

DIRECTOR OF THE DEPARTMENT OF LABOR & INDUSTRIES
STATE OF WASHINGTON

In re: Yellow Cab Express LLC dba
Tacoma Yellow Cab,

Citation and Notice of Assessment Nos.
W-673-15, W-674-15, W-675-15, W-676-15

OAH Docket No. 09-2015-LI-00220

No. 2017-005-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 July 5, 2016, having considered the petition for review filed by Yellow Cab Express LLC dba Tacoma Yellow Cab (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 issue of whether the Appellant timely appealed the Initial Order. **I conclude that the Appellant failed to timely appeal the Initial Order and therefore its appeal is DISMISSED.**

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 July 5, 2016, following a motion hearing that was held on June 28, 2016. The Initial Order denied the

Appellant's motion to vacate a default order, which was entered on June 2, 2016, and dismissed the appeal.

2. The Initial Order instructed the parties how to file a petition for administrative review. It included the Director's email, mailing, and physical addresses. It further notified the parties that the order becomes final if no appeal is received within 30 days: "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."

3. The Director did not receive a petition for review within 30 days of service of the Initial Order.

4. The Appellant mailed a letter, dated July 13, 2016, to Sarah Reyneveld, Assistant Attorney General, that requested administrative review. AAG Reyneveld represented the Employment Standards Program of the Department in the litigation before the Office of Administrative Hearings. AAG Reyneveld did not represent the Director. The letter was not received by the Director.

5. On November 18, 2016, more than four months after service of the Initial Order, the Director received a petition for review from the Appellant. The petition attached a copy of the July 13, 2016 letter (that was sent to AAG Reyneveld). The Appellant claimed that it intended to send the July 13, 2016 letter to the Director at the same time, but that the failure was due to a "mechanical error." No evidence was provided to substantiate the claimed mechanical error.

6. The Director requested briefing on the issue of whether the Appellant timely appealed the Initial Order. The Appellant submitted responsive briefing on December 19, 2016, and December 20, 2016. In this briefing, the Appellant makes no further mention of the purported mechanical error and instead claims that one of its employees had "forgotten" to send

the appeal to the Director due to a medical condition. The Department submitted responsive briefing on January 30, 2017. Yellow Cab was offered the opportunity file a reply brief by March 1, 2017, but did not do so. The record closed on that date.

7. On January 19, 2017, and January 20, 2017, the Appellant submitted additional letters, and attachments thereto, that relate to the underlying citations for wage payment violations.

II. CONCLUSIONS OF LAW

1. The Appellant did not timely appeal the Initial Order as required by RCW 49.48.084 and RCW 34.05.010(6).

2. Any appeal of an initial order must be filed with the Director within 30 days. RCW 49.48.084(3). Appeals under the Wage Payment Act must proceed in accordance with the Administrative Procedures Act, chapter 34.05 RCW, which defines “filing” as “delivery of the document to a place designated by the agency by rule for receipt of official documents, or in the absence of such designation, at the office of the agency head.” RCW 34.05.010(6); RCW 49.48.084(3). In this case, that means delivery of the appeal to the Director. If the appeal is not filed with the Director within 30 days, then the initial order becomes final and binding, and not subject to further appeal. RCW 49.48.084(5).

3. The Appellant failed to appeal to the Director within the 30-day timeframe and therefore the Initial Order is final and binding, and not subject to appeal.

4. The Appellant did not substantially comply with the appeal requirements of RCW 49.48.084 and RCW 34.05.010(6). The substantial compliance doctrine allows for appeals with procedural imperfections but requires compliance with the actual objectives of the statute. *City of Seattle v. Pub. Emp't Relations Comm'n*, 116 Wn.2d 923, 928-29, 809 P.2d 1377 (1991). Courts have uniformly held that a party that fails to achieve the statute's objectives within the timelines

has not substantially complied with the statute. *E.g.*, *Petta v. Dep't of Labor & Indus.*, 68 Wn. App. 406, 409-10, 842 P.2d 1006 (1992). The objectives of a filing or service deadline are achieved only if the document is actually filed or served within the deadline: one either complies with a deadline or one does not. *City of Seattle*, 116 Wn.2d at 928-29. Noncompliance with a statutory mandate, such as a filing deadline, is not substantial compliance. *Petta*, 68 Wn. App. at 409-10.

