

DIRECTOR OF THE DEPARTMENT OF LABOR & INDUSTRIES
STATE OF WASHINGTON

In re:

THR Washington II, L.P. dba Invitation
Homes

OAH Docket No. 04-2017-LI-00428

No. 2018-002-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 September 1, 2017, having considered the petition for review filed by THR Washington II, L.P. dba Invitation Homes (the Appellant) and briefing submitted to the Director's Office, and having reviewed the record created at hearing, issues this Director's Order.

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 September 1, 2017. The Initial Order affirmed the Department's Citation and Notice of Assessment No. W-254-17.
2. On September 29, 2017, the Appellant timely filed a petition for review with the Director.
3. The Director adopts and incorporates all the Initial Order's findings of facts.

4. The Director adopts and incorporates the Initial Order's "Issue" statement, 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. The Director adopts and incorporates Conclusions of Law 5.1 to 5.7, 5.9.
3. The Washington Legislature has not adopted the Federal Portal to Portal Act. *Anderson v. Dep't of Social & Health Serv.*, 115 Wn. App. 452, 457, 63 P.3d 134 (2003). But where its use would not narrow application of Washington law, the court has looked to its principles. *See id.* The principal work activity test aids in explaining what constitutes "on duty" time under WAC 296-126-002(8). An employer must pay its employees when they are on duty in a prescribed work place. WAC 296-126-002(8). Philip Gordon was on duty because he hauled and unloaded trash—principal work activities. The fact that he was driving home when he hauled trash as well does not change that he was also performing work. Performing work in a truck is hours worked. *Stevens v. Brink's Home Sec., Inc.*, 162 Wn.2d 42, 49, 169 P.3d 473 (2007). If Gordon did not take the trash home with him, he would have had to take it to a dumpsite and such time would indisputably be hours worked. It is the same task whether he takes it home for storage or drives directly to the dump.
4. The Appellant argues that the de minimis rule applies here. Although case law provides that the de minimis rule does not apply in Washington, this order need not reach the issue because the rule is not implicated here. *See Davis v. Dep't of Transp.*, 138 Wn. App. 811, 159 P.3d 427 (2007). All the drive time and trash unloading time was hours worked, and such combined time was not de minimis.

III. DECISION AND ORDER

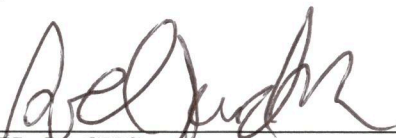
Consistent with the above Findings of Fact and Conclusion of Law, the Citation and Notice of Assessment No. W-254-17 is affirmed. The Initial Order of September 1, 2017 is incorporated by reference herein.

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 Philip Gordon for wages owed in the amount of \$11,621.10. 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 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 \$1,162.11. *See* Citation and Notice of Assessment for payment information.

DATED at Tumwater this 7 day of February 2018.



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 7 day of February 2018, via U.S. Mail, postage prepaid, to the following:

Anthony B. Byergo
Ogletree, Deakins, Nash,
Smoak & Stewart
800 Fifth Avenue, Suite 4100
Seattle, WA 98104

Kevin Elliott
Office of the Attorney General
1116 West Riverside Avenue, Suite 100
Spokane, WA 99201

Philip Gordon
206 Meadows Lane
Granite Falls, WA 98252

THR Washington II L.P. dba Invitation
Homes
901 Main Street, Suite 4700
Dallas, TX 75201

DATED this 7 day of February 2018, at Tumwater, Washington.



Lisa Rodriguez

**WASHINGTON STATE
OFFICE OF ADMINISTRATIVE HEARINGS**

In the matter of:

THR Washington II, L.P. dba Invitation
Homes,

Employer

And

Phillip Gordon,

Wage Claimant
Intervenor

Docket No. 04-2017-LI-00428

INITIAL ORDER

Agency: Labor and Industries
Program: Wage Payments
Agency No. W-254-17

1. ISSUE

- 1.1. During the period June 18, 2013 through June 18, 2016, did the employer fail to pay Philip Gordon for wages owed in the amount of \$11,621.10 for work performed after being required to clock out?

2. ORDER SUMMARY

- 2.1. During the period June 18, 2013 through June 18, 2016, the employer failed to pay Philip Gordon for wages owed in the amount of \$11,621.10 for work performed after being required to clock out.

