DIRECTOR OF THE DEPARTMENT OF LABOR & INDUSTRIES
STATE OF WASHINGTON

In re: Port of Tacoma, Appellant. Citation and Notice of Assessment Nos. W-175-18, W-176-18, W-177-18 & W-349-18 OAH Docket Nos. 02-2018-LI-00681 & 06-2018-LI-00770	No. 2019-005-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 10, 2018, having considered the petition for review filed by the Department of Labor & Industries and the briefing submitted to the Director's Office, and having reviewed the record created at hearing, issues this Director's Order.

The parties are the Department, the Port of Tacoma, Dax Koho, Glenn Brazil, Bruce Koch, and Donald Olsen.

This Order intends to resolve the contested issue of whether the Port failed to pay all the wages due to Dax Koho, Glenn Brazil, Bruce Koch, and Donald Olsen in violation of the wage payment laws. **The Port is ordered to pay wages to Dax Koho in the amount of $2,013.07. The Port is ordered to pay wages to Glenn Brazil in the amount of $2,435.95. The Port is**

ordered to pay wages to Bruce Koch in the amount of $2,592.69. The Port is ordered to pay wages to Donald Olsen in the amount of $1,740.08. The Port is also ordered to pay interest of one percent per month under RCW 49.48.083(2) for these wages (except for the period of October 10, 2018, to the date this order is served). The penalties for willfully withholding wages are vacated.

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 October 10, 2018. The Initial Order reversed the Department's Citation and Notice of Assessment Nos. W-175-18, W-176-18, W-177-18, and W-349-18.

2. On November 9, 2018, the Department timely filed a petition for review with the Director.

3. The Director adopts and incorporates the Initial Order's "Facts for Purposes of Summary Judgment" 4.1 through 4.29, 4.31 through 4.43, and 4.45 through 4.49.

4. On the return flight, Mr. Koho and Mr. Brazil did not spend time on activities related to their work for the Port. "China Trip #1 – March 2017".

5. The Director adopts and incorporates the Initial Order's "Issue" statement and "Summary Judgment Motion Hearing" summary.

II. CONCLUSIONS OF LAW

1. Based on the Department'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 Initial Order's Conclusions of Law 5.1 through 5.7, and 5.9 through 5.18.

3. An employer cannot contract around the requirement to pay wages for "hours worked." *See Wingert v. Yellow Freight Sys., Inc.*, 146 Wn.2d 841, 852, 50 P.3d 256 (2002).

4. An agency's interpretation of a statute or regulation is an issue of law subject to de novo review. *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 593, 90 P.3d 659 (2004). A court may substitute its interpretation for that of the agency. *Id.* But the court must "accord substantial weight to the agency interpretation." *D.W. Close Co. v.*

Dep't of Labor & Indus., 143 Wn. App. 118, 126, 177 P.3d 143, 148 (2008) (quoting *Everett Concrete Prods. v. Labor & Indus.*, 109 Wn.2d 819, 823, 748 P.2d 1112 (1988)).

5. Department Policy ES.C.2 is the Department's administrative policy about "hours worked." It provides information about the Department's interpretation and application of relevant statutes, regulations and policies. Section 1 of the policy states: "The department's interpretation of 'hours worked' means all work requested, suffered, permitted or allowed *and includes travel time*, training and meeting time, wait time, on-call time, preparatory and concluding time, and may include meal periods. Policy ES.C.2 at 1 (emphasis added). Thus, the Department interprets "hours worked" to include an employee's travel time when the travel is requested, suffered, permitted, or allowed by the employer.

6. Section 2 of Policy ES.C.2 relates to circumstances where an employee drives a company-provided vehicle. This section does not apply to the travel time at issue in this case, which does not involve a company-provided vehicle. Nothing in section 2 limits the Department's interpretation of "hours worked" set forth in section 1.

7. The Department distinguishes between out-of-town work assignments and normal travel to and from work. Federal law likewise makes this distinction. *Compare* 29 C.F.R. § 785.35 ("Normal travel from home to work is not worktime.") *with* 29 C.F.R. § 785.37 ("[Travel for an out-of-town assignment] cannot be regarded as ordinary home-to-work travel occasioned merely by the fact of employment. It was performed for the employer's benefit and at his special request to meet the needs of the particular and unusual assignment."). Thus, under federal law, travel for work assignments "qualif[ies] as an integral part of the 'principal' activity which the employee was hired to perform on the workday in question."). 29 C.F.R. § 785.37. Nevertheless, where a work assignment spans multiple days, the compensability of the employee's travel is limited to that which takes place during the employee's normal work hours. 29 C.F.R. § 785.39 ("As an enforcement policy the [Department of Labor] will not consider as worktime that time spent in travel away from home outside of regular working hours as a passenger on an airplane, train, boat, bus, or automobile.").

8. The Department's Employment Standards Desk Aid states:

> Washington law is more favorable to employees than federal law. The federal Portal to Portal Act limits compensability of out-of-town travel to travel that takes place during the employee's normal work hours. The federal law also dictates that the trip to the airport or train station is considered a normal commute and is not compensable. In Washington, all travel time related to work is compensable regardless of the hours when it takes place and includes the time to get to the airport or train station.
>
> If a person is required to travel to a training seminar in another city, the time from when the employee leaves their home until they arrive at their hotel in the other city is all compensable. Likewise, the time from when the employee leaves the hotel (or training facility) in the remote city, until they arrive back at their home, is also compensable. If, on the other hand,

the employee is required to report to work before they travel out of town, then the drive to work and home from work at the end of the travel is considered normal commute time and is not compensable.