5. The Appellant's failure was not a procedural imperfection but rather complete noncompliance with the express statutory filing deadline. Sending an appeal letter to the assistant attorney general who represented the Employment Standards Program in this context, rather than the Director, does not constitute substantial compliance. The Employment Standards Program is a party before the Director, and AAG Reyneveld acts on its behalf, not the Director's. The Appellant failed to comply with the filing deadline and therefore the Initial Order is final and binding, and the appeal should be dismissed.

6. The letters and attachments submitted by the Appellant on January 19, 2017, and January 20, 2017, relate to the underlying citations for wage payment violations and may not be considered here. It does not appear this evidence was part of the administrative hearing record, which precludes review 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). In any event, the evidence is irrelevant to the issue of timeliness and therefore does not support review in this case.

//

//

//

III. DECISION AND ORDER

Consistent with the above Findings of Fact and Conclusion of Law, the Appellant's appeal of the Initial Order served on July 5, 2016, is hereby DISMISSED.

DATED at Tumwater this 4 day of April, 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 4 day of April 2017, via certified mail, postage prepaid, and by regular mail to the following:

Sarah Reyneveld
Office of the Attorney General
800 Fifth Ave Ste. 2000
Seattle, WA 98104

Ali Nourbehesht
Yellow Cab Express, LLC
PO Box 111030
Tacoma, WA 87411

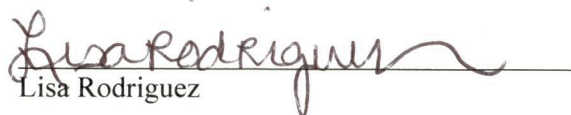
Christina Sams
106 7th Avenue N
Payette, ID 83661

Anthony Nix
2040 S 327th Street, #DD201
Federal Way, WA 98003

Danielle Morton
4123 D Street
Bremerton, WA 98312

Allieha Ghee
1421 S J Street, #120
Tacoma, WA 98405

DATED this 4 day of April, 2017, at Tumwater, Washington.


Lisa Rodriguez

WASHINGTON STATE
OFFICE OF ADMINISTRATIVE HEARINGS

In the matter of the assessment of wage
payment violations against:

Yellow Cab Express LLC dba Tacoma
Yellow Cab, and
Ali Nourbehesht and spouse, and
Stephen Bowman and spouse, and
the marital communities thereof,

Appellants.

Docket No. 09-2015-LI-00220

**INITIAL ORDER DENYING
APPELLANTS' MOTION TO
VACATE THE DEFAULT ORDER
DISMISSING THE APPEAL**

Agency: Dept. of Labor & Industries
Program: Wage Payments
Agency Nos. W-673-15, W-674-15,
W-675-15, & W-676-15

1. ISSUES

- 1.1. Should the Appellants' Motion to Vacate the Default Order Dismissing the Appeal be granted?

2. ORDER SUMMARY

- 2.1. The Appellants' Motion to Vacate the Default Order Dismissing the Appeal is denied.

3. MOTION HEARING

- 3.1. Hearing Date: June 28, 2016
- 3.2. Administrative Law Judge: Terry A. Schuh
- 3.3. Appellants: Yellow Cab Express LLC dba Tacoma Yellow Cab, and Ali Nourbehesht and spouse, and Stephen Bowman and spouse, and the marital communities thereof
- 3.3.1. Representatives: Joshua Smith, Office Manager, and Ali Nourbehesht, Operations Manager
- 3.4. Agency: Department of Labor and Industries

3.4.1. Representative: Sarah Reyneveld, Assistant Attorney General

3.5. Documents Considered: The Appellants' Motion to Vacate the Default Order, in letter form; oral argument offered on June 28, 2016, and the pleadings previously filed in this matter.

