

DIRECTOR OF THE DEPARTMENT OF LABOR & INDUSTRIES  
STATE OF WASHINGTON

In re: Concept One Performance and  
Repair, LLC and Ronald Clark, as an  
individual,

Citation and Notice of Assessment Nos.  
W-054-16 & W-117-16

OAH Docket Nos. 01-2016-LI-00002 &  
01-2016-LI-00014

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 November 22, 2016, having considered the petition for review filed by Concept One Performance and Repair LLC and Ronald Clark (the Appellant), briefing submitted to the Director's Office, and having reviewed the record created at hearing and the records and files herein, issues this Director's Order. This Order intends to resolve the contested issue of whether the Appellant paid all wages due to Jeffrey Gallagher and Nicholas Lofgran in violation of the wage payment and minimum wage laws. **The Appellant is ordered to pay wages to Jeffrey Gallagher in the amount of \$6,400. The Appellant is ordered to pay wages to Nicholas Lofgran in the amount of \$533.03. The Appellant is also ordered to pay interest in the amount of one percent per month under RCW 49.48.083(2) for these wages except for the time period of November 22, 2016, to the date this order is served. The**

**Appellant is ordered to pay the Department a penalty in the amount of \$2,000 (\$1,000 for each citation).**

The parties in this matter are the Department and the Appellant.

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 November 22, 2016, following a hearing that was held on September 29, 2016. The Initial Order affirmed the Department's Citation and Notice of Assessment Nos. W-117-16 and W-054-16.

2. On December 22, 2016, the Appellant timely filed a petition for review with the Director.

3. On March 3, 2017, the Department filed a response to the petition for review.

4. The Appellant filed no reply brief, despite being afforded an opportunity to do so by the briefing schedule set forth in this matter.

5. The Appellant raised a new issue in its petition for review, claiming the citations in this matter were untimely. This issue was not raised at any time before or during the administrative hearing, either by way of testimony, briefing, or oral argument.

6. The Director adopts and incorporates all the Initial Order's findings of facts.

7. The Director adopts and incorporates the Initial Order's "Issues Presented," 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 must conduct an administrative review of an Initial Order in accordance with the Administrative Procedure Act (APA), RCW 34.05. RCW 49.48.084(3). In order to address the issue of timeliness, the Appellant would have needed to place evidence on the record supporting its claim of untimeliness. The Department would have had the opportunity to provide evidence on the claim as well. The record is insufficient to judge this issue and the Director cannot take new evidence on appeal. *See Towle v. Dep't of Fish & Wildlife*, 94 Wn. App. 196, 206, 971 P.2d 591 (1999); RCW 34.05.464(5).

3. The Appellant cannot raise the new issue of timeliness now for the first time on appeal because it failed to raise this issue at any time before or during the administrative hearing, and an evidentiary record is necessary to determine the issue. The Appellant's arguments related to that issue are therefore rejected.

4. The Director adopts and incorporates all the Initial Order's conclusions of law.

### **III. DECISION AND ORDER**

Consistent with the above Findings of Fact and Conclusions of Law, the Citation and Notice of Assessment Nos. W-117-16 and W-054-16 are AFFIRMED and the Initial Order of November 22, 2016, is incorporated by reference herein.


1. Payment of wages (W-117-16). *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 Jeffrey Gallagher in the amount of \$6,400. The Appellant is also ordered to pay interest in the amount of one percent per month under RCW 49.48.083(2) for these wages (except for the time period of November 22, 2016, to the date this order is served). The Appellant is ordered to make these payments within thirty days of the date of service of this final Director's Order.

2. Payment of Civil Penalty (W-117-16): The Appellant is ordered to pay the Department a penalty in the amount of \$1,000. *See* Citation and Notice of Assessment for payment information.

3. Payment of wages (W-054-16). *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 Nicholas Lofgran in the amount of \$533.03. The Appellant is also ordered to pay interest in the amount of one percent per month under RCW 49.48.083(2) for these wages (except for the time period of November 22, 2016, to the date this order is served). The Appellant is ordered to make these payments within thirty days of the date of service of this final Director's Order.

2. Payment of Civil Penalty (W-054-16): The Appellant is ordered to pay the Department a penalty in the amount of \$1,000. *See* Citation and Notice of Assessment for payment information.

DATED at Tumwater this 1 day of June 2017.

