

In the Matter of
BEST CONCRETE AND GRAVEL LLC and Marlow Pounds
Case No. 16-07

Final Order of Commissioner Brad Avakian

Issued February 19, 2010

SYNOPSIS

The Agency did not prove by a preponderance of credible evidence that Respondents engaged Claimant's personal services or agreed to pay him \$7.50 per hour for personal services rendered. Consequently, the Commissioner dismissed Claimant's wage claim. ORS 652.140; ORS 652.150; ORS 653.055; ORS 653.261.

The above-entitled case came on regularly for hearing before Linda A. Lohr, designated as Administrative Law Judge ("ALJ") by Brad Avakian, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on November 19-20, 2008, in the Malheur County Economic Development Office, located at 316 NE Goodfellow St., Suite #2, Ontario, Oregon.

Chet Nakada, an Agency employee, represented the Bureau of Labor and Industries ("BOLI" or "Agency"). James Garland Rumsey ("Claimant") was present throughout the hearing and was not represented by counsel. William F. Nichols, Attorney at Law, represented Respondents Best Concrete and Gravel, LLC (Respondent LLC), and Marlow Pounds (Respondent Pounds). Respondent Pounds was present throughout the hearing.

The Agency called as witnesses: Margaret Pargeter, BOLI Wage and Hour Division Compliance Specialist; Troy Shupe, Claimant's friend; Tom Gene Skinner, Claimant's cousin; George Thomas Skinner, Claimant's cousin; James Warren, Parole and Probation Officer, Malheur County Corrections; and Claimant.

Respondent called as witnesses: Marlow Pounds, Respondent; John Bardan, truck driver; Bill Eccles, truck driver; John Smellage, Respondent Pounds's tenant; Duane Smith, Respondent Pounds's tenant; and Brenda Dirks, tax preparer.

The forum received as evidence:

- a) Administrative exhibits X-1 through X-37; and
- b) Agency exhibits A-1 through A-17 (filed with the Agency's case summary), A-18 (admitted at hearing).
- c) Respondent exhibits R-1 through R-14, R-16, R-18, R-19 (filed with Respondent's case summary), R-20 through R-22 (admitted at hearing)

Having fully considered the entire record in this matter, I, Brad Avakian, Commissioner of the Bureau of Labor and Industries, hereby make the following Findings of Fact (Procedural and on the Merits), Ultimate Findings of Fact, Conclusions of Law, Opinion, and Order.

FINDINGS OF FACT – PROCEDURAL

1) On or about December 13, 2004, Claimant filed a wage claim with the Agency alleging Respondents had employed him at the rate of \$7.50 per hour and failed to pay his wages for the hours he worked between October 31 and December 11, 2004. Claimant later withdrew his wage claim and on or about June 3, 2005, filed a lawsuit in district court against Respondents and Pounds Farms, LLC, alleging he was owed wages and civil penalties. On or about November 28, 2005, Claimant re-filed his wage claim with the Agency. On January 9, 2006, at Claimant's request, the district court dismissed his case without prejudice.

2) When he re-filed his wage claim, Claimant assigned to the Commissioner of the Bureau of Labor and Industries, in trust for Claimant, all wages due from Respondents.

3) On April 3, 2008, the Agency issued Order of Determination No. 05-3734 alleging Respondents had employed Claimant during the period claimed, failed to pay him for all hours worked during that period, and was liable for \$1,404.38 in unpaid wages, plus interest. The Agency also alleged Respondents' failure to pay all of the wages when due was willful and both were liable to Claimant for \$1,800 as penalty wages, plus interest. The Order gave Respondents 20 days to pay the sums, request an administrative hearing and submit an answer to the charges, or demand a trial in a court of law.

4) Respondents were served with the Order of Determination and thereafter, through counsel, timely filed an answer and requested a hearing. In the answer, Respondents denied all allegations, stating that Claimant was never employed by Respondents.

5) On June 24, 2008, the Agency submitted a request for hearing. On June 25, 2008, the Hearings Unit issued a Notice of Hearing stating the hearing would begin at 9:00 a.m. on September 30, 2008. The Notice of Hearing included a copy of the Order of Determination, a language notice, a Servicemembers Civil Relief Act notification, a Summary of Contested Case Rights and Procedures, and the Contested Case Hearing Rules, OAR 839-050-0000 to 839-050-0440.

6) On July 1, 2008, the ALJ issued an order requiring Respondents' out-of-state counsel to submit an application to appear on Respondents' behalf *pro hac vice*. Respondents' counsel filed a notice of appearance and advised the forum by letter dated July 7, 2008, that he was a member in good standing with the Oregon State Bar and had been a Bar member since 1980.

