

DIRECTOR OF THE DEPARTMENT OF LABOR & INDUSTRIES
STATE OF WASHINGTON

In re:

LYLE POWELL,

APPELLANT,

Determination of Compliance No. DOC-
091-17

OAH Docket No. 03-2017-LI-00410

NO. 2018-018-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 appeal filed by Lyle Powell (the Appellant) and briefing submitted to the Director's Office, and having reviewed the record, issues this Director's Order.

The parties in this matter are the Department of Labor & Industries, the Appellant, and the SBDS LLC and Joseph Shields (Employer).

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 March 07, 2018.
2. On April 6, 2018, the Director received a timely filed petition for review from the

NO. 2018-018-WPA

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DIRECTOR'S ORDER

RCW 49.48.084(4); RCW 34.05

Appellant.

3. The Director adopts and incorporates all the Order's Findings of Fact.
4. The Director also adopts and incorporates the Order's "Issue Presented," "Order Summary," and "Hearing" summary.
5. An additional \$147.48 in wages are owed to Appellant.

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 the Order's Conclusions of Law.
3. An additional \$147.48 in wages are owed to Appellant.

III. DECISION AND ORDER

Consistent with the above Findings of Fact and Conclusions of Law, the Determination of Compliance is AFFIRMED, and the Order of March 7, 2018, is incorporated by reference herein.

The Employer is ordered to pay an additional \$147.48 in wages and interest as provided under RCW 49.48.083.

DATED at Tumwater this 12 day of October, 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 emailing it to directorappeal@lni.wa.gov or 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 Deck, hereby declare under penalty of perjury under the laws of the State of Washington, that the DIRECTOR'S ORDER was mailed on the 12 day of OCTOBER 2018, to the following via regular, postage prepaid:

Lyle Powell
6438 West Trestle, Unit 3
Rathdrum, ID 83858

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

Joseph Shields
SBDS LLC
1816 W. Liberty Ave.
Spokane, WA 99205

DATED this 12 day of October, 2018, at Tumwater, Washington.

Lisa Deck

**WASHINGTON STATE
OFFICE OF ADMINISTRATIVE HEARINGS**

In the matter of:

Lyle Powell,

Appellant/Wage Claimant.

Docket No. 03-2017-LI-00410

INITIAL ORDER

Agency: Labor and Industries
Program: Wage Payments
Agency No. DOC-091-17

1. ISSUES PRESENTED

- 1.1 Whether the Department's November 18, 2016, Determination of Compliance concluding that the Employer SBDS LLC and Joseph Shields did not violate RCW 49.52.050 and RCW 49.48.010 by failing to pay agreed and final wages to Lyle Powell for work performed between October 20, 2015 and December 21, 2015, should be affirmed or reversed.

2. ORDER SUMMARY

- 2.1 The Department's November 18, 2016, Determination of Compliance concluding that the Employer SBDS LLC and Joseph Shields did not violate RCW 49.52.050 and RCW 49.48.010 by failing to pay agreed and final wages to Lyle Powell for work performed between October 20, 2015 and December 21, 2015, is **AFFIRMED**.

3. HEARING

Hearing Date	February 22, 2018
Administrative Law Judge	Courtney E. Beebe
Appellant	Lyle Powell
Appellant Representative	None
Appellant's Witnesses	Lyle Powell
Appellant's Exhibits	None
Agency	Department of Labor and Industries
Agency Representative	Kevin Elliott, Asst. Atty. General
Agency Witnesses	Justina Farnsworth, Industrial Relations Agent; Joseph Shields, Employer
Agency Exhibits	Department's Exhibits 1 through 18 were admitted

4. FINDINGS OF FACT

Based on the evidence presented, the Administrative Law Judge makes the following findings of fact:

- 4.1 Joseph Sheilds owns and operates SBDS, LLC, ("Employer") a baggage delivery company that delivers baggage from the Spokane International Airport to a variety of locations in Eastern Washington and North Idaho. The Employer does not employ any employees, but instead contracts with drivers and pays them per delivery. The rate of pay per delivery is established by a "zip code" book that lists the pay rate according to the delivery location.
- 4.2 Lyle Powell ("Wage Claimant") began working as a driver for Employer on October 20, 2015, as an independent contractor. The Wage Claimant entered into an "Independent Contractor Agreement" on October 27, 2015. The Wage Claimant confirmed at the hearing that the signature on page 4 of the Independent Contractor Agreement is his signature, and that the writing on page 1 of the Independent Contractor Agreement is his writing.
- 4.3 The Independent Contractor Agreement stated:
- The [Employer] shall pay the Contractor a fee equal to one half of the sum paid by the airlines to Contractor. Said amount shall be due and payable within ten business days from the close date. Said amount shall be due and payable within ten business days from the close date. Payments to Contractors are made thru an ACH process as payments from the Airlines are received by the Company. Payments from the Airlines are paid to the Company within 15 days after the vendor close dates. This schedule will be e-mailed to the Contractor so the Contractor will have a vendor payment schedule for each year.*
- 4.4 The Wage Claimant ceased working for the Employer on December 21, 2015. The Wage Claimant did not return to the Employer's place of business to collect his wages. The Employer paid the Wage Claimant the wages remaining owed by paying the wages to the Department, which forwarded the wages to the Wage Claimant.

