

DIRECTOR OF THE DEPARTMENT OF LABOR & INDUSTRIES
STATE OF WASHINGTON

In re: Northwest Freight & Parcel, LLC, and
Tony Mountaintes, as an individual,

Citation and Notice of Assessment No.
W-055-17

OAH Docket No. 11-2016-LI-00316

No. 2018-014-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 October 11, 2017, having considered the petition for administrative review filed by the Department of Labor & Industries, briefing submitted to the Director's Office, and having reviewed the record created at hearing, issues this Director's Order. Northwest Freight & Parcel, LLC, and Tony Mountaintes are collectively referred to as the "Appellant." Mark Johnsrud is the Wage Claimant.

The Director makes the following Findings of Fact, Conclusions of Law, and Final Decision and Order.

I. FINDINGS OF FACT

1. The Department issued the Appellant an Amended Citation and Notice of Assessment on June 13, 2017, replacing the Citation and Notice of Assessment issued on August 5, 2016. The Department assessed the Appellant \$1,376.63 in wages and assessed a \$2,000.00

penalty. The Appellant filed a timely letter of appeal on August 22, 2016, and the matter was referred to the Office of Administrative Hearings on November 17, 2016.

2. The Office of Administrative Hearings issued and served the Initial Order on October 11, 2017.

3. On November 7, 2017, the Department timely filed a petition for administrative review with the Director. The Appellant did not petition for administrative review.

4. Tony Mountaintes became the owner of Northwest Freight & Parcel, LLC, on January 1, 2016. At that time, the Wage Claimant had worked for the company, as well as other related companies, since 2011. The Wage Claimant performed worked for Appellant between January 4, 2016, and January 24, 2016.

5. The Wage Claimant's duties included taking direction from dispatchers regarding accepting and delivering freight from the Appellant's warehouse facility. The Wage Claimant did not supervise other employees. The Wage Claimant performed manual labor and did not work in an office environment. The Wage Claimant's position was somewhat self-directed in that he was not directly supervised, but generally, the Wage Claimant's daily work was directed by the Appellant's dispatchers.

6. The Wage Claimant and the Appellant agreed that the Wage Claimant would be paid \$675.00 per week as a "salary" for performing 40 hours of work per week. The Appellant informed the Wage Claimant that he was not to work over 40 hours per week because he would not receive additional pay. The Wage Claimant's work schedule was Monday through Friday.

7. The Wage Claimant's hourly wage was \$16.87 per hour. The Wage Claimant's overtime hourly wage was \$25.31 per hour.

8. The Wage Claimant submitted a time card showing he worked 48 hours between January 4, 2016, and January 10, 2016. Notably, the Wage Claimant claimed eight hours of overtime work performed on Saturday, January 10, 2016. On January 15, 2016, the Wage Claimant received \$675.00 in wages from the Appellant for 40 hours of work. The Wage Claimant was not paid overtime wages for working eight hours on Saturday, January 10, 2016.

9. The Wage Claimant submitted a time card showing he worked 48 hours between January 11, 2016, and January 17, 2016. Because the Wage Claimant was not paid overtime wages for eight hours of work performed previously, the Wage Claimant again included eight hours of overtime work performed on his time card. The Wage Claimant worked an additional 3 hours on Saturday, July 16, 2016. On January 22, 2016, the Wage Claimant received \$675.00 in wages from the Appellant for 40 hours of work for the week of January 11, 2016 through January 17, 2016.

10. The Wage Claimant submitted a time card showing he worked 48 hours between January 18, 2016, and January 24, 2016. Because the Wage Claimant was not paid overtime wages for work performed on the previous Saturdays, the Wage Claimant included eight hours of overtime work performed on his time card, along with an explanatory note. The Appellant terminated the Wage Claimant's employment on January 22, 2016. The Wage Claimant received \$810.04 in wages from the Appellant for 48 hours of work. Included in this amount was payment for eight hours of overtime that had been approved for work on Saturdays. But the Wage

Claimant was not paid at the overtime rate of \$25.31 for the claimed overtime hours, but instead the Appellant paid the Wage Claimant at his regular rate of \$16.88 per hour.

