

DIRECTOR OF THE DEPARTMENT OF LABOR & INDUSTRIES
STATE OF WASHINGTON

In re:

DANIEL MAHONY,

Appellant,

Citation and Notice of Assessment No. W-
292-16

OAH Docket No. 05-2016-LI-00156

No. 2017-009-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 petition for administrative review filed by Daniel Mahony (the Appellant) 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 Office of Administrative Hearings issued and served the Initial Order on November 10, 2016.
2. On December 12, 2016, the Director received a timely filed petition for administrative review from the Appellant.

NO. 2017-009-WPA

DIRECTOR'S ORDER

RCW 49.48.084(4); RCW 34.05

1

OFFICE OF THE DIRECTOR
DEPARTMENT OF LABOR & INDUSTRIES
P.O. BOX 44001
OLYMPIA, WA 98504-4001

3. The Director adopts and incorporates all the Initial Order's Findings of Fact.
4. The Director also adopts and incorporates the Order's "Issue Presented," "Order Summary," and "Hearing" summary.

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 all the Initial Order's Conclusions of Law.
Consistent with the above Findings of Fact and Conclusion of Law, the Citation and Notice of Assessment is REVERSED and the Initial Order of November 10, 2016, is incorporated by reference herein.

DATED at Tumwater this 8 day of June, 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 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

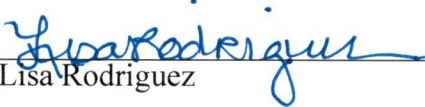
I, Lisa Rodriguez, hereby declare under penalty of perjury under the laws of the State of Washington, that the DIRECTOR'S ORDER was mailed on the 8 day of June 2017, to the following via regular and certified mail, postage prepaid:

Daniel Mahony
P.O. Box 1277
Quincy, WA 98848

Frieda Zimmerman, AAG
Attorney General's Office
1116 West Riverside Ave., Ste. 100
Spokane, WA 99201

Jeffrey Behling
Behling Dairy Management, Inc.
PO Box 815
Sunnyside, WA 98944

DATED this 8 day of June, 2017, at Tumwater, Washington.



Lisa Rodriguez

**WASHINGTON STATE
OFFICE OF ADMINISTRATIVE HEARINGS**

In the matter of:

Behling Dairy Management Inc and
Jefferson Behling,

Appellant.

Docket No. 05-2016-LI-00156

INITIAL ORDER

Agency: Department of Labor and Industries
Program: Wage Payments
Agency No. W-292-16

1. ISSUES PRESENTED

- 1.1 Whether the Department of Labor and Industries' February 5, 2016 Citation and Notice of Assessment concluding Behling Dairy Management Inc. and Jefferson Behling owe wage claimant Daniel Mahoney, \$1,787.21 in wages and interest for work performed between August 7, 2015 and September 29, 2015, should be affirmed or reversed.
- 1.2 Whether Behling Dairy Management Inc. and Jefferson Behling are liable for a \$1,000.00 penalty for failure to pay wages, as set forth in the Department of Labor and Industries' February 5, 2016, Citation and Notice of Assessment.

2. ORDER SUMMARY

- 2.1 The Department of Labor and Industries' February 5, 2016 Citation and Notice of Assessment concluding Behling Dairy Management Inc. and Jefferson Behling, owe wage claimant Daniel Mahoney, \$1,787.21 in wages and interest for work performed between August 7, 2015 and September 29, 2015, is REVERSED.
- 2.2 Behling Dairy Management Inc. and Jefferson Behling are not liable for a \$1,000.00 penalty for failure to pay wages. The Department of Labor and Industries' February 5, 2016, Citation and Notice of Assessment is REVERSED.

3. HEARING

Hearing	September 26, 2016
Administrative Law Judge	Courtney E. Beebe
Appellant	Behling Dairy Management Inc. and Jeffrey Behling
Department	Department of Labor and Industries
Department Rep.	Frieda Zimmerman, Asst. Attorney General
Department Witnesses	Yesenia Sabedra, Industrial Relations Agent; Daniel Mahoney, Wage Claimant
Exhibits	Department's Exhibits 1 through 16 were admitted, except for Exhibit 8 which was excluded.