4. DISCUSSION

- 4.1. The Office of Administrative Hearings (OAH) issued to the parties a Notice of Prehearing Conference on October 7, 2015, directing the parties to appear by telephone at a prehearing conference on October 27, 2015. OAH's phone number appears in the footer. The notice advised that failure to appear could result in entry of a default order dismissing the appeal.
- 4.2. Subsequently, OAH granted a request filed by the Department of Labor and Industries to continue the prehearing conference. On November 2, 2015, OAH issued notice to the parties that the prehearing conference would occur on November 10, 2015. The notice included OAH's phone number in the footer and at least three times in the body of the notice. The notice advised that failure to appear could result in entry of a default order dismissing the appeal.
- 4.3. On November 17, 2015, OAH issued to the parties a Prehearing Conference Order and Notice of Hearing. OAH's toll-free telephone number appeared in the footer and its local telephone number appeared at least three times in the body. The notice advised that failure to participate "in any stage of the proceeding" could result in a default order dismissing the appeal. The notice also advised parties of the deadline for filing and serving Witness Lists, Exhibit Lists, and marked Exhibits, and how to do so.
- 4.4. On January 25, 2016, OAH issued to the parties Notice of Hearing on Department's Motion for Continuance. OAH's telephone number appeared in the footer and at least twice in the body of the notice. The notice advised that failure to attend or participate "in a hearing or other stage of an adjudicative proceeding" could result in a default order dismissing the appeal.
- 4.5. Both Joshua Smith and Ali Nourbehesht appeared at the telephonic hearing addressing the motion for continuance on February 1, 2016. After I granted the motion for continuance, the parties and I reconstructed the

case schedule. The parties agreed that May 13, 2016, would be the deadline for filing and serving Witness Lists, Exhibit Lists, and marked Exhibits. The parties agreed to participate in the Status Conference by telephone on May 26, 2016, at 10:00 a.m. On February 8, 2016, OAH issued to the parties the Order Granting Continuance and Notice of Hearing and Amended Case Schedule. The document included the deadline for filing Witness Lists, Exhibit Lists, and marked Exhibits. The document referred the parties to the Prehearing Conference Order and Notice of Hearing issued on November 17, 2015, and said that it still controlled the proceeding except for the dates specifically changed by the order granting continuance. The document advised the parties of the Status Conference on May 26, 2016, at 10:00 a.m. by telephone and how to appear. The document advised the parties that failure to attend the Status Conference could result in a default order dismissing the appeal. OAH's telephone number appears in the footer and at least twice in the body of the document.

- 4.6. The Appellants did not file a Witness List, Exhibit List, or marked Exhibits at any time, much less by May 13, 2016.
- 4.7. The Department filed its Witness List, Exhibit List, and marked Exhibits on May 11, 2016.
- 4.8. The Appellants did not appear at the Status Conference on May 26, 2016, at 10:00 a.m. Consequently, the Department moved for default and I granted the Department's motion. On June 2, 2016, OAH issued to the parties the Initial Order Dismissing Appeal – the result of granting the Department's motion for default.
- 4.9. The Appellants filed their motion to vacate the default order on June 6, 2016.
- 4.10. On or about June 14, 2016, the Appellants filed several documents with OAH. It was not clear whether the Appellants intended these documents to constitute exhibits if their Appeal was reinstated or if they intended these documents to support their motion to vacate the default order. At the hearing on the motion to vacate, the Appellants said that the primary purpose of the documents was to constitute evidence. The predominant theme of the documents is to express that Christina Sams, one of the

Wage Claimants in these proceedings, was the general manager during the relevant times, was completely responsible for the alleged wage violations, was dishonest and irresponsible in performing her duties, and should be held accountable for the alleged wage violations. The Appellants also allege that Ms. Sams misreported the hours she worked, alleging at times that she worked when she clearly did not work.

