney Beebe
Administrative Law Judge
Office of Administrative Hearings

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:

Director
Department of Labor and Industries
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. 09-2015-LI-00214

I certify that true copies of this document were served from Tacoma, Washington upon the following as indicated

<p>Alfonso Garcia 4815 West Clearwater Lot 127 Kennewick, WA 99336</p> <p>91 7199 9991 7036 4649 6984</p>	<p><input checked="" type="checkbox"/> First Class Mail, Postage Prepaid <input checked="" type="checkbox"/> Certified Mail, Return Receipt <input type="checkbox"/> Hand Delivery via Messenger <input type="checkbox"/> Campus Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> E-mail</p>
<p>Amanda Goss Office Of The Attorney General 800 5th Ave Ste 2000 Seattle, WA 98104</p>	<p><input checked="" type="checkbox"/> First Class Mail, Postage Prepaid <input type="checkbox"/> Certified Mail, Return Receipt <input type="checkbox"/> Hand Delivery via Messenger <input type="checkbox"/> Campus Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> E-mail</p>
<p>Frontier Trading, LLC-1 4712 N Capital Avenue Pasco, WA 99301</p>	<p><input checked="" type="checkbox"/> First Class Mail, Postage Prepaid <input type="checkbox"/> Certified Mail, Return Receipt <input type="checkbox"/> Hand Delivery via Messenger <input type="checkbox"/> Campus Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> E-mail</p>

Date: Friday, April 15, 2016

OFFICE OF ADMINISTRATIVE HEARINGS



Melanie Barnhill
Legal Assistant