9. The Desk Aid is unpublished and is not binding authority. Nevertheless, it is evidence of the Department's longstanding interpretation of WAC 296-126-002(8). An agency interpretation need not be by formal adoption equivalent to an agency rule; it simply must represent a policy decision by the person or persons responsible. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 815, 828 P.2d 549 (1992). In conjunction with Policy ES.C.2 (as well as declarations from Department personnel), the Desk Aid demonstrates that the Department's interpretation represents an "established practice of enforcement" and not simply a "by-product of current litigation." *Sleasman v. City of Lacey*, 159 Wn.2d 639, 646, 151 P.3d 990 (2007).

10. The Department's interpretation of WAC 296-126-002(8) does not conflict with Washington case law. No Washington case addresses whether travel time for out-of-town, overnight work assignments constitutes "hours worked" within the meaning of this regulation. In *Anderson v. Department of Social & Health Services*, 115 Wn. App. 452, 63 P.3d 134 (2003), the Court of Appeals' analysis was limited to the ordinary commutes of employees. In *Stevens v. Brink's Home Security, Inc.*, 162 Wn.2d 42, 169 P.3d 473 (2007), the Washington Supreme Court considered only whether a service technician's trip from home to the first jobsite of the workday constituted "hours worked." Neither case addresses the compensability of travel time for out-of-town work assignments.

11. The Department's interpretation of its own rule is entitled to considerable deference. *See D.W. Close*, 143 Wn. App. at 129.

12. Under WAC 296-126-002(8), "hours worked" includes travel time for out-of-town work assignments. As in federal law, travel for an out-of-town work assignment is not the same as ordinary home-to-work travel. It is performed for the employer's benefit and at its special request to meet the needs of the particular assignment. It is an integral part of the principal activity that the employee was hired to perform. This is true regardless of whether the employee engages in additional work during the journey or whether the employer owns or controls the employee's means of transport. Because the travel itself is a duty of the work assignment, so long as the employer approves the means of travel, the employee is on duty at a prescribed work place throughout the travel time.[1]

13. The Port does not dispute that it authorized it employees to travel by plane to China and Houston for overnight work assignments. Because the travel time was an integral part of

[1] The Port argues that this analysis impermissibly melds two elements of the "hours worked" regulation. Under the Department's analysis, the Port contends, any time an employer requires or authorizes an employee to travel, the employee's vehicle becomes a "prescribed work place," rendering the term "prescribed work place" superfluous. But the Port is incorrect that the term is rendered superfluous. Where employee travel time is at issue, the reference to a prescribed work place simply contemplates that the employer must authorize the employee to travel by a method of which it approves. Indeed, if the Port were correct, then authorized travel to and from jobsites during a workday would also not constitute "hours worked." This is plainly not the law.

these assignments—in effect a work duty—the Department correctly assessed unpaid wages for travel time for which the Port did not compensate its employees.

14. The Wage Payment Act authorizes a civil penalty when an employer willfully withholds wages. RCW 49.48.083(3). A failure to pay wages is willful when it is knowing and intentional and not the result of a bona fide dispute. *See Lillig v. Becton-Dickinson*, 105 Wn.2d 653, 659, 717 P.2d 1371 (1986). A bona fide dispute is a narrow exception to the civil penalty provision for unpaid wages. *Dep't Labor & Indus. v. Overnite Transp. Co.*, 67 Wn. App. 24, 35, 834 P.2d 638 (1992).

15. Here, there is a bona fide dispute. The Port has provided "meritorious argument [and] citation to authority" to support its view. *See Overnite Transp.*, 67 Wn. App. at 36. The Department's instruction to the Port to pay the wages does not eliminate the bona fide dispute. A civil penalty for willfully withholding wages is inappropriate.

16. Because the Port failed to pay its employees their full wages, the Port must pay wages owed in the amount of $2,013.07 to Dax Koho, $2,435.95 to Glenn Brazil, $2,592.69 to Bruce Koch, and $1,740.08 to Donald Olsen, plus interest on these wages at one percent per month under RCW 49.48.083(2) (except for the period of October 10, 2018, to the date this order is served). The interest payment obligation is ongoing until paid in full.

III. DECISION AND ORDER

Consistent with the above Findings of Fact and Conclusions of Law, Citation and Notice of Assessment Nos. W-175-18, W-176-18, W-177-18, and W-349-18 are AFFIRMED IN PART and REVERSED IN PART.

1. Payment of wages. *See* Citation and Notice of Assessment for payment information and the effect of failing to pay wages and interest. The Port is ordered to pay wages to Dax Koho in the amount of $2,013.07. The Port is ordered to pay wages to Glenn Brazil in the amount of $2,435.95. The Port is ordered to pay wages to Bruce Koch in the amount of $2,592.69. The Port is ordered to pay wages to Donald Olsen in the amount of $1,740.08. The Port is also ordered to pay interest of one percent per month under RCW 49.48.083(2) for these wages (except for the period of October 10, 2018, to the date this order is served). The Port is ordered to make these payments within thirty days of service of this Director's Order.

2. Civil Penalties: The penalties for willfully withholding wages are vacated.

DATED at Tumwater, Washington this 24 day of April 2019.

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 24 day of April 2019, to the following via regular mail, postage prepaid.

Warren E. Martin
Gordon Thomas Honeywell, LLP
1201 Pacific Avenue, Suite 2100
Tacoma, WA 98402

Port of Tacoma
PO Box 1837
Tacoma, WA 98401

Bruce Koch
2815 53rd Street SE
Auburn, WA 98092

Donald Olsen
7906 211th Avenue E
Bonney Lake, WA 98391

Cynthia Gaddis, AAG
Office of the Attorney General
PO Box 40121
Olympia, WA 98504

Dax Koho
9605 165th Street CT E
Puyallup, WA 98375

Glenn Brazil
PO Box 2791
Yelm, WA 98597

DATED this 24 day of April, 2019, at Tumwater, Washington.

