



STATE OF WASHINGTON
DEPARTMENT OF LABOR AND INDUSTRIES

PO Box 44000 • Olympia Washington 98504-4400

February 25, 2025

Via E-mail and U.S. Mail

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Brett Sullivan
530 Windstone Dr Unit 202
Hartland, WI 53029
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RE: Brett Sullivan
OAH Docket No. 06-2023-LI-01898
Director No. 2025-006-WPA

Dear Parties:

Please find the enclosed Director's Order, which is served on the date of mailing. A copy of the Initial Order is enclosed for your convenience.

Sincerely,

Joel Sacks
Director

Enclosures

cc: Judge Dan Gerard
Haley Bobbitt, Tacoma OAH
Anastasia Sandstrom, AAG



**DIRECTOR OF THE DEPARTMENT OF LABOR & INDUSTRIES
STATE OF WASHINGTON**

In re:

BRETT SULLIVAN,

Appellant,

Determination of Compliance No.
DOC-091-23

OAH Docket No. 06-2023-LI-01898

No. 2025-006-WPA

DIRECTOR'S ORDER

RCW 49.48.084(4); RCW 34.05

Joel Sacks, Director of the Washington State Department of Labor & Industries, having considered the appeal filed by Brett Sullivan, (Appellant), briefing submitted to the Director's Office, and having reviewed the record, issues this Director's Order.

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

I. FINDINGS OF FACT

1. The Office of Administrative Hearings issued and served the Initial Order on September 17, 2024.
2. The Director received a timely filed petition for review from the Appellant.
3. The Director adopts and incorporates the Initial Order's "Issues," "Order Summary," and "Hearing" sections.

NO. 2025-006-WPA

DIRECTOR'S ORDER

RCW 49.48.084(4); RCW 34.05

JOEL SACKS
Director

DATED at Tumwater this 25 day of February, 2025.

reference herein.

Consistent with the above Findings of Fact and Conclusions of Law, the Determination of Compliance is AFFIRMED, and the Initial Order of September 17, 2024, is incorporated by

III. DECISION AND ORDER

- 5.12.
2. The Director adopts and incorporates the Initial Order's conclusions of law 5.1 through decide this matter under RCW 49.48.084 and RCW 34.05.
1. Based on the Appellant's timely filed petition for review, there is authority to review and

II. CONCLUSIONS OF LAW

- 4.15.
4. The Director adopts and incorporates the Initial Order's findings of facts 4.1 through

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.

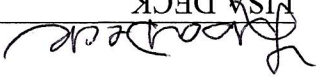
DECLARATION OF MAILING

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 25 day of February 2025, to the following via regular, postage prepaid:

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Brett Sullivan
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brtsullivan@hotmail.com


LISA DECK

DATED this 25 day of February, 2025, at Tumwater, Washington.

OFFICE OF THE DIRECTOR
DEPARTMENT OF LABOR & INDUSTRIES
P.O. BOX 44001
OLYMPIA, WA 98504-4001

**WASHINGTON STATE
OFFICE OF ADMINISTRATIVE HEARINGS**

In the matter of:

Brett Sullivan,

Appellant/Wage Claimant.

Docket No. 06-2023-LI-01898

INITIAL ORDER

Agency: Labor and Industries
Program: Wage Payments
Agency No. DOC-091-23

1. ISSUES

- 1.1. Did Jody Miller Construction, Inc. violate RCW 49.48.010 and/or RCW 49.52.050 by failing to pay commissions to Brett Sullivan, as addressed in Determination of Compliance No. 091-23?

2. ORDER SUMMARY

- 2.1. No. Jody Miller Construction, Inc. did not violate RCW 49.48.010 or RCW 49.52.050 with respect to Brett Sullivan.
- 2.2. Determination of Compliance No. 091-23 is AFFIRMED.

