DIRECTOR OF THE DEPARTMENT OF LABOR & INDUSTRIES
STATE OF WASHINGTON

In re: Sunshine Motel Inn LLC and Rajiv Sauson and spouse individually, Citation and Notice of Assessment Nos. W-157-16 & W-158-16 OAH Docket No. 02-2016-LI-00028	No. 2017-013-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 January 17, 2017, having considered the petition for review filed by Sunshine Motel Inn LLC and Rajiv Sauson and spouse individually (the Appellant), briefing submitted to the Director's Office, and having reviewed the record created at hearing, issues this Director's Order. This Order intends to resolve the contested issue of whether the Appellant paid all wages due to Sobhna Chandra and Satish Chandra in violation of the wage payment and minimum wage laws. **The Appellant is ordered to pay wages to Sobhna Chandra in the amount of $17,563.49 and to pay wages to Satish Chandra in the amount of $24,933.37. The Appellant is also ordered to pay interest in the amount of one percent per month under RCW 49.48.083(2) for these wages except for the period of January 17, 2017, to the date this order is served. The Appellant is ordered to pay the Department a penalty in the amount of $4,249.67.**

The parties are the Department of Labor & Industries (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 January 17, 2017, following a hearing held on August 17-18, 2016, and September 22-23, 2016. The Initial Order modified the Department's Citation and Notice of Assessment Nos. W-157-16 and W-158-16.

2. On February 16, 2017, the Appellant timely filed a petition for review with the Director. The Appellant filed additional briefing on May 26, 2017, and June 22, 2017.

3. The Department filed responsive briefing on April 26, 2017, and July 5, 2017.

4. The Director finds that the Appellant failed to make, keep, and preserve paystubs, timekeeping records, or other adequate records to establish the amount of wages paid to, or the amount of hours worked by, Sobhna and Satish Chandra.

5. In its briefing dated June 22, 2017, the Appellant argues that "[t]he Director should determine the amount of payroll taxes that the Chandras would have paid and offset the amount the ALJ awarded to them by the amount they should have paid in employee payroll taxes." Assuming this request was legally authorized, calculation of the Appellant's payroll taxes depends necessarily on consideration of information not before the Director in this appeal or otherwise available.

6. The Director adopts and incorporates all the Initial Order's findings of facts.

7. The Director adopts and incorporates the Initial Order's "Issues Presented," the "Order Summary," and the "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. Employers have a duty to "make, keep, and preserve such records of the persons employed by him or her and of the wages, hours and other conditions and practices of employment maintained by him or her, and shall preserve such records for such periods of time, and shall make reports therefrom to the director as he shall prescribe . . . ." RCW 49.46.040(3). An employer must retain the records for at least three years. WAC 296-128-020. As indicated above at Finding of Fact 4, the Appellant failed to keep adequate payroll records.

3. Special rules apply to evaluating the evidence and the burden of proof when an employer has failed to keep adequate records. *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 66 S. Ct. 1187, 90 L. Ed. 1515 (1946), is the seminal case addressing the effect of an employer's failure to keep adequate records and Washington courts have adopted this standard. *MacSuga v. Cty. of Spokane*, 97 Wn. App. 435, 445, 983 P.2d 1167 (1999); *see also Brady v. Autozone Stores, Inc.*, No. 93564-5, 2017 WL 2829439, at *4 (Wash. June 29, 2017); *see generally Drinkwitz v. Techsys, Inc.*, 140 Wn.2d 291, 298, 996 P.2d 582 (2000) (Washington often looks to the Fair Labor Standards Act as persuasive authority in interpreting the Minimum Wage Act). Under *Anderson*, employees should not be punished for the inability to prove with precision the amount of hours worked by the employees because the employer failed to keep adequate records:

> Due regard must be given to the fact that it is the employer who has the duty under [FLSA] to keep proper records of wages, hours and other conditions and practices of employment and who is in position to know and to produce the most probative facts concerning the nature and amount of work performed. Employees seldom keep such records themselves; even if they do, the records may be and frequently are untrustworthy. It is in this setting that a proper and fair

> standard must be erected for the employee to meet in carrying out his burden of proof.

328 U.S. 687; *see also Brock v. Seto*, 790 F.2d 1446, 1448 (9th Cir. 1986) ("an award of back wages will not be barred for imprecision where it arises from the employer's failure to keep records . . . .").