11. Even though the Wage Claimant consistently submitted a time card claiming he only worked eight hours per day Monday through Friday, the Wage Claimant kept track of the actual hours he worked on a daily basis. Including the work on Saturdays, the Wage Claimant worked 21.75 overtime hours the week of January 2, 2016, through January 10, 2016. The Wage Claimant worked 17.25 overtime hours the week of January 11, 2016, through January 17, 2016. The Wage Claimant worked 20.75 overtime hours the week of January 18, 2016, through January 22, 2016. This totals 59.75 overtime hours

12. The Appellant paid the Wage Claimant a total of \$2,160.04 in gross wages for 128 hours of work performed for the weeks of January 4, 2016, and January 24, 2016 at the regular rate of \$16.87 per hour. The Wage Claimant was paid \$135.04 for eight hours of overtime work performed on January 9, 2016, but only at the regular rate of pay of \$16.87 per hour. The Wage Claimant was not paid for the remaining 51.75 overtime hours.

13. The Wage Claimant was not paid at the overtime rate of pay of \$25.31 for all of the 59.75 overtime hours worked in January 2016, as reflected on his breakdown of hours worked, including a total of 11.00 hours worked on Saturdays. The Department correctly calculated a total of \$1,376.63 in overtime wages owed to the Wage Claimant. The difference is that the 11.00 hours reported by the worker on Saturday, January 23, 2016 should have been listed as 4.5 hours worked on Saturday, January 2, 2016, 3.5 hours worked

on Saturday, January 9, 2016 and three hours worked on Saturday, January 16, 2016. The Wage Claimant is the most credible witness regarding hours worked.

14. The Appellant did not explain how the Wage Claimant's job duties fell under the professional, administrative, or executive exemptions to overtime pay in WAC 296-128-510 through -530.

15. The Appellant did not make a genuine effort to keep a proper and accurate record of hours worked and to compensate the Wage Claimant at the overtime rate of pay for overtime hours worked, even when the Wage Claimant advised the Appellant of overtime hours worked on his timecards. Tony Mountaintes should have been aware of Wage Claimant regularly working significant overtime hours when Wage Claimant filled out timecards with all of his overtime hours for three months when the company operated under Diamond Freight. Mr. Mountaintes managed operations at that time. The Wage Claimant also talked to Mr. Mountaintes about overtime hours, who told him the company was thinking about getting somebody to help him so he could only work eight hours a day, but they never hired anybody.

16. The Appellant willfully and intentionally withheld wages from the Wage Claimant as shown by the fact that the Appellant knew that the Wage Claimant was working overtime hours. No bona fide dispute exists.

17. Mr. Mountaintes was the employer representative and operational manager for Northwest Freight and Parcel, LLC. Mr. Mountaintes controlled the day-to-day operations of Northwest Freight & Parcel, LLC, including approving payroll and timecards

for the company, and making decisions regarding the Wage Claimant's compensation for extra hours worked. Mr. Mountaintes approved payment of wages for the Wage Claimant's work on Saturdays in January 2016. Mr. Mountaintes also testified at hearing: "Right now I kind of run the company here by myself, Northwest Freight has, since we started that." Tr. 97.

18. Mr. Mountaintes is listed on the business license information and with the Secretary of State of Washington as a member of the Northwest Freight & Parcel, LLC. Tony Mountaintes signed documents on behalf of Northwest Freight & Parcel, LLC and represented the company in responding to the Department's investigation of the Wage Claimant's wage complaint, and throughout the hearing and appeals process.

II. CONCLUSIONS OF LAW

1. Based on the Department's timely filing of a petition for review, there is authority to review and decide this matter under RCW 49.48.084 and RCW 34.05.

2. Under the WPA, the Department 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, 687-68, S. Ct. 1187, 90 L. Ed. 1515 (1946) (federal minimum wage law under Fair Labor & Standards Act); *MacSuga v. Cty. of Spokane*, 97 Wn. App. 435, 445-46, 983 P.2d 1167 (1999). The prima facie showing must be supported by a preponderance of the evidence.

3. A preponderance of the evidence is that evidence which, when fairly considered, produces the stronger impression, has the greater weight, and is 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).

4. “If the employer fails to keep records, the burden is on the employer to prove the claimed hours were not worked.” *MacSuga*, 97 Wn. App. at 445. If the employee shows by “reasonable inference” the number of hours worked, then the burden shifts to the employer. *Id.* at 445 (citing *Anderson*, 328.U.S. 680).

5. The Wage Claimant seeks unpaid wages under the Washington Minimum Wage Act (WMWA) and the Wage Payment Act (WPA). 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).

6. Hours worked means all hours that 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.

7. An employer is required to pay overtime when an employee works over 40 hours in a workweek. 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.*

8. An employer is not required to pay overtime wages if the employee is an exempt employee under RCW 49.46.010(3)(c) and WAC 296-128-510, 520, and 530. The Appellant did not appeal from the Initial Order’s determination that the Wage Claimant was not an exempt

employee under RCW 49.46.010(3)(c) and WAC 296-128-510, 520, and 530. The Director conclusion stands unchallenged and the Director adopts it.