3. HEARING

- 3.1. Hearing Date: April 24, 2024
- 3.2. Administrative Law Judge: Joni Derifield
- 3.3. Appellant: Brett Sullivan ("Appellant")
- 3.3.1. Representative: Brett Sullivan represented himself.
- 3.3.2. Witness:
- 3.3.2.1. Brett Sullivan, Appellant
- 3.4. Agency: Labor and Industries ("Department")
- 3.4.1. Representative: Amanda Goss, Assistant Attorney General
- 3.4.2. Witness:
- 3.4.2.1. Russell Hauss, Compliance Specialist Supervisor for the Department
- 3.5. Employer: Jody Miller Construction, Inc. ("Jody Miller Construction" or "Employer")
- 3.5.1. Representative: James Krueger
- 3.5.2. Witness:

3.5.2.1. Josh Miller, President of Jody Miller Construction

3.6. Exhibits:

3.6.1. The Department's Exhibits 1 through 16 were admitted.

3.6.2. The Employer's Exhibits 50 through 59 were admitted.

3.6.3. The Appellant did not offer any exhibits for admission.

4. FINDINGS OF FACT

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

Jurisdiction

4.1. On March 16, 2023, the Department issued Determination of Compliance No. 091-23 in this matter. Ex. 1, pg. 1-3.

4.2. On April 4, 2023, the Appellant timely appealed the Determination of Compliance. Ex. 2, pg. 1-8.

Jody Miller Construction and Brett Sullivan

4.3. The Employer, Jody Miller Construction, is a construction company based in Tacoma. See, e.g., Ex. 2.

4.4. The Appellant, Brett Sullivan, worked as a Senior Project Manager for the Employer from July 12, 2021 to May 6, 2022. Ex. 50, pg. 1; Ex. 56, pg. 1; *Miller Testimony*.

4.5. The Appellant's offer letter from the Employer, dated June 25, 2021, provided that he was to be paid \$82.00 per hour. *Id.* Additionally, the offer letter specified a bonus structure as follows:

Projects that are 12 months in duration or less will receive a 4% bonus on the actual profit of the job. If the profit is greater than the anticipated profit you will receive 15% of the profit above the anticipated profit. This bonus will be paid out after substantial completion of the project and billings are complete by [Jody Miller Construction] and our subcontractors. If the project is greater than 12 months the bonus will be 4.5% of the profit and 15% of the profit above the anticipated profit. This bonus will be paid out at 50% of project billing and the balance will be paid after substantial completion and billings are complete by [Jody Miller Construction] and our subcontractors. The second half of the bonus may be adjusted if there is a fade in the overall project.

Id.

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West Seattle Elementary School Project

- 4.6. On July 7, 2021, the Seattle School District awarded the Employer a contract for the renovation of and addition to West Seattle Elementary School. Ex. 51. The contract had a "Notice to Proceed" date of July 19, 2021, and a "Substantial Completion" date of July 19, 2022. Ex. 51, pg. 3. Ultimately, the Employer did not receive a full Notice to Proceed (i.e., access to the site to begin work) until July 27, 2021, which in turn extended the substantial completion date to July 27, 2022. Ex. 53, pg. 1.
- 4.7. A number of factors prevented the project from being profitable for the Employer. *Miller Testimony*. There were subcontractor performance issues, union strikes, and an increase in the cost of materials. *Id.*
- 4.8. The West Seattle Elementary School project was not profitable as of May 6, 2022, the date the Appellant last worked for the Employer. *Id.* As of January 31, 2024, when the project was 97.72 percent complete, the Employer had incurred nearly a \$1.5 million loss on the project. *Id.*; Ex. 58. At that time, the Employer had already incurred a loss of \$968,385.29, with an estimated \$502,526.74 in additional costs remaining to complete the project.