3. HEARING

- 3.1. Hearing Date: August 17, 2017
- 3.2. Administrative Law Judge: Lauren M Erickson
- 3.3. Appellant: THR Washington II, L.P. dba Invitation Homes
- 3.3.1. Representative: Anthony Byergo
- 3.3.2. Witnesses:
- 3.3.2.1. N/A
- 3.4. Agency: Labor and Industries
- 3.4.1. Representative: Kevin Elliott
- 3.4.2. Witnesses:
- 3.4.2.1. Ana Gamino

3.4.2.2. Phillip Gordon

3.5. Phillip Gordon, Intervenor

3.5.1 Representative - none

3.5.2 Witnesses - none

3.6. Exhibits: Exhibits 1 through 80, A through P and 1A were admitted.

4. FINDINGS OF FACT

The following facts are established by a preponderance of the evidence:

- 4.1. Philip Gordon began work for Invitation Homes on June 18, 2013 and remains currently employed with them.
- 4.2. Invitation Homes is a company that owns and manages rental properties.
- 4.3. Mr. Gordon works as a maintenance technician caring for and repairing items on and in the rental properties. He works taking care of "just about anything that could go wrong with a home."
- 4.4. Mr. Gordon lives in Snohomish County. When he first started working for Invitation Homes, he lived in Lake Stevens, but in December 2013, moved to Granite Falls.
- 4.5. When Mr. Gordon first started working for the company, he traveled to King and Pierce County. For the last two years, Mr. Gordon has primarily worked in Snohomish County.
- 4.6. By company policy, Mr. Gordon is not to leave any trash he creates in the rental unit. He takes all the trash he generates with him when he leaves the unit.
- 4.7. With some jobs he may only generate a small amount of trash, such as the booties he uses. With other jobs, he may be hauling out things such as lumber, mechanical parts, or toilets. Sometimes the trash is smelly or could be poisonous.
- 4.8. Mr. Gordon is paid from the time he leaves his house in the morning until he finishes his last job at the close of the business day. When Mr. Gordon enters his truck in the morning he clocks in and gets his schedule. He then plans his route for the day and telephones the renter(s) at his first stop informing them that he is on his way.
- 4.9. At the end of the day, Mr. Gordon clocks out at the time he is ready to leave the last rental unit. By that time, he has completed all of his paperwork and has loaded the trash from the last unit in to his truck.
- 4.10. Mr. Gordon then drives home and unloads the accumulated trash from the day and puts it in his drive way. If only a minimal amount, he will place the trash in his own trash container.

- 4.11. Mr. Gordon is not paid for his drive home or for the time expended unloading the trash from his truck.
- 4.12. Even if only a minimal amount, there is never a day when no trash is generated.
- 4.13. Once a sufficient amount of trash has been accumulated, Mr. Gordon then schedules a time to take the trash to the transfer station. Generally a trip to the transfer station will occur once or twice per month.
- 4.14. Mr. Gordon is paid to load the trash back into his truck, take it to the transfer station and return home. The company pays the transfer station fee.
- 4.15. Mr. Gordon uses his own truck and tools to perform his job.
- 4.16. The employer was aware of Mr. Gordon's practice with regard to the accumulated trash. Mr. Gordon has never been instructed to not take the trash home with him.
- 4.17. Mr. Gordon has never been instructed that he must maintain his truck and tools in a certain manner or condition, nor are there any company imposed restrictions placed on him once he clocks out.
- 4.18. For the time period June 2013 through Mr. Gordon calculated what is owed by reviewing the locations of his past jobs and using Google maps to determine his drive time. Starting April 15, 2015, Mr. Gordon began contemporaneously recording his drive time.
- 4.19. Mr. Gordon estimates that on average, it takes five minutes for him to unload the trash from his vehicle each evening.
- 4.20. The employer has not presented any figures to counter those asserted by Mr. Gordon.

5. CONCLUSIONS OF LAW

Based upon the above findings of fact, the following conclusions of law are entered:

- 5.1. The Office of Administrative Hearings has jurisdiction over this matter. RCW 49.48.084 (3).
- 5.2. The standard of review is de novo for appealed citations, including any penalty assessed is de novo. RCW 49.48.084 (3).
- 5.3. Hours worked shall considered to mean all hours during which the employee is authorized or required by the employer to be on duty on the employer's premises or at the prescribed work place. WAC 296-126-002 (8).
- 5.4. If the Department determines an employer has violated a wage payment requirement, the Department may order the employer to pay the wages including interest of one percent per month form the first date the wages were owed. RCW 49.48.083(2).