Lisa Deck
Lisa Deck

WASHINGTON STATE
OFFICE OF ADMINISTRATIVE HEARINGS

In the matter of the assessment of wage payment violations against:	Docket Nos. 02-2018-LI-00681 & 06-2018-LI-00770
	INITIAL ORDER GRANTING APPELLANT'S MOTION FOR SUMMARY JUDGMENT AND DENYING DEPARTMENT'S MOTION FOR SUMMARY JUDGMENT
Port of Tacoma,	
Appellant/Employer.	Agency: Dept. of Labor and Industries
	Program: Wage Payments
	Agency Nos. W-175-18; W-176-18; W-177-18; & W-349-18

1. ISSUES

1.1. The wage claimants traveled to and from China and/or Houston to inspect cranes and/or crane parts being manufactured for the Port of Tacoma. Did that travel constitute hours worked under Washington wage payment law?[1]

1.2. Did the Port of Tacoma fail to pay wages to Dax Koho for the period beginning March 25, 2017, through April 2, 2017, as alleged in [Amended] Citation and Notice of Assessment No. W-175-18, dated April 19, 2018?

1.3. Did the Port of Tacoma fail to pay wages to Glenn Brazil for the period beginning March 25, 2017, through April 1, 2017, as alleged in [Amended] Citation and Notice of Assessment No. W-176-18, dated April 19, 2018?

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[1] The parties focused their competing motions for summary judgment on this issue. Both parties argued that a conclusion favorable to them on this issue results in a resolution favorable to them of the combined cases. Accordingly, I embrace and impute the statement of the issues in the combined cases overall, as recited in this section. The statement of the issues has been amended from the version recited in the Prehearing Conference Order issued on June 26, 2018. It has been amended in two regards. First, substantively, the statement of the issues on June 26, 2018, was incorrect because it failed to reflect the Amended Citation and Notice of Assessment that impacted three of the wage claims and which was adopted into the statement of the issues in the Letter Order dated May 22, 2018. Second, non-substantively, the presentation of the statement of the issues on June 26, 2018, does not fit cleanly into the style applied here.

1.4. Did the Port of Tacoma fail to pay wages to Bruce Koch for the period beginning May 14, 2017, through June 30, 2017, as alleged in [Amended] Citation and Notice of Assessment No. W-177-18, dated April 19, 2018?

1.5. Did the Port of Tacoma fail to pay wages to Donald Olsen for the period beginning June 16, 2017, through June 30, 2017, as alleged in Citation and Notice of Assessment No. W-349-18, dated April 20, 2018?

1.6. If any of the foregoing is so, did the Port of Tacoma's failure violate statutes and/or regulations as asserted?

1.7. If so, is the Port of Tacoma liable for the payment of wages, interest, and/or penalties?

1.8. If so, in what amount or amounts?

2. ORDER SUMMARY

2.1. The wage claimants' travel to and from China and/or Houston did *not* constitute hours worked under Washington wage payment law.

2.2. The Port of Tacoma failed to pay wages to Dax Koho for the period beginning March 25, 2017, through April 2, 2017, as alleged in [Amended] Citation and Notice of Assessment No. W-175-18, dated April 19, 2018.

2.3. The Port of Tacoma failed to pay wages to Glenn Brazil for the period beginning March 25, 2017, through April 1, 2017, as alleged in [Amended] Citation and Notice of Assessment No. W-176-18, dated April 19, 2018.

2.4. The Port of Tacoma failed to pay wages to Bruce Koch for the period beginning May 14, 2017, through June 30, 2017, as alleged in [Amended] Citation and Notice of Assessment No. W-177-18, dated April 19, 2018.

2.5. The Port of Tacoma failed to pay wages to Donald Olsen for the period beginning June 16, 2017, through June 30, 2017, as alleged in Citation and Notice of Assessment No. W-349-18, dated April 20, 2018.

2.6. The Port of Tacoma's failure to pay wages as recited above did *not* violate statutes and/or regulations as asserted.

2.7. Accordingly, the Port of Tacoma is *not* liable for the payment of wages, interest, and/or penalties.

2.8. Therefore, there are no amounts to calculate.

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3. SUMMARY JUDGMENT MOTION HEARING

3.1. Hearing Date: September 4, 2018

3.2. Administrative Law Judge: Terry A. Schuh

3.3. Appellant: Port of Tacoma

3.3.1. Representative: Warren E. Martin, Gordon Thomas Honeywell, LLP, Attorneys. Steven Fawcett, an attorney from the same firm, attended as well.

3.4. Agency: Department of Labor and Industries

3.4.1. Representative: Cynthia J. Gaddis, Assistant Attorney General. Matthew Wilson, Law Clerk, attended as well.

3.5. Record relied upon:

3.5.1. Citation and Notice of Assessment Nos. W-175-18, W-176-18, and W-177-18; October 27, 2017; 10 pages.

3.5.2. Port of Tacoma's Appeal; November 16, 2017, 1 page.

3.5.3. [Amended] Citation and Notice of Assessment Nos. W-175-18, W-176-18, and W-177-18; April 19, 2018; 8 pages.

3.5.4. Citation and Notice of Assessment No. W-349-18; April 20, 2018; 9 pages.

3.5.5. Port of Tacoma's Appeal; April 30, 2018; 1 page.

3.5.6. Department's Motion for Summary Judgment; July 27, 2018, 27 pages.

3.5.7. Declaration of Cynthia Gaddis in Support of Department's Motion for Summary Judgment; July 27, 2018; 2 pages plus 7 attachments.

3.5.8. Port of Tacoma's Motion for Summary Judgment; July 27, 2018; 25 pages.

3.5.9. Declaration of Warren E. Martin in Support of Port of Tacoma's Motion for Summary Judgment; July 27, 2018; 3 pages plus 11 attachments.

3.5.10. Department's Response to Port of Tacoma's Motion for Summary Judgment; August 10, 2018; 11 pages.

3.5.11. Port of Tacoma's Response in Opposition to the Department's Motion for Summary Judgment; August 10, 2018; 15 pages.