7) On August 25, 2008, the ALJ ordered the Agency and Respondents each to submit a case summary that included: a list of all persons to be called as witnesses;

identification and copies of all documents to be offered into evidence; and, for the Agency only, a brief statement of the elements of the claim and any wage and penalty calculations. The ALJ ordered the participants to submit their case summaries by September 19, 2008, and notified them of the possible sanctions for failure to comply with the case summary order.

8) On September 4, 2008, the Agency filed a motion to amend the Order of Determination to reduce the wages claimed from \$1404.38 to \$1,245.00 and to delete the sentence in Paragraph II stating:

“During this period the employer was required by the provisions of OAR 839-020-0030 to compensate the wage claimant at one and one half times the regular rate of pay for each hour worked over 40 hours in a given work week.”

As grounds for the motion, the Agency stated Claimant was not eligible for overtime as an employee subject to the overtime exemptions pertaining to employers regulated under the Federal Fair Labor Standards Act. The Agency further stated that Respondents' counsel would not oppose the motion.

9) On September 12, 2008, the Agency case presenter filed a motion to postpone the hearing indefinitely due to a family emergency. Respondents did not object to the motion and requested that the hearing be reset after October 31, 2008, and that the deadline for filing case summaries be vacated and reset after the new hearing date was set. The Agency's motion was granted and on September 30, 2008, the ALJ issued an order resetting the hearing for 9:00 a.m. (Mountain Time) on November 19, 2008. The case summary due date was extended to November 7, 2008.

10) The Agency moved for a discovery order on October 13, 2008. Respondents did not file a response to the motion and the ALJ issued a discovery order on October 23, 2008, requiring Respondents to produce documents responsive to the Agency's informal discovery requests.

11) On October 29, 2008, by facsimile transmission, Respondents filed a motion for a discovery order compelling the Agency to furnish discovery previously requested but not provided. On October 31, 2008, also by facsimile transmission, Respondents sent the ALJ copies of affidavits in response to the ALJ's discovery order. The ALJ subsequently issued an order pertaining to fax filings citing the contested case rules and stating that documents sent by facsimile transmission would not be considered unless verbal approval was obtained beforehand.

12) On November 4, 2008, the Agency filed an objection to Respondents' motion for discovery order on the ground that the information sought was irrelevant and overbroad. The ALJ issued an order thereafter denying Respondents' motion for discovery order after concluding that Respondents' request for copies of all wage claims Claimant filed in the last ten years was not relevant to the issues before the forum.

13) The Agency and Respondents timely filed case summaries.

14) On November 12, 2008, the Agency filed an addendum to its case summary.

15) At the start of hearing, the ALJ verbally advised the participants of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

16) At the start of hearing, the ALJ granted the Agency's September 4, 2008, motion to amend the Order of Determination.

17) The ALJ issued a proposed order on October 9, 2009, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. The Agency timely filed exceptions that are addressed in the opinion section of this Final Order.

FINDINGS OF FACT – THE MERITS

1) At times material, Respondent LLC was a domestic limited liability company doing business in Ontario, Oregon.

2) At times material, Respondent Pounds was Respondent LLC's managing member and an individual engaged in various enterprises. He holds a Master's degree in education and taught elementary school in the Ontario School District for 29 years. Before he started teaching school, he was a Navy pilot and flew 158 combat missions in Vietnam before completing active duty in 1970. For several years, he served as an elected board member of the Malheur Credit Union and the Ontario School District.

3) For 38 years, Respondent Pounds has owned a farm in Ontario, Oregon, operating as Pounds Farms LLC. Approximately 14 years ago, while still teaching school, Pounds acquired eight acres of industrial property through a bankruptcy proceeding. The property is a former sawmill site and lumber yard that eventually became a laminated wood plant. Surrounded by a chain link fence, the property includes three major buildings. The largest building is approximately 80' x 400' and composed of several rooms, including "kiln dried" rooms. The second building is approximately 100' x 120' and includes three different shops with an office area at the center of the building. The third is a "mechanic" building - a truck mechanic shop with double doors so trucks can get in and out. On each side is an awning that extends out approximately 30 feet. Pounds leased the shops to various businesses and rented storage space for recreational vehicles beneath the awnings. At some point, he built three offices, one for each shop area, to attract larger businesses. The buildings occupy one half of the property. A mobile office and assorted trucks, trailers, lumber and miscellaneous equipment occupy the other half.

4) In 2002, Respondent Pounds established Respondent LLC and bought a gravel pit that had "potential" for a concrete and gravel enterprise. Respondent LLC

began acquiring trucks and equipment at auctions. The trucks and equipment were maintained at Pounds's industrial property site.