4.11. At the hearing, Mr. Smith said that the Appellants failed to attend the Status Conference because they forgot the date because they were busy. Moreover, the Appellants were confused by the Department's Witness List that they received from Ms. Reyneveld, the Assistant Attorney General representing the Department in this matter. They called Ms. Reyneveld's office to address that confusion but did not receive a response. The Appellants did not call OAH because the confusing document was from the Attorney General's Office. The Appellants did not clarify what was confusing about the Witness List and how that confusion contributed to their failure to attend the Status Conference. Mr. Smith characterized the Appellants' failure to attend the Status Conference as a "mistake".

4.12. Ms. Reyneveld argued that the Department would suffer hardship if the default order is vacated because the Wage Claimants would be delayed further in realizing their wages. She also argued that the Appellants were not prepared to proceed to an evidentiary hearing because they have not filed or served a Witness List, an Exhibit List, or any marked Exhibits. Lastly, she argued that it was not material who was in charge of payroll.

4.13. At issue in this hearing, as agreed to at the prehearing conference and as recited in the Prehearing Conference Order and Notice of Hearings is: "Regarding Citation and Notice of Assessment Nos. W-673-15, W-674-15, W-675-15, and W-676-15, dated June 12, 2015: Did the Appellants fail to pay wages owed as alleged; if so, did that failure violate statutes and/or regulations as asserted; if so, are the Appellants liable for wages, interest, and penalties, and in what amounts?"

4.14. A party subject to a default and dismissal order may petition the issuing tribunal for an order vacating the default and dismissal order. Revised Code of Washington (RCW) 34.05.440(3). However, Chapter 34.05 RCW, which is the Administrative Procedures Act, is silent as to the basis for granting or denying such a motion. The Model Rules of Procedure located

in Chapter 10-08 Washington Administrative Code, are equally silent. Therefore, I refer to Civil Rule (CR) 60(b)(1) and CR 55(c)(1), as well as to *White v. Holm*, 73 Wn.2d 348, 438 P.2d 581 (1968), for guidance.

4.15. CR 55(c)(1) provides broadly that the tribunal may vacate a default order for good cause shown. CR 60(b)(1) more specifically offers several bases for vacating an order in general: mistakes, inadvertence, surprise, excusable neglect, and irregularity. The *White* court, even more specifically, identified four factors to consider: does the defaulted party have at least a prima facie showing of a defense to the allegation; was the defaulted party's failure to appear caused by mistake, inadvertence, surprise, or excusable neglect; did the defaulted party act with due diligence after it was notified of the default; will substantial hardship result to the opposing party if the default is vacated. *White* at 352.

4.16. The first two elements are the most important factors. *White* at 352. Moreover, if the defaulted party shows a "strong or conclusive defense", then the other three factors offer little weight to the decision. *White* at 352.

4.17. Here, the Appellants filed a motion to vacate the default four days after the default order issued. That demonstrated due diligence. The Appellants have satisfied the third element of *White*.

4.18. Further, the only factors the Department issued for consideration of substantial hardship if the default is vacated is that the Appellants failed to file a Witness List, an Exhibit List, and marked Exhibits, and that the Wage Claimants would be further delayed in obtaining the wages allegedly owed them. However, the Wage Claimants are not parties. Therefore, whether delay creates a hardship to them is not relevant to this analysis. To be sure, allowing the Appellants to proceed to hearing without having timely filed a Witness List, an Exhibit List, and marked Exhibits might prejudice, and harm, the Department. But that would result from a ruling on that matter, and not directly on vacating a default. Thus, the Department has not established that it will encounter substantial hardship if the default is vacated. The Appellants have satisfied the fourth element of *White*.

4.19. However, the third and fourth elements are factors only if the first two elements are not sufficiently clear for the tribunal to rely upon. Moreover, if

the Appellants do not show a “strong or conclusive defense”, the key then is the Appellant’s showing as to the second element.