4. FINDINGS OF FACT

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

Employment of Wage Claimant

- 4.1 Behling Dairy Management, Inc. operates a dairy business in Othello, Washington, and is owned by Jeffrey Behling and his spouse ("Appellant"). Appellant employed Jefferson Behling, son of Jeffrey Behling, as a manager of the dairy until the end of May 2015. Jefferson Behling relocated to Arizona in May 2015 and ceased involvement with the Appellant's business.
- 4.2 Daniel Mahoney ("Wage Claimant") lived in his car with a number of dogs he cared for, in the Othello, Washington area. The Wage Claimant's car was severely damaged, and he obtained a new vehicle. The Wage Claimant needed to relocate to a safe location so that he and his dogs could reside in the vehicle without disturbance.
- 4.3 Jeffrey Behling believes in engaging in charitable acts to provide support and assistance others. In July 2015, Jeffrey Behling allowed the Wage Claimant to park his car on the Appellant's property so that the Wage Claimant could care for his animals. Each week Jeffrey Behling provided the Wage Claimant with \$100.00 to assist the Wage Claimant with self-support.
- 4.4 While the Wage Claimant resided on the property he became familiar with some of the Appellant's employees and the Appellant's dairy operation. Jeffrey Behling never hired the Wage Claimant to perform work at the Appellant's business. Jefferson Behling never hired the Wage Claimant to perform work at the Appellant's business. No employee of the Appellant ever hired the Wage Claimant to perform work at the Appellant's business. The Wage Claimant did not perform work at the Appellant's business between August 7, 2015 and September 29, 2015.

Competency and Credibility Findings

- 4.5 A person is competent to testify when they have personal knowledge of facts and they are able to impart that information under oath in a meaningful manner. The Wage Claimant was largely unable to answer the questions posed to him by conveying information in a meaningful manner, and instead incoherently made inconsistent statements that did not provide answers to the questions posed by the Department's Representative. The Administrative Law Judge observed that while the Wage Claimant was polite and eager to participate, the Wage Claimant appeared to suffer from an inability to effectively communicate any facts in a manner that was meaningful to the proceedings, and was not able to assist the Department Representative in preparing for the hearing despite multiple attempts

to contact him and obtain information from him. Given these circumstances, it appears that the Wage Claimant's competency is at a minimum, highly suspect.

- 4.6 The testimony of the parties conflicted on material points, particularly whether the Wage Claimant was ever actually hired as an employee or performed any work. 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 employment relationship lacks credibility.
- 4.7 In his Worker's Rights form and subsequent supporting documentation, the Wage Claimant stated that it was Jefferson Behling the hired him to perform work. However, Jefferson Behling did not work at the Appellant's business between August and September 2015. Additionally, the Wage Claimant's testimony at the hearing about the rate of pay, the time frame the work was performed, and kind of work performed, was not only incoherent, but inconsistent with the documentation he had provided to the Department on prior occasions.

Jurisdiction

- 4.8 The Department of Labor and Industries issued Appellant a Citation and Notice of Assessment on February 5, 2016. The Citation and Notice of Assessment was issued to Behling Dairy Management, Inc. and Jefferson Behling and spouse, not Jeffery Behling. The Department's Citation and Notice of Assessment assessed Appellant \$1,787.21 in wages, plus interest and a \$1,000.00 penalty.
- 4.9 The Appellant filed a letter of appeal and request for hearing on March 7, 2016.
- 4.10 The matter was forwarded to the Office of Administrative Hearings on May 31, 2016.

5. CONCLUSIONS OF LAW

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

Jurisdiction

- 5.1 The Office of Administrative Hearings has jurisdiction over the persons and subject matter of this case under RCW 34.05, RCW 49.46, RCW 49.48, and RCW 49.52.

Burden of Proof

- 5.2 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 US. 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.

- 5.3 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).
- 5.4 Substantial evidence must be presented and must be "sufficient to persuade a fair-minded person of the truth or correctness of the matter." *Ongom v. Dept. of Health*, 124 Wn App. 935, 948-49, 104 P.3d 29 (2005), reviewed on other grounds, 155 Wn.2d 1001, 122 P.3d 185 (2005).

Evidentiary Ruling Regarding Department's Exhibit 8

- 5.5 The Department offered Exhibit 8, a hand written letter and accounting of hours worked, as evidence in support of the Wage Claimant's claim for wages. At the hearing, the Appellant objected to the document for lack of foundation and authenticity. The Wage Claimant was able to authenticate the document by testifying that he was the person who wrote the document and submitted it to the Department on October 2, 2015. However, the Wage Claimant was not able to testify that Exhibit 8, pages 3 through 9, was in fact an accurate record of the days, times and hours he worked for the Appellant.
- 5.6 Given the lack of foundation for Exhibit 8, pages 3 through 9, the Administrative Law Judge concludes that Exhibit 8, pages 3 through 9 is excluded as inadmissible.

Applicable Law and Analysis

- 5.7 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. The Wage Claimant seeks wages as per the WMWA and WPA.
- 5.8 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.)

5.9 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).

5.10 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.

5.11 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).

5.12 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. WAC 296-126-002(8). 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, 49.46 and 49.52.

5.13 When an employee ceases to work for an employer, “the wages due him or her on account of his or her employment shall be paid to him or her at the end of the established pay period.” RCW 49.48.010.