5) In 2004, Respondent Pounds had two semi-tractor trailers registered to Respondent LLC on the property "doing nothing" and he decided to lease them to outside drivers for a percentage of the load income. In April 2004, William Eccles, doing business as Bill Eccles Trucking, entered into a written one year lease agreement with Respondent LLC. In September 2004, John Bardan, doing business as J & B Transport, entered into a similar written lease agreement with Respondent LLC. Under the lease agreement, the drivers agreed to work directly with an independent broker, one with a "reputable background and history of paying accounts in a timely manner," to obtain the loads. Both drivers ended up hauling loads for Services Transport, an independent broker in Idaho. Neither driver hauled any loads owned or controlled by Respondent Pounds or Respondent LLC. The drivers determined the number of loads they hauled each month, but under the lease agreement the trucks were expected to produce income at least 18 days per month. The drivers received 25 percent of the truck's "gross flat rate." They also received \$15 for each additional pick-up or drop made during the course of a load haul. The broker paid the drivers a "lumping" fee if the drivers unloaded the trucks themselves. Under the lease agreement, "all money from broker must come directly through Lessor [Respondent LLC] for proper distribution." The drivers received payment for the loads "20 days after the bill of lading and paperwork [were] properly submitted [to Respondent LLC] for payment."

6) Under the lease agreements, Eccles and Bardan elected to have Respondent LLC maintain the trucks and equipment in accordance with Department of Transportation standards rather than do it themselves for an additional 12 percent of the gross revenues. Respondent LLC's obligations also included providing current and

valid vehicle registration and plates for the trucks, maintaining full liability coverage on both trucks, and paying for the fuel. Among other things, the drivers were responsible for keeping the trucks clean and maintained in good condition, maintaining all applicable and necessary federal and state licenses and certificates necessary to operate the trucks in conformance with the laws, and completing and delivering the trucks' log books. Additionally, drivers were liable for the first \$1,000 of damage caused to the trucks through operator negligence or error.

7) In or around September 2004, George "Tom" Skinner ("T. Skinner") asked Respondent Pounds for a job. At that time, he was living with his cousin, Tom Gene Skinner ("G. Skinner"), across the road from Pounds's industrial property. T. Skinner had previously owned an auto body and paint shop in Payette, Idaho, that had burned down in a fire. T. Skinner had tried starting up another auto body shop in Ontario, but ended up going into "drug rehab" for several months. Previously, Pounds had taken some cars to T. Skinner's auto body shop for paint jobs and had been happy with the work. He observed that the business appeared to be doing well. Pounds did not have a job for T. Skinner, but offered him an empty shop space to start up another auto body and paint shop. Pounds did not charge T. Skinner any rent for the first month and told him he could use the surplus materials on site for approved projects related to the shop. Pounds allowed T. Skinner to live in one of the empty trailers on site in exchange for maintaining the premises. T. Skinner did not sign a rental agreement for the trailer or shop space. T. Skinner brought in painting equipment and windshield repair materials and soon had customers, including some referrals from Pounds. T. Skinner dealt directly with his customers and customers paid him for the work he performed. When Respondent LLC's truck mechanics were unavailable, Pounds sometimes asked T. Skinner to wash trucks or do minor repair work and paid him for the work in cash. T.

Skinner was and is a self-described drug addict and has experienced legal problems involving drug abuse and anger problems that stem from his drug use. Pounds knew about T. Skinner's criminal history and that he had "meth" problems, but wanted to help him get back on his feet.

8) While living on Respondent Pounds's property, T. Skinner was under Malheur County Community Corrections supervision. He was on probation for reckless endangerment and contempt of court. During an office visit with his probation officer in September 2004, T. Skinner asked for a trip permit to travel out of state to pick up his tools. He told the officer that he worked for Pounds as a laborer. After that visit, Skinner quit checking in with his probation officer and continued to use illegal drugs while living and working on Pounds's property.

9) In or around late October 2004, Respondent Pounds went to Lewiston, Idaho, to be with his daughter, who was dying from cancer. While Pounds was gone, T. Skinner asked Claimant, his "cousin," to help him work on a truck. When Pounds returned from Idaho, T. Skinner told him Claimant had been looking for work and had helped him out with the truck. T. Skinner told Pounds that Claimant wanted to be paid by check and asked Pounds to write his cousin a check for the work. T. Skinner did not have a checking account and Pounds wrote Claimant a check for \$47.50, deducting \$2.50 "for the check" and deducted the amount from T. Skinner's invoice. T. Skinner gave the check to Claimant. At some point, Claimant approached Pounds with an offer to help Pounds "promote stuff." Pounds told him he had nothing to "promote" and Claimant then offered to sell some of the surplus equipment Pounds kept on the property. Pounds agreed to pay Claimant a commission if he found a buyer on eBay for a "Lincoln welder" that he wanted to sell for \$650. After they made the agreement,

Pounds never heard anything more about it and Claimant never sold anything on eBay for Pounds.