  
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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](mailto:DirectorAppeal@LNI.WA.GOV), or delivering it directly to Joel Sacks, Director of the Department of Labor and Industries, P. O. Box 44001 Olympia, Washington 98504-4001, with a copy to all other parties of record and their representatives. Filing means actual receipt of the document at the Director's Office. RCW 34.05.010(6).

**NOTE: A petition for reconsideration is not required before seeking judicial review.** If a petition for reconsideration is filed, however, the 30-day period will begin to run upon the resolution of that petition. A timely filed petition for reconsideration is deemed to be denied if, within twenty (20) days from the date the petition is filed, the Director does not (a) dispose of the petition **or** (b) serve the parties with a written notice specifying the date by which it will act on the petition. RCW 34.05.470(3).

**Judicial Review.** Any petition for judicial review must be filed with the appropriate court and served within 30 days after service of this Order. RCW 34.05.542. RCW 49.48.084(5) provides, "Orders that are not appealed within the time period specified in this section and Chapter 34.05 RCW are final and binding, and not subject to further appeal." Proceedings for judicial review may be instituted by filing a petition in superior court according to the procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil Enforcement.

### DECLARATION OF MAILING

I, Lisa Rodriguez, hereby declare under penalty of perjury under the laws of the State of Washington, that the DIRECTOR'S ORDER was mailed on the 1 day of June 2017, via U.S. Mail, postage prepaid to the following:

Ronald Clark  
Concept One Performance & Repair LLC  
3324 179th Street E  
Tacoma, WA 98446

Heather Leibowitz  
Assistant Attorney General  
Attorney General's Office  
800 Fifth Ave., Ste. 2000  
Seattle, WA 98104

Jeffrey Gallagher  
20314 Orting Kapowsin Hwy E  
Graham, WA 98338

Nicholas Lofgran  
8014 198th Street E  
Spanaway, WA 98387

DATED this 1 day of June 2017, at Tumwater, Washington.

  
\_\_\_\_\_  
Lisa Rodriguez

**WASHINGTON STATE  
OFFICE OF ADMINISTRATIVE HEARINGS**

In The Matter Of:

Concept One Performance and Repair LLC  
et al.,

Appellant.

Docket Nos. 01-2016-LI-00002  
& 01-2016-LI-00014

**INITIAL ORDER**

Agency: Labor and Industries  
Program: Wage Payments  
Agency No. W-054-16 & W-117-16

**1. ISSUES**

- 1.1. Whether the Appellant, Concept One Performance and Repair LLC et al., failed to pay agreed wages to **Jeffrey Gallagher**, Wage Claimant, for 240 hours worked from January 19, 2015 to February 27, 2015, in violation of RCW 49.52.050?
- 1.2. Whether the Appellant, Concept One Performance and Repair LLC et. al., failed to pay final wages to **Jeffrey Gallagher**, Wage Claimant, for 80 hours worked from March 2, 2015 to March 13, 2015, in violation of RCW 49.48.010?
- 1.3. If either allegation is proven, what is the appropriate penalty provided by RCW 49.48.083?
- 1.4. If either allegation is proven, what is the appropriate interest on the unpaid wages provided by RCW 49.48.083(2)?
- 1.5. Did the Department of Labor and Industries properly issue a Citation and Notice of Assessment against Concept One Performance and Repair LLC et al., for failing to pay wages owed to former employee, **Nicolas Lofgran**?
- 1.6. If so, what are the total wages owed to **Mr. Lofgran**?
- 1.7. Did the Department of Labor and Industries properly assess penalties and interest in this matter?

## 2. ORDER SUMMARY

- 2.1. **Yes.** The Appellant, Concept One Performance and Repair LLC et. al., failed to pay agreed wages to **Jeffrey Gallagher**, Wage Claimant, for 240 hours worked from January 19, 2015 to February 27, 2015, in violation of RCW 49.52.050.
- 2.2. **Yes.** The Appellant, Concept One Performance and Repair LLC et. al., failed to pay final wages to **Jeffrey Gallagher**, Wage Claimant, for 80 hours worked from March 2, 2015 to March 13, 2015, in violation of RCW 49.48.010.
- 2.3. A penalty of \$1,000 is appropriate, as provided by RCW 49.48.083.
- 2.4. The appropriate interest of 1% on the unpaid wages is \$996.45, as provided by RCW 49.48.083(2).
- 2.5. **Yes.** The Department of Labor and Industries properly issued an 'Amended Citation and Notice of Assessment No. W-054-16' against Concept One Performance and Repair LLC et al., for failing to pay minimum wages due and owing to former employee, **Nicolas Lofgran** for the period of December 16, 2014 to February 13, 2015.
- 2.6. The total minimum wages of \$533.03 are still due and owed to **Mr. Lofgran**.
- 2.7. **Yes.** The Department of Labor and Industries properly assessed a \$1,000 penalty and \$40.06 of interest in this matter as provided by RCW 49.48.083.

