

DIRECTOR OF THE DEPARTMENT OF LABOR & INDUSTRIES
STATE OF WASHINGTON

In re: Green Power of Washington, LLC,
and Clint Wise as an individual and the
marital community thereof,

Citation and Notice of Assessment No.
W-166-18, 167-18, 168-18

OAH Docket No. 02-2018-LI-00680

No. 2018-027-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 July 6, 2018, having considered the petition for review filed by Green Power of Washington, LLC, and Clint Wise (collectively the Appellant), 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 July 6, 2018.
2. On July 18, 2018, 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 “Issues,” 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’s order adopts and incorporates Conclusions of Law Nos. 5.1 through 5.8, and 5.11 through 5.12. The Director adopts and incorporates the “Initial Order.”

3. The definition of “employee” in the Minimum Wage Act incorporates the economic realities test developed by the federal courts. *Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wn.2d 851, 871, 281 P.3d 289 (2012). The relevant inquiry is “whether, as a matter of economic reality, the worker is economically dependent upon the alleged employer or is instead in business for himself.” *Id.* (citations omitted). The test includes the following nonexclusive factors:

1. The degree of control that the business has over the worker;
2. The worker’s opportunity for profit or loss depending on the worker’s managerial skill;
3. The worker’s investment in equipment or material;
4. The degree of skill required for the job;
5. The degree of permanence of the working relationship;
6. The degree to which the services rendered by the worker are an integral part of the business.

Anfinson v. FedEx Ground Package Sys., Inc., 159 Wn. App. 35, 54-55, 244 P.3d 32 (2010), *aff’d*, 174 Wn.2d 851 (2012). The six factors are not exclusive, and neither the presence nor absence of any single factor is determinative. *Donovan v. Sureway Cleaners*, 656 F.2d 1368, 1370 (9th Cir. 1981). The facts relevant to each factor must be viewed through the lens of “economic dependence.” *Scantland v. Jeffrey Knight, Inc.*, 721 F.3d 1308, 1312 (11th Cir. 2013).

4. The Appellant has not provided argument or sufficient evidence to show that the wage claimants were independent contractors. The evidence establishes that they were employees.

5. Any new evidence provided by Appellant in the appeal was not considered.

III. DECISION AND ORDER

Consistent with the above Findings of Fact and Conclusions of Law, Citation and Notice of Assessment Nos. W-167-18 and W-168-18 are affirmed. The Initial Order of July 18, 2018, 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 Joey Valenzuela in the amount of \$924.00. The Appellant is ordered to pay wages to Amber Romano in the amount of \$360.00. The Appellant is also ordered to pay interest at 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.

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

DATED at Tumwater, Washington this 5 day of December 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 5 day of December 2018, via U.S. Mail, postage prepaid, to the following:

Green Power of Washington , LLC
c/o Clint Wise
24629 SE 146th Street
Issaquah, WA 98207

Amber Romano
602 Briar Lane
Omak, WA 98841

Katy Dixon, AAG
Attorney General's Office
800 Fifth Ave., Ste. 2000
Seattle, WA 98104

Samantha Nelson
100 Weatherstone Road
Omak, WA 98841

Joey Valenzuela
100 Weatherstone Road
Omak, WA 98841

DATED this 5 day of December 2018, at Tumwater, Washington.

Lisa Deck

Lisa Deck

**WASHINGTON STATE
OFFICE OF ADMINISTRATIVE HEARINGS**

In the matter of:

Green Power of Washington, LLC,
Clint Wise as an individual and the
marital community thereof,

Appellant/Employer.

Docket No. 02-2018-LI-00680

INITIAL ORDER

Agency: Labor and Industries

Program: Wage Payments

Agency No. W-166-18, 167-18, 168-18

1. ISSUES

- 1.1. During the period May 8, 2017 through June 2, 2017, did the appellant fail to pay wages to Samantha Nelson in the amount of \$1760.00 in violation of 49.48 RCW?
- 1.2. During the period May 19, 2017 through June 7, 2017, did the appellant fail to pay wages to Joey Valenzuela in the amount of \$924.00 in violation of 49.48 RCW?
- 1.3. During the period May 22, 2017 through May 25, 2017, did the appellant fail to pay wages to Amber Romano in the amount of \$360.00 in violation of 49.48 RCW?