3.5.12. Declaration of Joseph Caldwell; August 7, 2018; 3 pages.

3.5.13. Declaration of Warren E. Martin in Opposition to the Department's Motion for Summary Judgment: August 10, 2018; 3 pages plus 5 attachments.

3.5.14. Department's Reply re Department's Motion for Summary Judgment; August 17, 2018; 6 pages.

3.5.15. Reply in Support of Port of Tacoma's Motion for Summary Judgment; August 16, 2018; 5 pages.

3.5.16. Oral argument on September 4, 2018;

3.5.17. The pleadings and other documents filed in this matter.

4. FACTS FOR PURPOSE OF SUMMARY JUDGMENT

On a motion for summary judgment, the decision maker only considers those facts for which the parties establish "no genuine issue as to any material fact".[2] "Summary judgment is appropriate only where the undisputed facts entitle the moving party to judgment as a matter of law."[3] Only evidence in the record and inferences from that evidence establish facts. If evidence in the record points to more than one possible finding of fact, then summary judgment may not rest on the moving party's version of that fact.[4] Admissions, stipulations, procedural history, and uncontested declarations and affidavits establish facts for summary judgment. Therefore, the record here supports the following facts for the purposes of summary judgment:

Jurisdiction

4.1. The Department of Labor and Industries ("the Department") issued to the Port of Tacoma ("the Port") on October 27, 2017, a Citation and Notice of Assessment Nos. W-175-18, W-176-18, and W-177-18. The Department alleged that the Port owed, as of that date, $8,658.43 in unpaid wages, interest, and penalties.

4.2. The Port filed an appeal on November 20, 2017.

4.3. The Department issued to the Port on April 19, 2018, an [Amended] Citation and Notice of Assessment Nos. W-175-18, W-176-18, and W-177-18. The Department alleged that the Port owed, as of that date, $10,433.84 in unpaid wages, interest, and penalties.

4.4. The appeal filed by the Port on November 20, 2017, was imputed to this amended citation.

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[2] WAC 10-08-135. In Superior Court matters, CR 56 governs summary judgment. Where the relevant procedural rules do not conflict with CR 56, it and the cases interpreting it serve as persuasive authority in the management of summary judgment under WAC 10-08-135.

[3] *Verizon NW, Inc. v. Employment Sec. Dep't,* 164 Wn.2d 909, 916 (2008), *citing Alpine Lakes Prot. Soc'y v. Dep't of Natural Res.*, 102 Wn. App. 1, 14 (1999).

[4] *Verizon NW,* 164 Wn.2d 916.

4.5. The Department issued to the Port on April 20 2018, a Citation and Notice of Assessment No. W-349-18. The Department alleged that the Port owed, as of that date, $1893.32 in unpaid wages, interest, and penalties.

4.6. The Port filed an appeal on May 2, 2018.

4.7. The Office of Administrative Hearings assigned Docket No. 02-2018-LI-00681 to the Citation and Notice of Assessment (and subsequently the [Amended Citation and Notice of Assessment) addressing wage claims W-175-18, W-176-18, and W-177-18. The Office of Administrative Hearings assigned Docket No. 06-2018-LI-00770 to the Citation and Notice of Assessment addressing wage claim W-349-18.

4.8. On June 18, 2018, I granted the Department's contested motion to consolidate the two matters into one hearing and prehearing process. Accordingly, the competing motions for summary judgment address and incorporate all four wage claims.

Summary Judgment

4.9. The Department and the Port each filed a motion for summary judgment on July 27, 2018.

4.10. Both parties filed responses on August 10, 2018.

4.11. The Port filed its reply on August 16, 2018. The Department filed its reply on August 17, 2018.

The Port sponsors and arranges trips

4.12. The Northwest Seaport Alliance ("NWSA") decided to purchase new marine cranes to employ at the Port.

4.13. NWSA selected a crane manufacturer located in China.

4.14. The Port is responsible for maintaining cranes operated on its premises an employs crane maintenance mechanics for that purpose.

4.15. Therefore, in 2017, the Port invited interested mechanics to volunteer to be part of the quality inspection team observing the manufacturing process in China. More specifically, the Port intended the mechanics to observe the manufacturing process at the time when parts that the mechanics will work on were being produced.

4.16. The trips were scheduled in coordination with the manufacturer and the Port's consultants.

4.17. There were two such trips to China. Moreover, there was a trip to Houston to attend training on the drive system to be employed by the new cranes.

4.18. The Port made all of the arrangements for the trips, including air transportation and hotel rooms.[5]

The Port negotiated with the labor union the terms of pay for the mechanics who traveled

4.19. The Port did not have a policy for this type of travel.

4.20. Accordingly, the Port negotiated with Local 22 to reach an agreement for wages on these trips. They agreed that the hourly employees would be paid a maximum of eight hours a day, straight time, for travel to and from China and within China.

4.21. The Port paid the wage claimants for their travel time consistent with the labor agreement and with the Port's understanding of applicable federal wage payment law. As a result, not all time the wage claimants spent traveling was paid.

China Trip #1 – March 2017

4.22. The first trip to China included wage claimants Dax Koho and Glenn Brazil.

4.23. The group left Sea Tac on March 25, 2017, and returned to Sea Tac on April 2, 2017.

4.24. The Port instructed Mr. Koho and Mr. Brazil to arrive at the airport three hours before their scheduled flight.

4.25. The men met at the Port, and Mr. Brazil's wife drove them to Sea Tac.

4.26. They ate lunch at the airport, each consuming a beer with their lunch.

4.27. Then they met another member of the group, Mr. Caldwell[6], at the gate and discussed their pending inspection of the cranes. Mr. Koho also reviewed some documents regarding the cranes.

4.28. Subsequently, while on the flight to China, both men spent some of their time electronically reviewing materials regarding the inspection in which they were going to participate. The Port did not require them to do so.