9. The Appellant owes the Wage Claimant agreed, overtime, and final wages for work performed between January 4, 2016 and January 24, 2016. The Appellant did not petition for administrative review from the Initial Order's determination that the wage claimant is owed \$972.26 in wages. This amount stands unchallenged. In addition, the Department has shown that additional wages are owed in its appeal.

10. The Wage Claimant's contemporaneous log of the hours he worked each week is consistent with the Wage Claimant's testimony that he worked 59.75 overtime hours and 120 regular hours between January 2, 2016, and January 24, 2016. While the Appellant disputes that the Wage Claimant actually worked these hours, the Appellant has not produced any evidence to the contrary. Therefore, it is concluded that the Wage Claimant worked 59.75 overtime hours during the period at issue.

11. At an overtime rate of \$25.31 per hour, the Wage Claimant was owed \$1,512.27 in overtime wages for 59.75 overtime hours, and \$2,025 in regular wages at the regular rate of pay of \$16.87 per hour.

12. The Appellant paid the Wage Claimant at the regular rate of \$16.87 per hour for 128 hours of work between January 4, 2016 and January 24, 2016 for a total of \$2,160.64.

13. Based on the Wage Claimant's logs, the Wage Claimant is owed a total of \$3,537.27 in regular and overtime wages. The Appellant paid the Wage Claimant \$2,160.64,

including 8 overtime hours paid at the straight time rate of \$16.87 per hour. Thus, the Wage Claimant is owed \$1,376.63.

14. The Department has shown by a preponderance of the evidence that the Wage Claimant is not an overtime exempt employee and that the Appellant violated RCW 49.52.050, RCW 49.46.130, and RCW 49.48.010 by failing to pay the Wage Claimant overtime and final wages in the amount of \$1,376.63.

15. Unpaid wages may accrue interest at the rate of 1% of the unpaid wage amount until payment is received by the Department, calculated from the first date wages were owed to the employee. RCW 49.48.083.

16. The Wage Claimant is entitled to interest at a rate of 1% from January 24, 2016.

17. The Department has the authority to issue a civil penalty to employers who unlawfully withhold an employee's wages. RCW 49.48.083(3)(a).

18. A willful violation is defined in RCW 49.48.082(13) as a "knowing and intentional action that is neither accidental nor the result of a bona fide dispute, as evaluated under the standards applicable to wage payment violations under RCW 49.52.050(2)." RCW 49.48.082(13).

19. RCW 49.52.050, the agreed wage statute, makes it unlawful for an employer to willfully withhold wages it must pay to an employee. If there is a willful withholding of wages, the employee may receive the agreed wage. RCW 49.52.050(2). The Director also determines the appropriateness of penalties under RCW 49.48.083(3) using the willfulness standard in RCW 49.52.050. RCW 49.48.082(13). Our Supreme Court noted that the test for "willful" failure to

pay is not stringent—the employer’s failure to pay must simply be volitional. *Schilling v. Radio Holdings, Inc.*, 136 Wn.2d 152, 159, 961 P.2d 371 (1998). The question of willfulness is a question of fact. *Schilling*, 136 Wn.2d at 160. Here Northwest Freight & Parcel, LLC and Mr. Mountaintes failed to keep accurate records of hours worked by the Wage Claimant, even when they were aware that the Wage Claimant had worked overtime hours. The Appellant’s refusal to pay overtime wages to the Wage Claimant when he reported overtime hours was volitional.

20. An employer acts willfully in depriving an employee of wages when it “makes no genuine effort to keep a proper record of their payroll account with the [employee] or to determine by audit the correct amount of wages owing.” *Brandt v. Impero*, 1 Wn. App. 678, 680, 463 P.2d 197 (1969). The Appellant did not keep accurate records of hours worked by the Wage Claimant, even when it knew the Wage Claimant had worked overtime hours.

21. Willfulness is also found where the employer’s refusal to pay is volitional: “Willful means merely that the person knows what he is doing, intends to do what he is doing, and is a free agent.” *Morgan v. Kingen*, 166 Wn.2d 526, 534, 210 P.3d 995 (2009) (internal quotations omitted). It knew of overtime hours because of records showing delivery and pick up times. Even when the Wage Claimant reported overtime hours on his timecards, the Appellant only paid some of the hours at straight time, or did not pay for the hours.