2. ORDER SUMMARY

- 2.1. It is not proven that the appellant failed to pay wages to Samantha Nelson in the amount of \$1760.00 as claimed.
- 2.2. During the period May 19, 2017 through June 7, 2017, the appellant failed to pay wages to Joey Valenzuela in the amount of \$924.00 in violation of 49.48 RCW.
- 2.3. During the period May 22, 2017 through May 25, 2017, the appellant failed to pay wages to Amber Romano in the amount of \$360.00 in violation of 49.48 RCW.

3. HEARING

3.1. Hearing Date: June 19, 2018 and June 20, 2018

3.2. Administrative Law Judge: Lauren M. Erickson

3.3. Appellant: Clint Wise

3.3.1. Representative: N/A

3.3.2. Witnesses:

3.3.2.1. Kaleb Steinschouer

3.4. Agency: Labor and Industries

3.4.1. Representative: Katy J. Dixon

3.4.2. Witnesses:

3.4.2.1. Brittany Bolser

3.4.2.2. Amber Romero

3.4.2.3. Joey Valenzuela

3.5. Exhibits: Exhibits 1 through 23 were admitted.

4. FINDINGS OF FACT

The following facts have been established by a preponderance of the evidence:

- 4.1. Green Power LLC is a marijuana grow operation located in Okanogan County, State of Washington.
- 4.2. Green Power, LLC is owned by Clint Wise. Mr. Wise lives and works in King County and only intermittently visited the grow operation.
- 4.3. Samantha Nelson asserts that she is owed \$1760.00 for the period May 8, 2017 through June 2, 2018, including her final paycheck, plus interest. For the period May 8, 2017 through May 31, 2017, she alleges she is owed wages in the amount of \$1584.00 or 144 hours at \$11.00 per hour. She further alleges she is owed \$176.00 for the period June 1, 2017 through June 2, 2017, her final paycheck, or 16 hours at \$11.00 per hours.
- 4.4. Joey Valenzuela asserts that he is owed \$924.00 for the period May 19, 2017 through June 7, 2017, including his final paycheck, plus interest. For the period May 19, 2017 through May 31, 2017, he alleges he is owed \$610.50 or 55.5 hours at \$11.00 per hour. He further alleges that he is owed \$315.50 for the period June 1, 2017 through June 7, 2017, his final paycheck, or 28.5 hours at \$11.00 per hour.
- 4.5. Amber Romano asserts that she is owed \$360.00 for the period May 22, 2017 through May 25, 2017, her final paycheck, or 24 hours at \$15.00 per hour, plus interest.
- 4.6. The above named wage claimants filed complaints with the Department of Labor and Industries. As a result of those complaints, on October 20, 2017, the Department of Labor and Industries issued Citations and Notices of Assessment. In addition to the owed wages, the Department is seeking interest and penalties for each wage claimant.

- 4.7. Green Power through Mr. Wise, and Mr. Wise, as an individual and the marital community thereof, assert that the three above named wage claimants are owed nothing; i.e. that Ms. Nelson was hired as an independent contractor and was to be paid commission only for her sole task which was to make sales. The appellants assert Mr. Valenzuela was never hired by the farm or offered work as an independent contractor and was never even given permission to be at the farm. The appellants assert that Ms. Romano was an independent contractor and that any money she was owed has been paid.
- 4.8. The appellants have not provided any documentation to support claim that the above three wage claimants worked as independent contractors such as a contract or proof of them submitting a bid for work.
- 4.9. Other than some work logs, and in the case of Ms. Nelson, some photographs apparently taken at the farm, the wage claimants have not provided any documentation such as W-2s or past wage stubs or correspondence to support their claims.
- 4.10. Ms. Nelson did not appear at the hearing but in written submissions to the Department, she states that she was hired to answer phones, perform computer work, make sales, water plants and trim and package the cannabis. She further states she was fired by Mr. Wise.
- 4.11. Mr. Wise states that he met Ms. Nelson at a coffee shop and told her that the farm was on its last legs and that if she could make some sales, he could pay her a commission on the sales. Mr. Wise alleges that Ms. Nelson stole \$1400.00 from him by keeping the money from a sale with an invoice date of May 22, 2017.
- 4.12. With regard to Ms. Nelson, the undersigned finds that other than written submissions to the Department and statements made to Ms. Bolser, the Industrial Relations agent, the evidence to support Ms. Nelson's claim is all hearsay evidence (Ms. Nelson is not a party to the case and therefore her statements do not qualify under the non-hearsay, party-opponent, designation). The testimony of Mr. Valenzuela and Ms. Romano support the premise that she may have actually worked at the farm, however, there is no non-hearsay specific evidence as to days and hours worked. Although hearsay is admissible in an administrative proceeding, hearsay cannot be the only evidence used to support a finding, unless the presiding officer determines that doing so would not unduly abridge the parties' opportunity to confront witnesses and rebut evidence. Here, the undersigned finds that concluding a specific amount of wages are owed to Ms. Nelson based upon her hearsay statements would unduly abridge the appellant's opportunity to confront Ms. Nelson and rebut evidence.