5.14 In cases where there is no documentation of work performed or of the employment relationship, the Administrative Law Judge is resigned to relying on the testimony of the parties and making findings and drawing conclusions based on the corroboration and credibility of the testimony given. As found above, the Wage Claimant’s competency as a witness is highly questionable. Regardless of competency, the Wage Claimant’s incoherent testimony lacks credibility and there is no admissible supporting documentation to corroborate his otherwise inconsistent statements regarding the hours worked or the work performed.

5.15 On the other hand, the Appellant has presented credible testimony that it would have been impossible for Jefferson Behling to have offered the Wage Claimant a job because Jefferson Behling had left the company and moved out of state.

Moreover, the Appellant provided credible testimony that 1) there was no work for the Wage Claimant that the Wage Claimant had the skills to perform, 2) that he, Jeffery Behling, did not offer the Wage Claimant any work, and 3) that Appellant simply allowed the Wage Claimant to park his car on a portion of the Appellant's property.

- 5.16 Given these circumstances, the Department has not met its burden and shown by a preponderance of the evidence that the Appellant ever employed the Wage Claimant or that the Wage Claimant actually ever performed work for the Appellant, at an agreed rate of pay, during the period of August 7, 2015 through September 29, 2015.¹
- 5.17 The Department's February 5, 2016, Citation and Notice of Assessment must be reversed.

Interest and Penalties

- 5.18 Because no violation occurred, the Appellant is not liable for interest and penalties on the unpaid wages as per RCW 49.48.083. The Department's February 5, 2016, Citation and Notice of Assessment must be reversed as to the assessment of interest and penalties.

6. INITIAL ORDER

- 6.1 The Department of Labor and Industries' February 5, 2016, Citation and Notice of Assessment is REVERSED.

Dated: October 6, 2016.



Courtney Beebe
Administrative Law Judge
Office of Administrative Hearings

¹ It must be noted that the February 5, 2016, Citation and Notice of Assessment was issued to "Jefferson Behling and Spouse," not to "Jeffrey Behling and Spouse." The Department's Exhibit 6, page 2 shows that the Department was aware on October 22, 2015, that Jefferson Behling, Jeffery Behling's son, had no ownership interest in the corporation because he is not listed as an owner or governing person on the business license record obtained by the Department. Only Jeffery Behling and his spouse are listed as governing persons with an ownership interest. Certainly, the failure to properly name the persons with the actual ownership interest as the liable parties in the February 5, 2016, Citation and Notice of Assessment would be grounds for dismissal as to Jefferson Behling and Jeffery Behling. However, because the February 5, 2016 Citation and Notice of Assessment is reversed on other grounds, this issue will not be addressed.

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.² 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.³

If you timely file a Petition for Administrative Review, the Director will conduct an administrative review under chapter 34.05 RCW.

CERTIFICATE OF MAILING ATTACHED

² RCW 49.48.084 and RCW 34.05.464.

³ RCW 49.48.084 and Chapter 34.05 RCW.

CERTIFICATE OF SERVICE FOR OAH DOCKET NO. 05-2016-LI-00156

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

<p>Jeffrey Behling Behling Dairy Management Inc. PO Box 815 Sunnyside, WA 98944 Appellant 91 7199 9991 7036 8809 4506</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>Frideda Zimmerman Assistant Attorney General 1116 Riverside Avenue, Suite 100 Spokane, WA 99201 Agency Representative</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>Daniel Mahony 17773 23-Road Se Mattawa, WA 99349 Wage Claimant</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: Thursday, October 06, 2016

OFFICE OF ADMINISTRATIVE HEARINGS



Melanie Barnhill
Legal Assistant

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DATE & TIME	STATUS OF ITEM	LOCATION
November 2, 2016 , 10:55 am	Delivered, To Original Sender	TACOMA, WA 98402
Your item has been delivered to the original sender at 10:55 am on November 2, 2016 in TACOMA, WA 98402.		
November 2, 2016 , 6:54 am	Arrived at Unit	TACOMA, WA 98402
November 2, 2016 , 12:54 am	Departed USPS Facility	TACOMA, WA 98413
November 1, 2016 , 1:25 pm	Arrived at USPS Facility	TACOMA, WA 98413
October 31, 2016 , 10:41 pm	In Transit to Destination	
October 30, 2016 , 9:32 pm	Departed USPS Facility	SPOKANE, WA 99224
October 30, 2016 , 10:41 am	Arrived at USPS Facility	SPOKANE, WA 99224
October 27, 2016 , 2:44 pm	Unclaimed/Max Hold Time Expired	SUNNYSIDE, WA 98944
October 11, 2016 , 8:53 am	Available for Pickup	SUNNYSIDE, WA 98944
October 11, 2016 , 2:05 am	Departed USPS Facility	YAKIMA, WA 98903
October 9, 2016 , 2:16 pm	Arrived at USPS Facility	YAKIMA, WA 98903
October 9, 2016 , 1:01 pm	Accepted at USPS Origin Facility	OLYMPIA, WA 98501
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