## 3. HEARING

- 3.1. Hearing Date: Thursday, September 29, 2016
- 3.2. Administrative Law Judge: T.J. Martin
- 3.3. Appellant: Concept One Performance & Repair et al.  
('Appellant')
  - 3.3.1. Representative: Ronald Clark, Owner



- 3.3.2. Witnesses: The Appellant did not call any witnesses
- 3.4. Agency: Department of Labor and Industries  
(‘Department’)
- 3.4.1. Representative: Heather Leibowitz, Assistant Attorney General
- 3.4.2. Witnesses: Jeffrey Gallagher, Wage Claimant  
  
Nicolas Lofgran, Wage Claimant  
  
Russell Hauss, Department of Labor and Industries Industrial Relations Supervisor
- 3.5. Exhibits: Department’s Exhibits 1 through 6 were admitted.  
The Appellant did not submit any exhibits for admission.
- 3.6. Court Reporting Services: J. Gayle Hays, Central Court Reporting
- 3.7. Other: On Tuesday, April 12, 2016, Administrative Law Judge Stephanie Croom-Williams granted the Department’s Motion to Consolidate Office of Administrative Hearings Docket Numbers 01-2016-LI-00002 and 01-2016-LI-00014.

#### **4. FINDINGS OF FACT**

I find the following facts by a preponderance of the evidence:

##### ***Jurisdiction***

- 4.1. On July 31, 2015, the Department issued ‘Citation and Notice of Assessment W-054-16’ regarding Nicholas Lofgran (‘Wage Claimant No. 1’) against Concept One Performance and Repair LLC (‘Appellant’). *Exhibit (‘Ex.’) 2; pgs. 13-26.*

[Continued]

- 4.2. On September 24, 2015, the Department issued 'Citation and Notice of Assessment W-117-16' regarding Jeffrey Gallagher ('Wage Claimant No. 2') against the Appellant. *Ex. 2; pgs. 1-12.*
- 4.3. On October 21, 2015, Ronald A. Clark, on behalf of the Employer, appealed the Department's two Citations and Notices of Assessment. *Ex. 3.*
- 4.4. On May 6, 2016, the Department issued 'Amended Citation and Notice of Assessment W-054-16' regarding Nicholas Lofgran against the Appellant. *Ex. 1; pgs. 1-8.*
- 4.5. On May 6, 2016, the Department also issued 'Amended Citation and Notice of Assessment W-117-16' regarding Jeffrey Gallagher against the Appellant. *Ex. 1; pgs. 9-16.*

#### ***Concept One Performance and Repair***

- 4.6. The Employer, Concept One Performance and Repair, is an auto repair shop located at 12811 Canyon Road E, Suite 3, Puyallup, Washington. *Testimony of Ronald Clark (hereinafter 'Testimony of Clark'); and Ex. 6, pg. 1-3.*
- 4.7. The Employer/Appellant is a limited liability company which opened on March 1, 2013 and is owned and operated by Ronald Clark (father) and Matt Clark (son). *Testimony of Clark; and Ex. 6, pgs. 2-4.*
- 4.8. Ronald Clark was in charge of payroll while Matt Clark oversaw operations and directed employees on daily work projects and vehicle repairs. *Testimony of Clark, Testimony of Jeffrey Gallagher (hereinafter 'Testimony of Gallagher'), and Testimony of Nicholas Logran (hereinafter 'Testimony of Logran').*

#### ***Jeffrey Gallagher's Wage Complaint***

- 4.9. In the middle of October 2014, Matt Clark hired Jeffrey Gallagher to work as an auto mechanic. *Testimony of Jeffrey Gallagher.*
- 4.10. Mr. Gallagher's daily activities and vehicle repair work were directed by Matt Clark. *Testimony of Gallagher.*