4.20. The first element is whether the Appellants can show a “strong or conclusive defense”, or at least a prima facie defense. The Appellants intend to prove and argue that Ms. Sams, a Wage Claimant and former general manager, lied at least in part about the hours she worked and was solely and directly responsible for the Appellants’ alleged failure to properly pay the Wage Claimants. Accordingly, the Appellants might be able to persuade me – depending upon the evidence -- to reduce the amount of wages allegedly owed to Ms. Sams. However, as to the other Wage Claimants, Ms. Sams was acting as the Appellants’ agent and her conduct is attributable to the Appellants. I am not persuaded, within the context of this motion, that casting blame on her is likely under the law to relieve the Appellants from liability for wages it should have paid to the Wage Claimants, along with interest and penalties. Accordingly, the Appellants have not shown a strong and conclusive defense but, rather, at best, a prima facie defense, and that perhaps no more than as to part of the wages allegedly owed to one of the four Wage Claimants. Therefore, the Appellants have satisfied the first element of *White*, but only just barely. Thus, here, the success of the Appellants’ motion lies within the second element. In other words, the Appellants must clearly show good cause for failing to appear at the Status Conference.

4.21. To satisfy the second element, the Appellants must show that their failure to attend the Status Conference was a result of mistake, inadvertence, surprise, or excusable neglect. Here, the Appellants acknowledged that they knew about the Status Conference but forgot or were confused about the date. However, as recited in paragraphs 4.1 through 4.5 above, the Appellants were given proper notice of the Status Conference, were repeatedly warned that failing to appear could result in a default order dismissing their appeal, and were provided on every document issued by OAH a telephone number with which to reach OAH. In other words, the Appellants knew or should have known about the Status Conference and the cost of not appearing. The parties could have reviewed their documents to confirm the date and time. Finally, the parties could have called OAH to confirm that date and time. Therefore, the Appellants’ failure to appear was not caused by mistake, inadvertence, surprise, or excusable

neglect. Thus, the Appellants have failed to satisfy the second element of *White*.

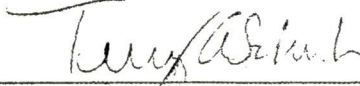
4.22. Accordingly, I hold that the Appellants failed to satisfy the *White* test. Therefore, the Appellants have failed to establish good cause for having failed to attend the Status Conference on May 26, 2016. Thus, the Appellants' motion to vacate the default order should be denied.

5. INITIAL ORDER

IT IS HEREBY ORDERED THAT:

5.1. The Appellants' Motion to Vacate the Default Order Dismissing the Appeal (entitled the Initial Order Dismissing Appeal) issued on June 2, 2016, is DENIED.

Issued from Tacoma, Washington, on the date of mailing.



Terry A. Sobuh
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

¹ RCW 49.48.084 and RCW 34.05.464.

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.

CERTIFICATE OF MAILING IS ATTACHED

² RCW 49.48.084 and Chapter 34.05 RCW.

CERTIFICATE OF SERVICE FOR OAH DOCKET NO. 09-2015-LI-00220

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

Tacoma Yellow Cab #1 dba Yellow Cab Exp, LLC PO Box 111030 Tacoma, WA 98411 91 7199 9991 7036 9384 0952	<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
Sarah Reyneveid Office of The Attorney General 800 Fifth Ave Ste 2000 Seattle, WA 98104	<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
Christina Sams PO Box 8842 Moreno Valley, CA 92552	<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
Anthony Nix 17303 Park Ave S Spanaway, WA 98387	<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
Allieha Ghee 1421 S J St Tacoma, WA 98405	<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
Danielle Morton 7820 Enchanted Hills Blvd NE Rio Rancho, NM 87144	<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

Date: Tuesday, July 05, 2016

OFFICE OF ADMINISTRATIVE HEARINGS



Melanie Barnhill
 Legal Assistant