22. An employer’s failure to pay wages is not willful where a bona fide dispute existed between the employer and employee regarding the payment of wages. *Schilling*, 136 Wn.2d at 160. The Appellant asserted that the Wage Claimant was exempt from overtime under the professional, administrative, and/or executive exemptions to overtime in WAC 296-128-510

through -530. But it failed to explain how the Wage Claimant's job duties fell under any of these exemptions. The Appellant also asserted that the Wage Claimant's reporting of hours was not credible, but did not produce accurate records of hours worked even though it knew the Wage Claimant worked overtime hours. In any event, willfulness is proven because the Appellant knew the Wage Claimant worked overtime hours and did not pay him correctly. This at a minimum establishes willfulness.

23. The Appellant did not raise a bona fide dispute with regard to whether the Wage Claimant was exempt from overtime pay and whether the Wage Claimant was owed overtime wages. Because the Appellant failed to keep accurate records of hours worked, they failed to show that the Wage Claimant did not work the overtime hours he claimed based on his contemporaneous personal record of hours worked.

24. An employer who willfully violates a wage payment requirement may be ordered to pay a civil penalty of not less than one thousand dollars or an amount equal to ten percent of the total amount of unpaid wages, whichever is greater. RCW 49.48.083(3). If an employer is a "repeat willful violator" the Department may also assess a civil penalty of not less than \$1,000 or amount equal to 10 percent of the total amount of unpaid wages, whichever is greater. RCW 49.48.125(1).

25. The Appellant owes a penalty in the amount of \$2,000 under RCW 49.48.083(3) and RCW 49.48.125(1). The Appellant had a prior final and binding citation issued against it.

26. RCW 49.52.050 imposes liability on "[a]ny employer or officer, vice principal or

agent of any employer” who violates standards relating to the rebate of wages, payment of wages, and accurate records. There must be a showing that an agent had some control over payment of wages before personal liability attached to the agent. *Ellerman v. Centerpoint Prepress, Inc.*, 143 Wn.2d 514, 522-23, 22 P.3d 795 (2001). Federal courts typically apply the "economic realities test" to determine if an individual is liable for FLSA violations along with a corporate entity or limited liability company. “The overwhelming weight of authority is that a corporate officer with operational control of a corporation's covered enterprise is an employer along with the corporation, jointly and severally liable under the FLSA for unpaid wages.” *Donovan v. Agnew*, 712 F.2d 1509, 1511 (1st Cir. 1983). Some federal courts that generally look for corporate ownership are willing to waive the requirement in certain situations, and find supervision of the corporation sufficient where the individual effectively dominates a corporation's administration or otherwise acts, or has the power to act on behalf of the corporation vis-a-vis its employees. *Donovan v. Sabine Irrig. Co.*, 695 F.2d 190 (5th Cir. 1983); *Reich v. Circle Inv., Inc.*, 998 F.2d 324 (5th Cir. 1998) (personal liability imposed where individual exercised control over work situation and employees, including various functions related to hiring, payroll, and records)

27. Although Tony Mountaintes denies ownership interest in the LLC, Tony Mountaintes is personally liable as an employer of the Wage Claimant along with Northwest Freight & Parcel, LLC under RCW 49.52.050 and RCW 49.46.010(4) because as operational manager, Mr. Mountaintes had control over payment of wages to the Wage Claimant by approving his timecards and payroll, and approving payment for extra hours he worked. Tony

Mountaintes controlled the day-to-day operations of the company, was listed on corporate paperwork as an agent for the company, and represented the company in the investigation of the Wage Claimant's wage complaint as well as the hearing and appeals process.

III. DECISION AND ORDER

Consistent with the above Findings of Fact and Conclusions of Law, the June 13, 2017 Amended Citation and Notice of Assessment is affirmed as modified.

1. Payment of wages. See Amended 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 the Wage Claimant in the amount of \$1,376.63. 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. The Appellant is ordered to make these payments within thirty days of the date of service of this final Director's Order. See Amended Citation and Notice of Assessment for payment information.

2. Payment of Civil Penalty: The Appellant is ordered to pay the Department a penalty in the amount of \$2,000.00. See Amended Citation and Notice of Assessment for payment information.

DATED at Tumwater, Washington this 14 day of September 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 Deck, hereby declare under penalty of perjury under the laws of the State of Washington, that the DIRECTOR'S ORDER was mailed on the 14 day of September 2018, via U.S. Mail, postage prepaid, to the following:

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DATED this 14 day of September 2018, at Tumwater, Washington.



Lisa Deck