Jurisdiction

- 4.5 On July 15, 2016, the Wage Claimant filed a Worker's Rights Complaint (Exhibit 3), seeking unpaid wages in the amount of \$3,000.00 to \$5,000.00.
- 4.6 On November 18, 2016, the Department of Labor and Industries ("Department") issued a Determination of Compliance concluding that the Employer had not violated any laws or rules and that wages were not owed to the Wage Claimant.
- 4.7 The Wage Claimant appealed the determination and requested a hearing on December 12, 2016.
- 4.8 The case was referred to the Office of Administrative Hearings on March 14, 2017.

Credibility Determination

- 4.9 The testimony of the parties and the documentation presented conflicted on the material point of the Wage Claimant's rate of pay and whether the Wage Claimant had signed an agreement with the Employer. 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 concludes that the Wage Claimant's testimony lacked any credibility, so much so that no findings of fact are made based on the Wage Claimant's testimony.

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, in this case 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 U.S. 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 "If the employer fails to keep records, the burden is on the employer to prove the claimed hours were not worked." *MacSuga v. County of Spokane*, 97 Wn. App. 435, 445, 983 P.2d 1167 (1999). If the employee shows by "reasonable inference" the number of hours worked, then the burden shifts to the employer. *Id.* at 445 (citing *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 66 S. Ct. 1187, 90 L.Ed 1515 (1946)).

Applicable Law

- 5.5 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.
- 5.6 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.)
- 5.7 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).
- 5.8 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.
- 5.9 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).
- 5.10 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. "If the employer knows or has reason to believe that the employee is continuing to work, such time is working time." Department Administrative Policy ES.C.2 at 1.

Analysis

- 5.11 It is not disputed that the Wage Claimant is an independent contractor for the Employer. The issue in this case is whether the Employer violated any law or rule by failing to pay the Wage Claimant wages for hours worked between October 20, 2015 and December 21, 2015.
- 5.12 The only evidence presented in support of the Wage Claimant's complaint for wages is the Wage Claimant's testimony. As found above, the Wage Claimant's testimony that he signed a random blank piece of paper and not the Independent Contractor Agreement lacks any credibility. The Wage Claimant presented no testimony under oath regarding the hours he worked or the amount of wages owed, or even evidence of an alternate rate of pay for per bag delivery.
- 5.13 Based on the evidence presented, it is clear that the Employer paid the Wage Claimant for all wages due in accordance with the Independent Contractor Agreement for work performed by the Wage Claimant during the period at issue. There is no credible evidence to the contrary.
- 5.14 Therefore, it must be concluded that the Employer did not violate RCW 49.48.010 or RCW 49.52.050 and the Department's Determination of Compliance must be affirmed.

6. INITIAL ORDER

- 6.1 The Department's November 18, 2016, Determination of Compliance concluding that the Employer SBDS LLC and Joseph Shields did not violate RCW 49.52.050 and RCW 49.48.010 by failing to pay agreed and final wages to Lyle Powell for work performed between October 20, 2015 and December 21, 2015, is **AFFIRMED**.

Order issued from Tacoma, Washington on the date of mailing.



Courtney Beebe
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.

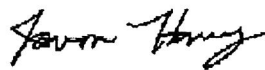
CERTIFICATE OF SERVICE FOR OAH DOCKET NO. 03-2017-LI-00410

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

<p>Lyle Powell 6438 West Trestle, Unit 3 Rathdrum, ID 83858 Appellant/Wage Claimant</p> <p>91 7199 9991 7037 9107 4624</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, AAG Office of the Attorney General 1116 West Riverside Ave., 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>SBDS LLC c/o John Shields 1816 W. Liberty Avenue Spokane, WA 99205 Intervenor/Employer</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: Wednesday, March 07, 2018

OFFICE OF ADMINISTRATIVE HEARINGS



Javon Harvey
Legal Assistant 2



Date: March 21, 2018

Zachary Griswold:

The following is in response to your March 21, 2018 request for delivery information on your Certified Mail™ item number 9171999991703791074624. The delivery record shows that this item was delivered on March 10, 2018 at 12:00 pm in RATHDRUM, ID 83858. The scanned image of the recipient information is provided below.

Signature of Recipient :

Signature X	
Printed Name	Kyle Powell

Address of Recipient :

Delivery Address	2438 W Nestle #3
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Thank you for selecting the Postal Service for your mailing needs.

If you require additional assistance, please contact your local Post Office or postal representative.

Sincerely,
United States Postal Service