- 4.13. Mr. Valenzuela was told by Ms. Nelson that there was work at the farm. He was told he would be paid \$11.00 per hour. He never completed any employment type work documents such as a W-4 or never spoke to Mr. Wise, except for a conversation that occurred prior to his engagement with the farm. He had no set schedule and there was no system in place in which to clock in or out. He kept track of his hours on a piece paper. He was given instructions on work to be performed by either Ms. Nelson or Ms. Romano. He performed general labor. He quit working as soon as he learned that he wasn't going to be paid.
- 4.14. Both Ms. Nelson and Ms. Romano told the Industrial Relations agent, Brittany Bolser, that Mr. Valenzuela performed labor at the farm.
- 4.15. Mr. Wise states that he did not hire Mr. Vanezuela, that he has never met him, and that he did not have permission to be on the farm.
- 4.16. The undersigned finds Mr. Valenzuela's testimony to be credible. Although Mr. Wise indicates he never met Mr. Valenzuela, the fact he worked at the farm was supported by statements from Ms. Nelson and Ms. Romano to Ms. Bolser. As to the dates and hours worked, the undersigned also finds his testimony to be credible. He testified that he was told he would be making minimum wage and he quit as soon as he realized he wasn't going to be paid. In other words, this is not an individual making outlandish claims as to promises of exorbitant rates of pay or continuing to work for an extended period of time after not having been paid.
- 4.17. Although it is unclear, Ms. Romano apparently worked on and off for the farm for the approximate period March 2016 through May 25, 2017. When she first started work, Ms. Romano believed she was working as an independent contractor but that at the beginning of 2017, her status was changed to a W-2 employee. Generally, Ms. Romano worked a set schedule of Monday through Thursday from 8:00 to 5:00 or 8:00 to 4:00. She took instructions from a woman named Ariel, and then a man named Joey Brown and then Kaleb Steinshouer. Ms. Romano had been paid for previous work performed but started having trouble getting paid in May 2017.
- 4.18. Mr. Wise states that no money is owed to Ms. Romano; i.e. that she was paid \$845.00 by direct deposit on May 26, 2017. The pay stub indicates the \$845.00 was for the pay period May 6, 2017 through May 19, 2017.
- 4.19. The undersigned finds Ms. Romano's testimony to be credible. Although she was unclear as to dates, and was easily rattled, she had worked for the farm for over a year and seemed to be invested in its success. She presented the hours for which she believes she has not been paid. She is only claiming \$360.00 in unpaid wages. It seems as though if she were going to be dishonest she could have inflated her claim to reflect many more hours.

4.20. Kaleb Steinschouer, someone who also worked at the farm, considered himself to be an independent contractor. He worked an hourly rate and was paid in cash.

4.21. All work performed by the wage claimants was done at the employer's location and at the direction of the employer or his designee, and was the kind of work that was not outside the usual course of business for the farm enterprise.

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 When any employee shall cease to work for an employer, whether by discharge or voluntary withdrawal, 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 work period. RCW 49.48.010.

5.5 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).

5.6 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). The civil penalty shall be waived if it is determined all wages and interest owed were paid within ten days of the receipt of the citation and notice of assessment. RCW 49.48.083 (3)(c).

5.7 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).

5.8 Absent inadvertence or the existence of a bona fide dispute over the obligation to pay, an employer who fails to pay an employee's wages does so willfully.

Financial inability is not a defense. *Schilling v. Radio Holdings*, 136 W.2d 152, 164 – 165, 961 P.2d 371 (1998).

5.9 Independent contractors are exempt from the Washington State Minimum Wage Law. However, the law cannot be avoided by simply calling a worker an independent contractor. RCW 51.08.180, RCW 51.08.181, RCW 51.08.195.