Wage Complaint

- 4.9. On June 20, 2022, the Appellant filed a worker rights complaint with the Department. Ex. 4, pg. 1-3. The Appellant alleged in his complaint that the Employer owed him additional compensation based upon performance of the project. The Appellant alleged that he is owed \$25,000.00 in agreed and final wages for the period of July 12, 2021 to May 31, 2022. *Id.* at 2.
- 4.10. Crystal Arnold was the Department's Industrial Relations Agent assigned to the case. Ex. 1, pg. 1; *Hauss Testimony*. She followed the standard work process for investigating the complaint. *Hauss Testimony*. After reviewing information supplied by the Appellant and the Employer, including the employment offer letter, Ms. Arnold recommended issuing a Determination of Compliance. *Id.*; Ex. 15, pg. 1-3. Russell Hauss, Compliance Specialist Supervisor for the Department, concurred with her recommendation. *Hauss Testimony*.
- 4.11. The basis for the Department's decision is that the bonus at issue was nondiscretionary. *Id.* The bonus was contingent upon project completion, but the Appellant separated from employment prior to completion. Ex. 15, pg. 3.
- 4.12. On March 16, 2023, the Department issued Determination of Compliance No. 091-23. Ex. 1, pg. 1-3. The Determination of Compliance stated that the

Employer did not violate the Washington State Wage Payment Act or Minimum Wage Act concerning Brett Sullivan. *Id.* at 1.

- 4.13. On April 4, 2023, the Appellant appealed the Department's Determination of Compliance. Ex. 2, pg. 1-8.

Conflicting Testimony

- 4.14. There were conflicts in the testimony regarding whether the West Seattle Elementary School project generated a profit for the Employer. The Appellant testified without specificity that the project was profitable at the time he left the company on May 6, 2022.
- 4.15. Conversely, Josh Miller, President of the Employer, testified that the project incurred a huge loss for the Employer. Mr. Miller's testimony is supported by a detailed management report from the Employer's bookkeeping software which shows project expenses in relation to the contract price. On this basis, the undersigned finds the testimony offered by the Employer's witness more credible as a whole than that of the Appellant.

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 of this case under RCW 49.48.084(3) and Chapter 34.05 RCW.

Burden of Proof, Standard of Proof, and Standard of Review

- 5.2. In appealing a Citation and Notice of Assessment or Determination of Compliance, the party challenging the Department's decision has the burden of proof, by a preponderance of the evidence. See RCW 34.05.570(1)(a).
- 5.3. A preponderance of the evidence is that evidence which, when fairly considered, produces the stronger impression, has the greater weight, and is more convincing as to its truth when weighed against the evidence in opposition to it. *Yamamoto v. Puget Sound Lumber Co.*, 84 Wash. 411, 146 P. 861 (1915).
- 5.4. The standard of review by the administrative law judge is de novo. RCW 49.48.084(3).

Wage Payment Laws

- 5.5. When an employee files a wage complaint, the Department must investigate. RCW 49.48.083(1). If the Department determines that the employer violated one or more wage payment requirements, the Department shall issue a

Citation and Notice of Assessment. *Id.* If the Department determines that the employer complied with the law, the Department shall issue a Determination of Compliance. *Id.*

- 5.6. Wage payment requirements are those "set forth in RCW 49.46.020, 49.46.130, 49.48.010, 49.52.050, or 49.52.060, and any related rules adopted by the department." RCW 49.48.082(12). These wage payment requirements include, but are not limited to, requirements to pay minimum wages, overtime wages, agreed wages, and wages for final pay periods. *Id.*
- 5.7. Employers must comply with wage payment requirements and are liable for wage payment violations. RCW 49.48.083(2).
- 5.8. Pursuant to RCW 49.52.050(2), it is unlawful for any employer or agent of any employer to "[w]ilfully and with intent to deprive the employee of any part of his or her wages . . . pay any employee a lower wage than the wage such employer is obligated to pay such employee by any statute, ordinance, or contract."
- 5.9. When an employee ceases to work for an employer, wages due the employee shall be paid at the end of the established pay period. RCW 49.48.010(2).

Analysis

- 5.10. In this case, the Appellant, who bears the burden of proof, did not establish by a preponderance of the evidence that he is owed additional wages. The Appellant's bonus was conditioned upon the Employer's profit on the West Seattle Elementary School project. Because that project generated no profit for the Employer, the Appellant was not entitled to a bonus based upon profits from the project. Whether or not the project exceeded one year in duration is immaterial, as the lack of profit precludes payment of a bonus.
- 5.11. On this basis, undersigned concludes Jody Miller Construction did not violate RCW 49.48.010 or RCW 49.52.050 with respect to Brett Sullivan.
- 5.12. Accordingly, Determination of Compliance No. 091-23 will be AFFIRMED.