- 4.11. Mr. Gallagher worked Monday through Friday from 8:00 a.m. until 4:30 p.m. *Testimony of Gallagher; and Ex. 4E, pgs. 1-3.*
- 4.12. Mr. Gallagher was paid an agreed wage of \$20.00 per hour. He received a paycheck every two weeks. *Testimony of Gallagher; Ex. 4F, pg. 1.*
- 4.13. At this point, the testimonies of the Wage Claimant, Mr. Gallagher, and Owner, Ron Clark, conflicted on material points. Mr. Clark asserted that he notified Mr. Gallagher in person on or around January 15, 2015 that he was being laid off due to a slowdown in business. However, Mr. Gallagher denied that he was told he was laid off or only working for Matt or that the Employer was no longer in business. Based on the totality of circumstances, I determine the conflicting evidence in favor of Mr. Gallagher for the following reasons: (1) Mr. Gallagher continued to work for the employer at the same location, doing the same vehicle repair work, and under the continuing supervision of Matt Clark; (2) The Employer remained open for business and continued to do auto repairs for customers; and (3) Matt Clark did not appear for the hearing to refute the testimony of Mr. Gallagher.
- 4.14. On or around March 13, 2015, Mr. Gallagher stopped working for the Employer after he had not been paid for several weeks. *Testimony of Gallagher.*
- 4.15. On May 6, 2015, Jeffrey Gallagher filed a 'Workers Rights Complaint' with the Department. In his complaint, Mr. Gallagher alleged he was owed wages for the period of January 19, 2015 to March 13, 2015. *Testimony of Russell Hauss (hereinafter 'Testimony of Hauss'); and Ex. 4B.*
- 4.16. From May 6, 2015 to July 9, 2015, the Department's Industrial Relations Agent Martha Doyle investigated Mr. Gallagher's wage complaint. Ms. Doyle's investigation included gathering the Appellant's employment information including time sheets and paystubs. *Testimony of Russell Hauss; Exs. 4A, 4C, 4D, 4E, 4F, 4H, and 4J.*
- 4.17. During the investigation, Ms. Doyle made repeated requests to the Employer to provide a response to Mr. Gallagher's wage complaint. However, the Employer failed to respond or provide documentation. *Testimony of Russell Hauss; Exs. 4G; 4I; and 4J.*

- 4.18. Based on the information supplied by Mr. Gallagher, Ms. Doyle compiled a spreadsheet regarding the hours worked and wages due to Mr. Gallagher. Ms. Doyle created a spreadsheet showing:

<u>Week Ending</u>	<u>Hours Worked</u>	<u>Reg. Hrly Rate</u>	<u>Total Wages</u>
January 24, 2015	40	\$20.00	\$800.00
January 31, 2015	40	\$20.00	\$800.00
February 7, 2015	40	\$20.00	\$800.00
February 14, 2015	40	\$20.00	\$800.00
February 21, 2015	40	\$20.00	\$800.00
February 28, 2015	40	\$20.00	\$800.00
March 7, 2015	40	\$20.00	\$800.00
March 14, 2015	40	\$20.00	\$800.00
	320		\$6,400.00

See Ex. 4K.

- 4.19. On July 10, 2015, based on the information gathered and spreadsheet compiled, Ms. Doyle issued a 'Wage Payment Act-Citation and Notice of Assessment Agent Summary', recommending a citation be issued against the Employer for failing to pay Mr. Gallagher 320 hours of work at \$20.00 per hour for the period of January 19, 2015 through March 13, 2015 for a total of \$6,400.00. *Testimony of Russell Hauss; and Ex. 4L.*
- 4.20. The Department's recommendation regarding Mr. Gallagher's Agreed Wages, of \$4,800.00, and Final Paycheck, of \$1,600.00, for a total of \$6,400.00, was based on records and documents submitted only by Mr. Gallagher. *Testimony of Russell Hauss; and Ex. 1, pg. 13.*
- 4.21. The Department also recommended interest, in the amount of \$996.45, and a penalty, in the amount of \$1,000. *Testimony of Hauss; and Ex. 1, pg. 13.*

[Continued]