4. The *Anderson* Court provided for a shifting burden of proof if the employer does not keep adequate records:

> [W]e hold that an employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. The burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence. If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result be only approximate.

328 U.S. at 687-88. The *Anderson* Court developed the burden-shifting standard because of FLSA's remedial nature and the "great public policy which it embodies" and because lack of evidence is within the control of the employer. 328 U.S. at 687. Placing responsibilities on the employer when it fails to keep adequate records is "a result consistent with Washington's long and proud history of being a pioneer in the protection of employee rights." *Drinkwitz*, 140 Wn.2d at 300.

5. Under *Anderson*, although the preponderance of the evidence standard applies, the burden of proof is relaxed when an employer does not keep adequate records. *Lamonica v. Safe Hurricane Shutters, Inc.*, 711 F.3d 1299, 1315 (11th Cir. 2013) (FLSA places upon the employee "the burden of proving that he performed work for which he was not properly compensated. . . . However, if the employer failed to keep time records, as in this case, that burden is relaxed.")

(citation omitted); *Reich v. Gateway Press, Inc.*, 13 F.3d 685, 701 (3d Cir. 1994) ("The Secretary's burden in these cases, however, is merely to present a prima facie case. Indeed, it is settled that the burden (with respect to a given employee) is met if it is proved that the employee has in fact performed work for which he was improperly compensated and if the employee produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference."); *Sec'y of Labor v. DeSisto*, 929 F.2d 789, 793 (1st Cir. 1991) (the "initial burden in these cases is minimal."); *McLaughlin v. Ho Fat Seto*, 850 F.2d 586, 589 (9th Cir. 1988) ("burden is not on the employees to prove the precise extent of uncompensated work.").

6. In its prima facie case, the party seeking wages must (1) prove that the employee has performed work that the employer did not properly compensate the worker for and (2) provide evidence to show the amount of such work by reasonable inference. *Anderson*, 328 U.S. at 687. This fact-finder determines this looking to the totality of the evidence. *See MacSuga*, 97 Wn. App. at 446. If the employee meets the initial burden, "The employer must then rebut the inference that the employee worked the number of hours required to accomplish this amount of work." *MacSuga*, 97 Wn. App. at 446.

7. *Anderson* applies here. The Appellant did not keep adequate records that showed the hours worked or wages paid to their employees. The Department met its burden of proof to show that Sobhna and Satish Chandra performed work for which the Appellant did not properly compensate them for. And the wages awarded to them, as detailed in the Initial Order, represent the proper amount of such work by reasonable inference from the totality of evidence. The Appellant failed to rebut the reasonableness of these inferences.

8. The Director does not have the authority, under the Wage Payment Act or otherwise, to calculate the Appellant's payroll tax obligations for individual employees. There is no legal or factual basis to adjust the wages based on a calculation of such taxes.

9. The Director adopts and incorporates all the Initial Order's conclusions of law.

III. DECISION AND ORDER

Consistent with the above Findings of Fact and Conclusion of Law, the Citation and Notice of Assessment Nos. W-157-16 and W-158-16 as modified by the Initial Order of January 17, 2017, is incorporated by reference.

1. Payment of wages. *See* Citation and Notice of Assessment for payment information and the effect of the failure to pay wages and interest. The Appellant is ordered to pay wages to Sobhna Chandra in the amount of $17,563.49 and to pay wages to Satish Chandra in the amount of $24,933.37. The Appellant is also ordered to pay interest in the amount of one percent per month under RCW 49.48.083(2) for these wages except for the period of January 17, 2017, to the date this order is served. The Appellant is ordered to make these payments within thirty days of the date of service of this final Director's Order.

2. Payment of Civil Penalty: The Appellant is ordered to pay the Department a penalty in the amount of $4,249.67. *See* Citation and Notice of Assessment for payment information.

DATED at Tumwater this 25 day of July, 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 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, declare under penalty of perjury under the laws of the State of Washington, that the DIRECTOR'S ORDER was mailed on the 25 day of July 2017, via U.S. Mail, postage prepaid to:

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DATED this 25 day of July, 2017, at Tumwater, Washington.

Lisa Rodriguez

Lisa Rodriguez