- 5.5. If the Department determines the violation of the wage payment requirement was a willful violation, the Department may also order the employer to pay the Department a civil penalty of not less than \$1,000.00. RCW 49.48.083 (3).
- 5.6. Willful means the person knows what he is doing, intends to do so, and is a free agent. *Schilling v. Radio Holdings*, 136 W.2d 152, 160, 961 P.2d 371 (1998). Willful means a knowing and intentional action that is neither accidental nor the result of a bona fide dispute, as evaluated under standards applicable to wage payment violations under RCW 59.52.050 (2). RCW 49.48.082(13).
- 5.7. Wages must be paid for all activities which are an integral and indispensable part of the principal work activity. Any activity that is integral and indispensable to a principal activity is itself a principal activity. *IBP, Inc. v. Alvarez*, 546 U.S. 21, 15 (2005).
- 5.8. The work day is the period of time between the commencement of the employee's first principal activity and the conclusion of the employee's last principal activity. Periods of time between the commencement of the first principal activity and the completion of the last principal activity on any workday must be included in the computation of hours worked to the same extent as if the Portal Act had not been enacted. 29 CFR 790.6 (a).
- 5.9. In applying the law to the facts of the case herein, the undersigned concludes Mr. Gordon must be paid for his drive time home and the time it takes him to unload the trash. As indicated, Mr. Gordon is responsible for maintaining and repairing rental units. He performs just about any task associated with properly maintaining a home. The performance of such tasks is Mr. Gordon's principal work activity. As part of this principal work activity, trash and debris are generated. The generated trash is a direct result of Mr. Gordon's principal work activity; had the work not been performed, no trash would have been produced. By company directive, Mr. Gordon must remove all trash that his work has created. He is specifically prohibited from leaving the trash in the rental unit. As such, hauling out the trash is an integral and indispensable part of the principal work activity. In fact, the employer pays Mr. Gordon to haul out the trash from the rental units and place it in his truck. However, once the trash from the last rental unit is loaded, Mr. Gordon is required to clock out. He is not paid to haul the trash home and unload it; an activity the employer has authorized.

Under the law, the employee's work day begins with the commencement of the employee's first principal activity and ends at the conclusion of the employee's last principal activity. Here, trash removal is part of the principal work activity. In order to accomplish the trash removal, the trash must be both loaded and unloaded from Mr. Gordon's truck. Unloading the trash is an integral and indispensable part Mr. Gordon's job and does not fall within the category of postliminary activity. See *IBP*,

Inc. v. Alvarez @ 5. Therefore Mr. Gordon's principal work activity is not over until the trash is unloaded – in this case, once he reaches his home. As indicated in *IBP*, any activity that is integral and indispensable to a principal activity is itself a principal activity and cannot be simply designated as *de minimis* and not compensable. This is particularly true given that Mr. Gordon is using his own truck. Mr. Gordon shouldn't be required to store Invitation Homes' trash in his truck. Mr. Gordon does not want the trash sitting in his truck over-night and/or on top of his tools. As indicated sometimes the trash can be smelly and/or poisonous. It may be that there is a better way to arrange the work day and the scheduling of trips to the transfer station, but that issue is not for the undersigned to decide.

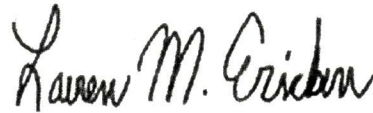
The undersigned further concludes the calculations submitted by Mr. Gordon and relied upon by the Department are appropriate. The employer has not submitted any countering evidence and the proposed calculations seem to be reasonably accurate. The undersigned also concludes it is appropriate to impose the penalty; no evidence was presented to suggest that the employer was not aware of what Mr. Gordon was doing. In fact, Mr. Gordon testified that his activity was authorized by the employer, an assertion supported by uncontradicted testimony that the employer paid for Mr. Gordons bi-monthly trips to the Granite Falls transfer station.

6. INITIAL ORDER

IT IS HEREBY ORDERED THAT:

- 6.1. The Labor and Industries action dated December 16, 2016 is AFFIRMED.
- 6.2. The matter is remanded the Department to calculate the updated interest amount.

Issued from Tacoma, Washington on the date of mailing.



Lauren M Erickson
Administrative Law Judge
Office of Administrative Hearings

CERTIFICATE OF SERVICE ATTACHED

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:

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. 04-2017-LI-00428

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

<p>THR Washington II, L.P. dba Invitation Homes 901 Main Street, Suite 4700 Dallas, TX 75201 Appellant 91 7199 9991 7037 7459 9700</p>	<p><input checked="" type="checkbox"/> First Class Mail <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>Anthony Byergo Ogletree, Deakins, Nash, Smoak & Stewart, P.C. 800 Fifth Avenue, Suite 4100 Seattle, WA 98104 Appellant Representative 91 7199 9991 7037 7459 9717</p>	<p><input checked="" type="checkbox"/> First Class Mail <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>Kevin Elliott Office of the Attorney General 1116 West Riverside Avenue Suite 100 Spokane, WA 99201 Agency Representative</p>	<p><input checked="" type="checkbox"/> First Class Mail <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>Philip Gordon 206 Meadows Lane Granite Falls, WA 98252 Wage Claimant</p>	<p><input checked="" type="checkbox"/> First Class Mail <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, September 01, 2017

OFFICE OF ADMINISTRATIVE HEARINGS



Melanie Barnhill
 Legal Assistant