### ***Nicholas Lofgran's Wage Complaint***

- 4.22. The Wage Claimant, Nicholas Lofgran, and the Appellant, represented by Ron Clark, conflicted on material points. Mr. Clark asserted that Mr. Lofgran was offered a job with the Employer, in December 2014, but declined such work. While Mr. Lofgran denied that he refused work. Rather, he accepted the job with the Employer and took his direction from Matt Clark. Based on the totality of circumstances, I determine the conflicting evidence in favor of Mr. Lofgran regarding his employment for the Appellant for the following reasons: (1) Mr. Lofgran credibly testified that he worked for the Employer from December 16, 2014 until around February 15, 2015; (2) Mr. Lofgran's testimony was corroborated by Mr. Gallagher; and (3) Matt Clark did not appear for the hearing to refute the testimony of Mr. Lofgran. Based on these facts, I find the following facts occurred:
- 4.23. On or around December 16, 2014, Matt Clark hired Nicholas Lofgran as an auto mechanic. *Testimony of Logran.*
- 4.24. From December 16, 2014 until February 13, 2015, Nicholas Lofgran worked as a mechanic at a rate of pay of \$12.50 per hour. He was paid every two weeks in cash. *Testimony of Lofgran.*
- 4.25. Mr. Lofgran's daily activities and repair work were directed by Matt Clark. *Testimony of Lofgran.*
- 4.26. Mr. Lofgran worked Monday through Friday, 9:00 a.m. until 6:00 p.m. *Testimony of Lofgran; and Ex. 5E, pgs. 6-8.*
- 4.27. Mr. Lofgran was never told he was laid off, only working for Matt, or that the Employer was no longer in business. *Testimony of Lofgran.*
- 4.28. On or around February 15, 2015, Mr. Lofgran quit working for the employer after he had not been paid for several weeks. *Testimony of Lofgran.*
- 4.29. On March 10, 2015, Mr. Lofgran filed a 'Workers Rights Complaint' with the Department. In his complaint, Mr. Lofgran alleged he was owed wages for the period from December 16, 2014 to February 17, 2015. *Testimony of Russell Hauss; and Ex. 5B.*



- 4.30. From May 6, 2015 to July 9, 2015, the Department's Industrial Relations Agent Martha Doyle investigated Mr. Lofgran's wage complaint. Ms. Doyle's investigation included gathering Mr. Lofgran's handwritten time sheets. *Testimony of Russell Hauss; Exs. 5A; 5C; 5D; 5E; and 5H.*
- 4.31. Ms. Doyle made repeated requests to the Appellant, to provide a response to Mr. Lofgran's wage complaint. However, the Employer failed to respond or provide documentation. *Testimony of Russell Hauss; Exs. 5E; and 5G.*
- 4.32. Based on the information supplied by Mr. Lofgran, Ms. Doyle compiled a 'Wage Transcription Sheet' and wage spreadsheet regarding the hours worked and wages due to Mr. Lofgran. Since Mr. Lofgran did not provide any paystubs demonstrating agreed-upon wages, Ms. Doyle imputed Mr. Lofgran's hourly rate at the current Minimum Wage \$9.32 in 2014 (with an overtime rate of \$13.98) and \$9.47 in 2015 (with an overtime rate of \$14.21). Ms. Doyle created a spreadsheet showing:

<u>Week Ending</u>	<u>Hours Worked</u>	<u>Reg. Hrs.</u>	<u>O.T.</u>	<u>Total Wages</u>
December 20, 2014	36	36		\$335.53
December 27, 2014	52	40	12	\$540.56
January 3, 2015	39.5	39.5		\$374.07
January 10, 2015	39	39		\$369.33
January 17, 2015	45.5	40	5.5	\$456.96
January 24, 2015	40	40		\$378.80
January 31, 2015	27.5	27.5		\$260.43
February 7, 2015	40.5	40	.5	\$385.91
February 14, 2015	35	35		\$331.45
	355	337	18	\$3,433.03

Ms. Doyle then subtracted from the \$3,433.03 balance the cash payments Mr. Lofgran received from the Employer in the amount of \$2,900.00. The resulting balance owed was \$533.03. *See Ex. 5I.*

[Continued]

4.33. On May 20, 2015, based on the information gathered and spreadsheet compiled, Ms. Doyle issued a 'Wage Payment Act-Citation and Notice of Assessment Agent Summary', recommending a citation be issued against the Employer for failing to fully pay Mr. Lofgran 337 regular hours and 18 overtime hours of work for the period of December 16, 2014 through February 13, 2015. Mr. Lofgran was paid partial payments of \$2,900.00, but still owed a balance of \$533.03. *Testimony of Russell Hauss and Ex. 5J.*

4.34. The Department also recommended interest, in the amount of \$40.06, and a penalty, in the amount of \$1,000. *Testimony of Hauss and Ex. 1, pg. 5.*

## **5. CONCLUSIONS OF LAW**

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

### ***Jurisdiction***

5.1. The undersigned administrative law judge has jurisdiction over the persons and subject matter under Revised Code of Washington (RCW) 49.48.084(3) and chapter 34.05 RCW.

### ***Wage Payment Law***

5.2. It is unlawful for an employer to willfully pay an employee a lower wage than the wage the employer is obligated to pay by statute, ordinance, or contract. RCW 49.52.050(2).