4.29. The rest of the time they spent on activities not related to work.

4.30. On the return flight, the men did no work.

4.31. The return flight took over 11 hours. The record does not reflect how much time the initial flight took. The flights were long, uncomfortable, and boring. The flight

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[5] When the wage claimants were advised of the travel dates, it was likely too close in time for them to make their own travel arrangements had they wanted to do so.

[6] Mr. Caldwell is a member of management but he was not a supervisor of either of the mechanics.

time does not reflect time spent going through customs, time spent waiting, and time spent traveling to and from the airport, in either country.

Houston Trip – May 2017

4.32. In May 2017, Bruce Koch flew to and from Houston to attend training there regarding the drive systems to be employed by the new cranes.

4.33. He was compensated from his training time but not for his flight time.

China Trip #2 – June 2017

4.34. The second trip to China included wage claimants Dax Koho, Glenn Brazil, Bruce Koch, and Donald Olsen.

4.35. The group left Sea Tac on June 16, 2017, and returned on June 24, 2017.

4.36. On the flights, the men chatted at times about the inspection but spent most of their time amusing themselves or sleeping.

The Department investigates the wage complaints

4.37. Dax Koho, Glenn Brazil, Bruce Koch, and Donald Olsen each filed wage claims with the Department, seeking compensation for the time they spent traveling for the Port. That travel time included all travel to and from the airport, all time spent at that airport, and all time spent in flight.

4.38. All four wage claims were assigned to Industrial Relations Agent Shannon Enright.

4.39. During her investigation, Ms. Enright consulted with Brent Debeaumont, a wage and hour technical specialist with the Department. She also consulted with her supervisor, Russell Hauss, and with the Department's Employment Standards Program Manager David Johnson.

4.40. Ms. Enright reviewed Department Policy E.S.C.2. However, she believed that this policy did not address the travel at issue with the wage claims she was investigating.

4.41. Mr. Debeaumont suggest she review the Desk Aid. The Desk Aid provides that all travel time related to work is compensable, ostensibly including the travel time at issue in her investigation.

4.42. Nevertheless, the Desk Aid is not available to the public. Furthermore, Industrial Relations Agents are not required to apply the provisions of the Desk Aid.

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The Department cites the Port

4.43. Ms. Enright recommended issuing a citation to the Port for wages owed the wage claimants. Her supervisor, Mr. Hauss, reviewed the recommendation and the program manager, Mr. Johnson, signed it.

4.44. Ms. Enright based her recommendation upon WAC 296-126-002(8), Department Policy E.S.C.2, and the Desk Aid. The record is unclear as to precisely how much weight Ms. Enright attached to each of these authorities. However, she was apparently not persuaded to recommend citations until after she consulted the Desk Aid. Nevertheless, the Department has defended the citation primarily based upon WAC 296-126-002(8).

4.45. Mr. Johnson approved and signed the citations because the Department's position is that the wage claimants were on duty at the employer's prescribed work place while traveling because the employer had assigned them to travel.

4.46. The citations were issued as discussed above.

The Port appealed both citations and those two appeals were consolidated

4.47. The Port appealed both citations, as discussed above.

4.48. One of the citations was amended, as discussed above.

4.49. The two citations were consolidated, as discussed above.

5. CONCLUSIONS OF LAW

Based upon the facts above, I make the following conclusions:

Jurisdiction

5.1. I have jurisdiction over the persons and subject matter here under Revised Code of Washington ("RCW") 49.48.084 and Chapter 34.05 RCW.

This matter is ripe for summary judgment

5.2. "A motion for summary judgment may be granted and an order issued if the written record shows that there is no genuine issue as to any material fact and the moving party is entitled to judgement as a matter of law."[7]

5.3. "Summary judgement is appropriate 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show

[7] Washington Administrative Code ("WAC") 10-08-135.

that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.' CR 56(c)."[8]

5.4. "The facts and reasonable inferences therefrom are construed most favorably to the nonmoving party."[9]

5.5. "Summary judgment should be granted if reasonable persons could reach but one conclusion from the evidence presented."[10]

5.6. "The burden is on the moving party to demonstrate there is no issue as to a material fact, and the moving party is held to a strict standard."[11]

5.7. If the moving party meets this initial standard, "the non-moving party may not rest upon the mere allegations or denial of [its] pleadings, but [its] response, by affidavits or as otherwise provided in the rule, must set forth specific facts showing that there is a genuine issue for trial."[12]

5.8. Here, the parties each filed a motion for summary judgment. Thus, each party asserted that no material facts were in issue. Moreover, they agree about the underlying facts regarding the travel that is the fulcrum of this case. There may be some disagreement about the precise calculation of the wages that the Department asserts that the Port owes. However, as will be apparent below, that is not material here. The parties agree that the key is the legal issue of whether the travel time at issue here is compensable. Accordingly, I hold that there are no material facts in dispute and that this matter is ripe for summary judgment.

Wage complaints

5.9. If an employee files a wage complaint, the Department must investigate.[13]

5.10. If the Department determines that the employer violated one or more wage payment laws, the Department issues a Citation and Notice of Assessment.[14] If not, the Department issues a Determination of Compliance.[15]

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8 *American Legion Post #149 v. Washington State Dept. of Health,* 164 Wn.2d 570, 584, 192 P.2d 306 (2008).

9 *Korslund v. Dycorp Tri-Cities services, Inc.,* 156 Wn.2d 168, 177, 125 P.3d 119 (2005) (citations omitted).

10 *Korslund*, 156 Wn.2d at 177.

11 *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 811, 828 P.2d 549 (1992) (citations omitted).

12 *McGough v. City of Edmonds*, 1 Wn.App. 164, 168, 460 P.2d 302 (1969).