6. INITIAL ORDER

IT IS HEREBY ORDERED THAT:

- 6.1. Determination of Compliance No. 091-23 is AFFIRMED.

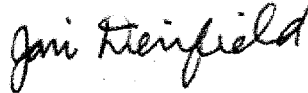
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- 6.2. Jody Miller Construction did not violate RCW 49.48.010 or RCW 49.52.050 with respect to Brett Sullivan.

Issued from Olympia, Washington on the date of mailing.



Joni Derifield
Administrative Law Judge
Office of Administrative Hearings

CERTIFICATE OF SERVICE ATTACHED

PETITION FOR REVIEW

Any party that disputes this Initial Order may file a Petition for Review with the Director of the Department of Labor and Industries.¹ You may e-mail your Petition for Review to the Director at directorappeal@lni.wa.gov. You may also mail or deliver your Petition for Review to the Director at the Department's physical address listed below.

Mailing Address:

Director
Department of Labor and Industries
PO Box 44001
Olympia, WA 98504-4001

Physical Address:

7273 Linderson Way SW
Tumwater, WA 98501

If you e-mail your Petition for Review, please do not mail or deliver a paper copy to the Director.

Whether you e-mail, mail or deliver the Petition for Review, the Director *must actually receive* the Petition for 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 Review to the other parties at the same time.

If the Director does not receive a Petition for Review within 30 days from the date of the Initial Order, the Initial Order shall become final with no further right to appeal.²

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

¹ RCW 49.48.084 and RCW 34.05.464.

² RCW 49.48.084 and Chapter 34.05 RCW.

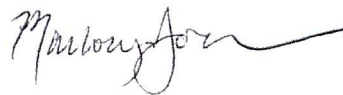
CERTIFICATE OF SERVICE FOR OAH DOCKET NO. 06-2023-LI-01898

I certify that true copies of this document were served on those listed below, from Olympia, Washington via Consolidated Mail Services by one of the following: First Class Mail, Certified Mail, Hand Delivery via Messenger, Campus Mail, Facsimile, or by email.

Brett Sullivan 530 Windstone Dr Unit 202 Hartland, WI 53029 <i>Appellant/Wage Claimant</i>	<input type="checkbox"/> First Class Mail <input checked="" type="checkbox"/> Certified Mail, Return Receipt <input type="checkbox"/> Campus Mail <input checked="" type="checkbox"/> E-mail: brttsllvn@hotmail.com
Amanda Goss, AAG Office of the Attorney General MS: TB-14 800 5th Ave Ste 2000 Seattle, WA 98104 <i>Agency Representative</i>	<input type="checkbox"/> First Class Mail <input type="checkbox"/> Certified Mail, Return Receipt <input type="checkbox"/> Campus Mail <input checked="" type="checkbox"/> E-mail: Amanda.Goss@atg.wa.gov rory.pela@atg.wa.gov lniseaeservice@atg.wa.gov
Jody Miller Construction, Inc. PO Box 44628 Tacoma, WA 98448 <i>Intervenor/Employer</i>	<input checked="" type="checkbox"/> First Class Mail <input type="checkbox"/> Certified Mail, Return Receipt <input type="checkbox"/> Campus Mail <input type="checkbox"/> E-mail: jody@jodymillerconstruction.com jodyjr@jodymillerconstruction.com josh@jodymillerconstruction.com cristal@jodymillerconstruction.com
James Krueger Vandberg Johnson & Gandara, PS 1201 Pacific Ave Ste 1900 PO Box 1315 Tacoma, WA 98401 <i>Intervenor Representative</i>	<input type="checkbox"/> First Class Mail <input type="checkbox"/> Certified Mail, Return Receipt <input type="checkbox"/> Campus Mail <input checked="" type="checkbox"/> E-mail: jkrueger@vjglaw.com Rjennison@vjglaw.com

Date: Tuesday, September 17, 2024

OFFICE OF ADMINISTRATIVE HEARINGS



Mallory Jordan
Legal Assistant 2