5.3. Any employer who pays an employee less than wages to which such employee is entitled shall be liable to such employee for the full amount of such wage rate. RCW 49.46.090.

5.4. "Wage" is statutorily defined as "compensation 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..." RCW 49.46.010(7); RCW 49.48.082(10).

5.5. "Hours worked" shall be considered to mean all hours which the employee is authorized or required by the employer to be on duty on the employer's premises or at a prescribed work place. WAC 296-126-002(8).

## **Wage Complaint**

- 5.6. The Department is responsible for implementing and enforcing the provisions of RCW Chapters 49.46 and 49.48 and Title 296 Washington Administrative Code (WAC), pertaining to wages, in the exercise of the police powers of the state for the purpose of protecting the immediate and future health, safety and welfare of the people of the state.
- 5.7. If an employee files a wage complaint, the Department must investigate. RCW 49.48.083(1). If the Department finds that the employer has violated one or more wage payment requirements, it should issue a Citation and Notice of Assessment, which may include ordering the employer to pay all wages plus 1% interest per month on all unpaid wages. RCW 49.48.083(2). If the Department determines that the employer has complied with the law, the Department shall issue a Determination of Compliance. RCW 49.48.083(1).
- 5.8. In appealing a Determination of Compliance, the party challenging the Department's decision has the burden of proof by a preponderance of the evidence. The standard of review of the Determination of Compliance by the Administrative Law Judge is *de novo*. RCW 49.48.084(3).

## **Jeffrey Gallagher's Wage Complaint**

### **A. Regular and Final Wages**

- 5.9. The Washington Minimum Wage Act (MWA) is based upon the federal Fair Labor Standards Act (FLSA). As a result, Washington courts look to federal case law interpreting the FLSA for guidance in applying the MWA. *Drinkwitz v. Alliant Techsystems, Inc.*, 140 Wn.2d 291, 298 (2000); *Inniss v. Tandy Corp.*, 141 Wn.2d 517, 524 (2000).
- 5.10. Under the FLSA, the employer is liable if it knew or should have known the employee was performing uncompensated work. *Forrester v. Roth's I.G.A. Foodliner, Inc.*, 646 F.2d 413, 414 (9<sup>th</sup> Cir. 1981) "An employer must have an opportunity to comply with the provisions of the FLSA (Fair Labor Standards Act).

“...[W]here the acts of an employee prevent an employer from acquiring knowledge, here of alleged uncompensated overtime hours, the employer cannot be said to have suffered or permitted the employee to work in violation of [the FLSA]”; *Davis v. Food Lion*, 792 F.2d 1274, 1276 (4<sup>th</sup> Cir. 1986).

- 5.11. In the present case, Jeffrey Gallagher worked for the Appellant from January 19, 2015 to March 13, 2015 without receiving compensation, in the form of regular wages, for the work he performed. During this time, Mr. Gallagher worked a total of 240 unpaid hours. His rate of pay was \$20.00 per hour. The Appellant has failed to meet its burden, by a preponderance of evidence, demonstrating Mr. Gallagher did not work the hours as alleged. As a result, Concept One Performance and Repair LLC et al., violated RCW 49.52.050 by failing to pay agreed wages to **Jeffrey Gallagher** for 240 hours worked, in the amount of \$4,800.00, from January 19, 2015 to February 27, 2015. The Department's 'Amended Citation and Notice of Assessment W-117-16' is **affirmed**.
- 5.12. Further, Jeffrey Gallagher worked for the Appellant from March 2, 2015 until March 13, 2015, when he quit due to not receiving a paycheck from the employer. During this time, Mr. Gallagher worked 80 unpaid hours, at a rate of \$20.00 per hour. The Appellant has failed to meet its burden by a preponderance of evidence, demonstrating Mr. Gallagher did not work the hours, as alleged. As a result, Concept One Performance & Repair LLC et al., violated RCW 49.48.010, by failing to pay final wages to **Jeffrey Gallagher** for 80 hours worked, in the amount of \$1,600.00, from March 2, 2015 to March 13, 2015. The Department's 'Amended Citation and Notice of Assessment W-117-16' is **affirmed**.

### ***B. Penalty***

- 5.13. In accordance with RCW 49.48.083, the Wage Payment Act includes a penalty assessment by the Department if there is a willful violation of a wage payment requirement. The penalty shall not be less than \$1,000.00 or an amount equal to ten percent of the total amount of unpaid wages, whichever is greater, with a maximum penalty of \$20,000.
- 5.14. RCW 49.48.082(11) defines “willful” as a “knowing and intentional action that is neither accidental nor the result of a bona fide dispute...”