13 RCW 49.48.083(1)

14 RCW 49.48.083(1); RCW 49.48.082(1), (7).

15 RCW 49.48.083(1); RCW 49.48.082(3).

5.11. Here, the Department determined that the Port failed to pay all wages earned by the wage claimants when they traveled on Port business to China and/or Houston. Therefore, the Department issued the Citations and Notices of Assessment at issue here.

The Port's failure to pay all of the time spent traveling did not violate Washington wage payment law

5.12. As clarified by the issues recited in section 1 above, the key here is whether the Port's undisputed failure to pay wages to the wage claimants for all of the time that they spent traveling violated Washington wage payment law.

5.13. In the Citations and Notices of Assessment, the Department asserted that the Port failed to pay wages to the wage claimants at the agreed rate of pay in violation of RCW 49.52.050.

5.14. It is unlawful for an employer to pay any employee a wage lower than that which the employer is obliged to pay by statute, ordinance, or contract.[16]

5.15. Employers are obliged to pay time-and-a-half for hours in excess of 40 worked per workweek.[17]

5.16. In short, employers are obliged to pay employees for all hours worked.

5.17. "'Hours worked' shall be 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 a prescribed workplace."[18]

5.18. It is undisputed that the travel time did not represent hours when the wage claimants were authorized or required to be on duty on the employer's premises. What is disputed is whether the wage claimants were authorized or required to be on duty at a prescribed workplace.

5.19. The Department has published policy ES.C.2, entitled "Hours Worked", which addresses travel time. In Sec. 1, this policy provides that "hours worked" includes all travel time. However, in Sec. 2, the policy limits its application: "This policy is not intended to address or cover all employee travel time issues. Instead, it is limited to the particular issues raised in the *Brink's* case regarding whether time spent driving a company-provided vehicle between home and the first or last job site of the day constitutes compensable hour's worked."

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16 RCW 49.52.050(2).

17 RCW 49.46.130.

18 WAC 296-126-002(8).

5.20. Accordingly, Ms. Enright did not rely on this policy in making her determination. Therefore, neither will I.

5.21. After consulting with others, Ms. Enright reviewed the Desk Aid. Page 70 of the Employment Standards Desk Aid provides that "all travel time related to work is compensable regardless of the hours when it takes place and includes the time to get to the airport or train station."

5.22. However, Industrial Relations Agents are not required to follow the provisions in the Desk Aid. If Industrial Relations Agents are not governed by the provisions in the Desk Aid, and those provisions are not made available to the public, I am not persuaded that the employer is governed by them or that the tribunal is governed by them.

5.23. If I am not bound by the Desk Aid and the only potentially relevant policy specifies that it does not apply to the factual circumstances that are the framework of this case, I must return to the only remaining authority provided by either party, namely WAC 296-126-002(8), for determining whether the travel time at issue here constituted hours worked.

5.24. Of the variety of cases referenced by the parties in their summary judgment pleadings, only three discuss that regulation.

5.25. In the earliest such case, the Court of Appeals of Washington, Division 2, addressed the circumstance of employees working at the Special Commitment Center on McNeil Island.[19] These employees could reach work only via a 20-minute ride on a ferry operated by the Department of Corrections from the mainland to the island.[20] On the ferry, the employees "engage[d] in a variety of personal activities" and performed no work, although they were ostensibly "subject to discipline".[21] The court first looked at WAC 296-126-002(8).[22] The court held that the employees were not on duty, were not on the employer's premises, were not at a prescribed work place, and were essentially commuting to and from work.[23] The court then looked to the federal Fair Labor Standards Act, to determine if it applied.[24] The court observed that no language in Washington's Minimum Wage Act implied or imported the federal Portal to

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19 *See, Anderson v. State, Dept. of Social and Health Services,* 115 Wn.App. 452, 63 P.3d 134 (Wash. App Div. 2, 2003).

20 *Id.* at 454.

21 *Id.*

22 *Id.* at 455-457.

23 *Id.*

24 *Id.* at 457-459.

Portal Act.[25] The court declined to rule regarding whether federal case the predated the Portal to Portal Act were relevant in Washington State.[26] Rather, the court observed that the two arguably relevant federal cases, *Tennessee Coal*[27] and *Jewell Ridge*[28], were distinguishable.[29] In those two cases, the miners were traveling within the mines to their assigned workstations and were not engaged in personal activity, were on the employer's premises, were traveling primarily for the benefit of the employer, and were subject to physical and mental exertion.[30] In *Anderson*, the employees were not on the employer's premises and not subject to physical or mental exertion.[31] Therefore, the court held that their travel by ferryboat was not compensable.[32]

5.26. In the second case, the Washington State Supreme Court reached a different result, this time regarding installation and service technicians driving company trucks.[33] That court focused on the same regulation and distinguished *Anderson*, observing that the *Anderson* court found that the employees were not "on duty" and not on the employer's "premises" or at a "prescribed workplace."[34] At issue in *Brink's* was the time the technicians spent traveling in employer trucks from their residences to the first job of the day and from the last job of the day to their residences.[35] The court held that the technicians were on duty because the employer "strictly control[led] the drive time, forbade use of its trucks for personal business, and required the technicians to remain available to assist with other jobs or answer service calls while they were driving the employer's vehicle to and from their residence.[36] The court held that the employers' trucks constituted a "prescribed work place" because the trucks were an integral part of the technicians' work. This was so because the trucks contained the tools and equipment necessary for the job, the employer required technicians to use the

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25 *Id.* at 457.

26 *Id.* at 457-459.

27 *Tennessee Coal, Iron & Railroad Co. v. Muscoda Local No. 123*, 321 U.S. 590, 64 S.Ct. 698, 88 L.Ed. 949 (1944).

28 *Jewell Ridge Coal Corp. v. Local No. 6167*, 325 U.S. 161, 65 S.Ct. 1063, 89 L.Ed 1534 (1945).

29 *Anderson* at 458.

30 *Id.*

31 *Id.* at 459.