5.10 Services performed by an individual for remuneration shall not constitute employment subject to the 51.08 RCW if it is shown, among other things, that the individual has been and will continue to be free from control or direction over the performance of the service – both under contract of service and in fact, the service is outside the usual course of business for the service is performed, the service is performed outside of all of the places of business of the enterprise for which the service is performed and the individual is customarily engaged in an independently established trade or occupation. RCW 51.08.195.

5.11 Workers paid on commission or by piecework must earn a minimum wage rate. WAC 296-126-021. From January 1, 2017 through December 31, 2017, the minimum wage in the State of Washington was \$11.00 per hour. RCW 49.46.020.

5.12 In applying the law to the facts of the case herein, the undersigned concludes the above three wage claimants were employees and not independent contractors. The wage claimants performed all of their work at the farm and all of the work performed fell within the kind of work that was done to advance the main purpose of the business enterprise; i.e. to produce and sell marijuana. Additionally no evidence was presented to indicate the wage claimants had bid on work or entered into contracts regarding a scope or time period of work.

The question then remains who are owed wages and how much. As to Mr. Valenzuela, the undersigned concludes he is owed the wages he is claiming; i.e. \$924.00, plus interest in the amount of \$45.38. Although Mr. Wise asserts he never met or hired Mr. Valenzuela, such a situation does not relieve him from paying Mr. Valenzuela for work performed at the farm.

As to Ms. Romano, the undersigned concludes that she is owed the wages she is claiming; i.e. \$360.00, plus interest in the amount of \$17.88. Mr. Wise states that she was paid these wages; however, the written documentation supports her claim that she was not. The \$845.00 she was paid on May 26, 2017, was for the pay period May 6, 2017 through May 19, 2017.

As to Ms. Nelson, the undersigned concludes there is insufficient evidence to support her claim for past due wages.

As to the penalties in the amount of \$3000.00 - \$1000.00 for each wage claimant – no penalty shall be assessed with regard to Ms. Nelson. With regard to Mr. Valenzuela

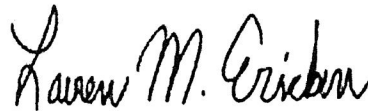
and Ms. Romano, the undersigned concludes the non-payment of wages by the appellants was willful and hereby upholds the penalties assessed by the Department. As indicated, financial inability is not a defense to wage claims. Here the appellants knew wages had to be paid and failed to do so. There was no inadvertence or bona fide wage dispute. Ms. Romano was last paid on May 26, 2017 to cover a pay period occurring prior to the period of time for which she is claiming wages. With regard to Mr. Valenzuela, even if the appellants did not know Mr. Valenzuela had worked at the farm, they knew he had as soon as they received his wage complaint; that is why under RCW 49.48.083, the Department shall waive any civil penalty assessed if it is determined that all wages including interest has been paid within ten days of the receipt of the citation and notice of assessment.

6. INITIAL ORDER

IT IS HEREBY ORDERED THAT:

- 6.1. The Labor and Industries action set forth in W-166-18 is set aside.
- 6.2. The Labor and Industries action set forth in W-167-18 is affirmed.
- 6.3. The Labor and Industries action set forth in W-168-18 is affirmed.

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.

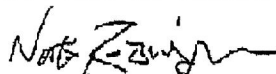
CERTIFICATE OF SERVICE FOR OAH DOCKET NO. 02-2018-LI-00680

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

Green Power of Washington, LLC c/o Clint Wise 24629 SE 146 th St Issaquah, WA 98027 <i>Appellant/Employer</i>	<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
Katy J. Dixon, AAG Office of the Attorney General MS: TB-14 800 5 th Ave Ste 200 Seattle, WA 98104 <i>Agency Representative</i>	<input type="checkbox"/> First Class Mail <input type="checkbox"/> Certified Mail, Return Receipt <input type="checkbox"/> Hand Delivery via Messenger <input checked="" type="checkbox"/> Campus Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> E-mail
Samantha Nelson 100 Weatherstone Rd Omak, WA 98841 <i>Intervenor/Wage Claimant</i>	<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
Joey Valenzuela 100 Weatherstone Rd Omak, WA 98841 <i>Intervenor/Wage Claimant</i>	<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
Amber Romano 602 Briar Ln Omak, WA 98841 <i>Intervenor/Wage Claimant</i>	<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

Date: Friday, July 06, 2018

OFFICE OF ADMINISTRATIVE HEARINGS



Nathan Robinson
 Legal Assistant 3