5.15. In the present case, the Appellant knowingly and intentionally withheld regular and final wages from Jeffrey Gallagher. Consequently, the Appellant's failure to pay regular and final wages from January 19, 2015 to March 13, 2015 was willful violation of RCW 49.48.083. As a result, the Department request for a penalty of \$1,000 is **affirmed**.

### ***C. Interest***

5.16. Under RCW 49.48.083(2), unpaid wages accrue interest at the rate of 1% per month of the unpaid wage amount until payment is received by the Department. The interest owed must be calculated from the first date wages were owed to the employee. In the present case, since the Department's 'Amended Citation and Notice of Assessment W-117-16' against the Appellant is **affirmed**, the Appellant is liable for the payment of interest to date on the unpaid wages as set out above. The amount of interest owed by the Appellant, Concept One Performance and Repair LLC, to Jeffrey Gallagher is \$996.45.

### ***Nicholas Lofgran's Wage Complaint***

#### ***A. Minimum and Overtime Wages***

5.17. Employers must pay employees age 18 and older no less than the established minimum wage. RCW 49.46.020. In 2014, the minimum wage in Washington State equaled \$9.32 per hour. In 2015, minimum wage equaled \$9.47 per hour.

5.18. When an employee works over 40 hours in a work week, an employer is required to pay overtime in an amount not less than one and one-half times the employee's regular rate of pay. RCW 49.46.130(1).

5.19. In the present matter, Nicholas Lofgran worked for the Appellant from December 16, 2014 to February 13, 2015. During that time, Mr. Lofgran worked 337 regular hours and 18 overtime hours. Since the employer and Mr. Lofgran had no documented evidence, such as paystubs, demonstrating that Mr. Lofgran was paid an agreed rate of \$12.50 per hour, as he alleged, the Department imputed Minimum Wage for Mr. Lofgran in calculating any unpaid amount by the employer. Therefore, based on a Minimum Wage calculation of Mr. Lofgran's work during the time period at issue, he should have been paid \$3,433.03.



However, he was paid several times in cash installments, totaling \$2,900.00. Therefore, based on the Department's calculations, Mr. Lofgran is still owed \$533.03 from his former employer. The Employer has failed to prove by a preponderance of the evidence that Mr. Lofgran did not work the hours as alleged. As a result, Concept One Performance and Repair LLC et al., violated RCW 49.46.020 by failing to pay at least minimum wage to **Nicholas Lofgran**, in the amount of \$533.03, from December 16, 2014 to February 13, 2015. The Department's 'Amended Citation and Notice of Assessment W-054-16' is **affirmed**.

### ***B. Penalty***

- 5.20. In accordance with RCW 49.48.083, the Wage Payment Act includes a penalty assessment by the Department if there is a willful violation of a wage payment requirement. The penalty shall not be less than \$1,000.00 or an amount equal to ten percent of the total amount of unpaid wages, whichever is greater, with a maximum penalty of \$20,000.
- 5.21. RCW 49.48.082(11) defines "willful" as a "knowing and intentional action that is neither accidental nor the result of a bona fide dispute..."
- 5.22. In the present case, the Appellant knowingly and intentionally withheld at least minimum wages, in the amount of \$533.003, to Nicholas Lofgran. Consequently, the Appellant's failure to pay regular and final wages from December 16, 2014 to February 13, 2015 was a willful violation of RCW 49.48.083. As a result, the Department request for a penalty of \$1,000 is **affirmed**.

### ***C. Interest***

- 5.23. Under RCW 49.48.083(2), unpaid wages accrue interest at the rate of 1% per month of the unpaid wage amount until payment is received by the Department. The interest owed must be calculated from the first date wages were owed to the employee. In the present case, since the Department's 'Amended Citation and Notice of Assessment W-054-16' against the Appellant is **affirmed**, the Appellant is liable for the payment of interest to date on the unpaid wages as set out above. The amount of interest owed by the Appellant, Concept One Performance and Repair LLC, to Nicholas Lofgran is \$40.06.