32 *Id.*

33 *See Stevens v. Brink's Home Security, Inc.*, 162 Wn.2d 42, 169 P.3d 473.

34 *Id.* at 48.

35 *Id.*at 44.

36 *Id.* at 48-49.

trucks, and because the technicians needed to complete all their paperwork either at the customer's house or in the truck.[37] Thus, the court held that the time technicians spent traveling in the trucks to and from the first and last job sites of the day constituted compensable work.[38]

5.27. The final case was a federal court employing Washington State law.[39] That court addressed travel by dispatched union members driving from the local union dispatch hall to the job site for the day.[40] The court observed that the union members were not restricted or controlled by the employer during their commute from the dispatch hall to the job site. Accordingly, the court held that the union members were not "on duty" and their vehicles did not constitute a "prescribed work place".[41]

5.28. Here, the wage claimants could not complete their assignment in China or Houston without traveling there. Moreover, the employer arranged and paid for the travel. The wage claimants, in theory, could have booked their own flights, but given that they were not advised of the dates of the trips until shortly before, there was not enough time to purchase an alternative flight. Finally, the employer directed the wage claimants to report to the airport three hours ahead of the scheduled flight time. Although the wage claimants spent some time on the China trips discussing with one another the inspection they would conduct, and spent some time reviewing materials that the Port provided to them or allowed to access, the Port did not require them to have those discussions or review those materials while traveling. Other than requiring the wage claimants to be on the plane, to be at the airport by a certain time, and to cooperate with the pre-arranged transportation in China to and from the airport, the wage claimants were free to use their time in the airport and on the plane as they wished. There is evidence that the wage claimants found the lengthy flights to and China to be demanding physically and mentally. One of the wage claimants found the long flights to be particularly uncomfortable because of his physical condition. But those circumstances are distinguishable from *Tennessee Coal* and *Jewell Ridge* because the instant circumstances were reflections of the particularly long flight and because of one wage claimant's personal circumstances as opposed to the miners' responsibility to be alert to danger during the trip. Therefore, the wage claimants were more like the employees in

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37 *Id.* at 49.

38 *Id.* at 49-50.

39 *See Levias v. Pacific Maritime Ass'n*, 760 F.Supp.2d 1036 (W.D.Wash. 2011).

40 *Id.* at 1041.

41 *Id.* at 1053.

Anderson and *Levias*, and not like the employees in *Brink's*. Thus, I hold that the wage claimants were not "on duty" within the meaning of WAC 296-126-002(8) when traveling to and from China and/or Houston.

5.29. Here, the Port required nothing more of the wage claimants than to be at the airport on time and on the plane. The Port did not require the wage claimants to do any work on the plane. The Port exercised no control over the plane. The Port expected the wage claimants to refrain from conduct that might embarrass the Port, but that generic expectation did not translate into specific directions or limitation. Truly, the behavior expected of air travelers was undoubtedly more severe and detailed than any expectation that the Port might have had. Therefore, I hold that the plane, and the related instruments of travel, did not constitute a "prescribed workplace" under the regulation.

The Department's interpretation of WAC 296-126-002(8) is not entitled to deference in this instance

5.30. The Department argued that I should defer to the Department's interpretation of its regulation.

5.31. It is a commonly held principle that a tribunal is to give deference to an agency's interpretation of a statute where the agency's expertise is clearly in play, although final interpretation of said statute remains ultimately up to the tribunal.[42] The footnoted authority – with one exception – addressed statutes as opposed to regulations. Moreover, the authority operated within judicial review of agency decisions. Here, at issue, is the interpretation and application of a regulation, which was promulgated as well as interpreted by the Department. Here, the present procedural posture of the case is an agency decision being adjudicated by an administrative law judge. An administrative law judge is part

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[42] *See, e.g., Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 587, 90 P.3d 659 (2004) (stating that deference to an agency's interpretation is apt provided that interpretation is consistent with the statute, the statue is ambiguous, and the statute "falls within the agency's expertise"); *Id.* at 589 (holding that the "court should not 'undertake to exercise the discretion that the legislature has placed in the agency.' RCW 34.05.574(1)."); *Id.* at 593 (holding that "deference to an agency's interpretation of its own regulations is also appropriate"); *American Legion Post No. 32 v. City of Walla Walla*, 116 Wn2d 1, 5, 802 P.2d 784 (1991) (observing that "[i]nterpretation of a statute is solely a question of law and within the conventional competence of the court."); *Safeco Ins. Co. v. Meyering*, 102 Wn.2d 385, 391, 687 P.2d 195 (1984) (noting that an agency's expertise suggests its construction of a statute should be "accorded substantial weight" but also observing that the tribunal's interpretation is ultimate even in the face of agency expertise); *Franklin County Sheriff's Office v. Sellers*, 97 Wn.2d 317, 325, 646 P.2d 113 (1982) (recognizing the "substantial weight" inherently attributed to an agency's view of the law but reserving the judiciary's "province and duty . . . to say what the law is"); *W. Ports Transp., Inc. v. Emp't Sec. Dep't*, 110 Wn.App 440, 450, 41 P.3d 510 (2002) (recognizing the "heightened degree of deference" given to an agency's interpretation of a statute but reserving for the court the privilege "to determine the purpose and meaning of statutes, even when the court's interpretation is contrary to that of the agency charged with carrying out the law.")

of the executive branch of government and not part of the judiciary branch. Therefore, the footnoted authority is not directly on point. However, I am persuaded that the principles expressed by that authority apply by analogy to an administrative law judge interpreting a regulation. Here, interpreting a regulation that expresses what kind of travel is compensable falls surely within the Department's field of expertise. However, there exist here some considerations that deflect that deference. One, three courts have spoken, and I owe more deference to precedence than I do to agency expertise. Two, the agency's position that all work-related travel is compensable appears to expand rather than merely interpret and apply the definition of "hours worked" in the regulation, effectively re-writing the regulation without the process required under the Administrative Procedures Act. Three, the Department's only expression of its discretion seems to flow from the Desk Aid, which is not a rule and was not available to the Port to advise it of the Department's interpretation and intended application of the regulation. Accordingly, I respectfully decline to defer to the Department's interpretation of WAC 296-126-002(8) in this instance.

The Citations and Notices of Assessment should be set aside

5.32. Therefore, the wage claimants' travel to and from China and Houston at issue here was not compensable.

5.33. Thus, the Port did not violate Washington wage payment laws when it failed to fully compensate the wage claimants for their time spent traveling.

5.34. Accordingly, the Port is not liable for the payments of wages, interest, or penalties assessed by the Department.

5.35. The Appellant's Motion for Summary Judgment should be granted.

5.36. The Department's Motion for Summary Judgment should be denied.

5.37. Furthermore, the [Amended] Citation and Notice of Assessment Nos. W-175-18, W-176-18, and W-177-18, issued on April 19, 2018, should be set aside.

5.38. In addition, Citation and Notice of Assessment No. W-349-18, issued on April 20, 2018, should be set aside.

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6. INITIAL ORDER

IT IS HEREBY ORDERED THAT:

6.1. The Department of Labor and Industries action is SET ASIDE.

6.2. The Port of Tacoma's Motion for Summary Judgment is GRANTED.

6.3. The Department of Labor and Industries's Motion for Summary Judgment is DENIED.

6.4. [Amended] Citation and Notice of Assessment Nos. W-175-18, W-176-18, and W-177-18, issued on April 19, 2018, is SET ASIDE.

6.5. Citation and Notice of Assessment Nos. W-349-18, issued on April 20, 2018, is SET ASIDE.

6.6. The Port of Tacoma is not liable for the payment of wages, interest, or penalties assessed by the foregoing Citations and Notices of Assessment.

6.7. The evidentiary hearing scheduled to occur on October 30 through November 1, 2018, is struck.

6.8. All remaining deadlines and events regarding OAH Dkt. Nos. 02-2018-LI-00681 and 06-2018-LI-00770 are struck.

SIGNED at Tacoma, Washington on the date of mailing.

Terry A Schuh
Administrative Law Judge
Office of Administrative Hearings

CERTIFICATE OF SERVICE IS ATTACHED

APPEAL RIGHTS

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.[43] 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:	Physical Address:
Director	7273 Linderson Way SW
Department of Labor and Industries	Tumwater, WA 98501
PO Box 44001	
Olympia, WA 98504-4001	

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.[44]

If you timely file a Petition for Administrative Review, the Director will conduct an administrative review under chapter 34.05 RCW.

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[43] RCW 49.48.084 and RCW 34.05.464.

[44] RCW 49.48.084 and Chapter 34.05 RCW.

CERTIFICATE OF SERVICE FOR OAH
DOCKET NOS. 02-2018-LI-00681 & 06-2018-LI-00770

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

Port of Tacoma PO Box 1837 Tacoma, WA 98401 ***Appellant/Employer*** 9489 0090 0027 6021 0137 11	☒ First Class Mail ☒ Certified Mail, Return Receipt 9489 0090 0027 6021 0137 11 ☐ Hand Delivery via Messenger ☐ Campus Mail ☐ Facsimile ☐ E-mail
Warren E. Martin Gordon Thomas Honeywell, LLP 1201 Pacific Ave Ste 2100 Tacoma, WA 98402 ***Appellant Representative*** 9489 0090 0027 6021 0137 28	☒ First Class Mail ☒ Certified Mail, Return Receipt 9489 0090 0027 6021 0137 28 ☐ Hand Delivery via Messenger ☐ Campus Mail ☐ Facsimile ☒ E-mail: wmartin@gth-law.com
Cynthia J. Gaddis, AAG Office of the Attorney General MS: 40121 7141 Cleanwater Dr SW Olympia, WA 98504-0121 ***Agency Representative***	☐ First Class Mail ☐ Certified Mail, Return Receipt ☐ Hand Delivery via Messenger ☒ Campus Mail ☐ Facsimile ☒ E-mail: cynthiag1@atg.wa.gov
Bruce Koch 2815 53rd St SE Auburn, WA 98092 ***Intervenor/Wage Claimant*** 9489 0090 0027 6021 0137 35	☒ First Class Mail ☒ Certified Mail, Return Receipt 9489 0090 0027 6021 0137 35 ☐ Hand Delivery via Messenger ☐ Campus Mail ☐ Facsimile ☐ E-mail
Dax Koho 9605 165th St CT E Puyallup, WA 98375 ***Intervenor/Wage Claimant*** 9489 0090 0027 6021 0137 42	☒ First Class Mail ☒ Certified Mail, Return Receipt 9489 0090 0027 6021 0137 42 ☐ Hand Delivery via Messenger ☐ Campus Mail ☐ Facsimile ☐ E-mail

Glenn Joseph Brazil PO Box 2791 Yelm, WA 98597 ***Intervenor/Wage Claimant*** 9489 0090 0027 6021 0137 59	☒ First Class Mail ☒ Certified Mail, Return Receipt 9489 0090 0027 6021 0137 59 ☐ Hand Delivery via Messenger ☐ Campus Mail ☐ Facsimile ☐ E-mail
Donald Olsen 7906 211th Ave E Bonney Lake, WA 98391 ***Intervenor/Wage Claimant*** 9489 0090 0027 6021 0137 66	☒ First Class Mail ☒ Certified Mail, Return Receipt 9489 0090 0027 6021 0137 66 ☐ Hand Delivery via Messenger ☐ Campus Mail ☐ Facsimile ☐ E-mail

Date: Wednesday, October 10, 2018

OFFICE OF ADMINISTRATIVE HEARINGS

Nathan Robinson
Legal Assistant 3