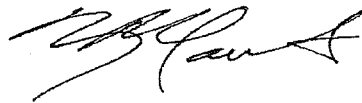
## 6. INITIAL ORDER

### IT IS HEREBY ORDERED THAT:

- 6.1. The Department's 'Amended Citation and Notice of Assessment W-117-16', regarding **Jeffrey Gallagher** is **AFFIRMED**.
- 6.2. The Appellant, Concept One Performance and Repair LLC et al., failed to pay agreed wages to **Jeffrey Gallagher**, Wage Claimant, for 240 hours worked, in the amount of \$4,800.00, from January 19, 2015 to February 27, 2015, in violation of RCW 49.52.050.
- 6.3. The Appellant, Concept One Performance & Repair LLC et al., failed to pay final wages to **Jeffrey Gallagher**, Wage Claimant, for 80 hours worked, in the amount of \$1,600.00, from March 2, 2015 to March 13, 2015, in violation of RCW 49.48.010.
- 6.4. A penalty of \$1,000 is appropriate as provided by RCW 49.48.083.
- 6.5. The appropriate interest of 1% per month on the unpaid wages is \$996.45 as provided by RCW 49.48.083(2).
- 6.6. The Department's 'Amended Citation and Notice of Assessment W-054-16' regarding **Nicholas Lofgran** is **AFFIRMED**.
- 6.7. The Department of Labor and Industries properly issued an 'Amended Citation and Notice of Assessment' against Concept One Performance and Repair LLC et. al., for violating RCW 49.46.020, by failing to pay at least minimum wages due and owing to former employee, **Nicholas Lofgran** for the period of December 16, 2014 to February 13, 2015.
- 6.8. The Employer, Concept One Performance and Repair LLC, still owes Mr. Lofgran minimum wages of \$533.03.
- 6.9. The Department of Labor and Industries properly assessed a \$1,000 penalty as provided by RCW 49.48.083. Interest of \$40.06 is also appropriate in this matter as provided by RCW 49.48.083(2).

[Continued]

Issued from Tacoma, Washington, on the date of mailing.



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T.J. Martin  
Administrative Law Judge  
Office of Administrative Hearings

### NOTICE OF APPEAL RIGHTS

Any party that disputes this Initial Order may file a Petition for Administrative Review with the Director of the Department of Labor and Industries.<sup>1</sup> A Petition for Administrative Review may be mailed to the Director or delivered 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:

Director  
Department of Labor and  
Industries  
7273 Linderson Way SW  
Tumwater, WA 98501

Whether you 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. Part of filing a Petition is providing copies 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.<sup>2</sup>

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

### CERTIFICATE OF MAILING IS ATTACHED

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<sup>1</sup> RCW 49.48.084 and RCW 34.05.464

<sup>2</sup> RCW 49.48.084 and Chapter 34.05 RCW

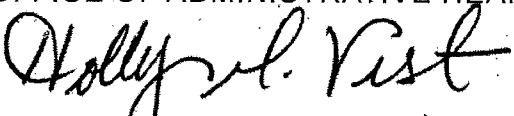
**CERTIFICATE OF SERVICE FOR OAH DOCKET NO. 01-2016-LI-00002/00014**

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

<p>Concept One Performance &amp; Repair LLC 12811 Canyon Road E Ste #3 Puyallup, WA 98373 <b><i>Appellant</i></b></p>	<p><input checked="" type="checkbox"/> First Class Mail <input checked="" type="checkbox"/> Certified Mail, Return Receipt 91 7199 9991 7036 8809 4360 <input type="checkbox"/> Hand Delivery via Messenger <input type="checkbox"/> Campus Mail <input type="checkbox"/> Facsimile</p>
<p>Ronald A. Clark, Concept One Performance &amp; Repair, LLC 3324 179<sup>th</sup> St E Tacoma, WA 98446 <b><i>Appellant</i></b></p>	<p><input checked="" type="checkbox"/> First Class Mail <input checked="" type="checkbox"/> Certified Mail, Return Receipt 91 7199 9991 7036 8809 4353 <input type="checkbox"/> Hand Delivery via Messenger <input type="checkbox"/> Campus Mail <input type="checkbox"/> Facsimile</p>
<p>Heather Leibowitz 800 Fifth Ave Suite 2000 MS: TB-14 Seattle, WA 98104 <b><i>Agency Representative</i></b></p>	<p><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</p>
<p>Nicholas Lofgran 8014 198<sup>th</sup> Street E Spanaway, WA 98387 <b><i>Wage Claimant</i></b></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</p>
<p>Jeffrey Gallagher 20314 Orting Kapowsin Hwy E Graham, WA 98338 <b><i>Wage Claimant</i></b></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</p>

Date: Tuesday, November 22, 2016

OFFICE OF ADMINISTRATIVE HEARINGS



Holly Vest, Legal Assistant