10) In November 2004, Respondent Pounds wrote two more checks to Claimant. One check, dated November 11, 2004, was for work Claimant performed for T. Skinner in his body shop. T. Skinner asked Pounds to write the check and then T. Skinner gave the check to Claimant. Another check, dated November 24, 2007, was for \$142.50, and the check's memo section contained the notation, "\$150 Loan." Pounds gave the check directly to Claimant.

11) Around November 1, 2004, Claimant began living in the office next to the one T. Skinner occupied. When Respondent Pounds discovered Claimant sleeping in the office, Claimant told him that T. Skinner had given him permission to sleep there. Although T. Skinner did not rent that particular office from Pounds, he told Pounds that Claimant had nowhere else to go and asked Pounds to let him stay. Pounds acquiesced and Claimant did some odd jobs in exchange for living in the office. During this time, Claimant was collecting unemployment benefits that were charged to his former employer, Auburn Chevrolet in Auburn, Washington.

12) After Claimant began sleeping on the property, he began asking Respondent Pounds about becoming a truck driver. Pounds asked John Bardan if he was interested in "taking on [Claimant]" to help him get his commercial driver's license ("CDL"). Claimant told Bardan that he had driven semi-trucks for several years in Montana and Idaho and wanted to get back into truck driving and Bardan decided to help Claimant prepare for his CDL driving test. He helped Claimant with the basics about truck driving, including making pre-trip inspections, hooking up trailers, and practicing maneuvers on Pounds's premises. With Respondent Pounds's knowledge, Bardan provided the truck he leased from Respondent LLC for Claimant's road test and

paid for Claimant's CDL. Claimant failed the first test, but passed two weeks later and rode with Bardan as a student driver. Drivers and student drivers are required to keep daily logs of each trip. Prior to becoming a student driver, Claimant "went on runs" with Bardan while using a learner's permit and was not required to keep a daily log. He began keeping logs on or about November 31, 2004, as a student driver. Claimant never drove without Bardan and was never a "first seat driver." First seat drivers have primary control over the truck and Bardan always drove as the first seat driver. After each run, Bardan paid Claimant a percentage of what Bardan made on each load. He paid Claimant in cash and Claimant used it to buy food and pay bills. After the first week in November, Claimant primarily was on the road with Bardan.

13) On or about December 10, 2004, after delivering a load of wood pellets to a "receiver" in Sand Point, Idaho, Claimant and Bardan drove back to Ontario, Oregon, via Kennewick, Washington. Bardan was "not feeling up to par" and let Claimant do most of the driving. During an inspection at the Washington/Idaho border, Claimant was ticketed by the Washington State Patrol for not carrying a medical card. Claimant had a medical card and Bardan had assumed Claimant had it with him. When they stopped in Kennewick for food, Claimant almost hit a light pole while making a turn. Around 10 p.m., outside of Baker City, Oregon, Claimant pulled in to a rest area and sideswiped another semi-tractor trailer, causing damage to both trailers. The Oregon State Police investigated the accident and Claimant and the other driver filled out accident reports at the scene. Bardan told Claimant that at this point there was "no way" that Respondent Pounds would let Claimant lease a truck. When they returned to Ontario around 4 a.m. on December 11, 2004, Bardan told Claimant that "he [Claimant] was done" and that Claimant could not drive with him anymore. After trying unsuccessfully to reach Respondent Pounds, Bardan called T. Skinner and told him about the accident. T.

Skinner called Pounds and told him about the accident. Later in the morning, T. Skinner told Claimant to pack up his belongings and get off the property. Claimant packed his gear and moved across the street to G. Skinner's house. During the Sand Point trip, Bardan gave Claimant \$100 that he used to buy a bag of groceries in Kennewick. Claimant took the groceries with him when he left. Claimant did not speak to Pounds after the accident and did not ask him for any wages. Bardan paid for the first \$1,000 in damage to Respondent LLC's truck.

14) Claimant was paid for all of the work he performed before the trip to Sand Point, Idaho, on December 10, 2004. Although he had weekly reporting requirements, he did not report any of his earnings to the Washington State Employment Department.

15) On or about December 16, 2004, T. Skinner was sanctioned for his probation violations and placed in a work release center where he resided for 30 days. T. Skinner told the work release intake officer that he worked for Best Concrete and Gravel and lived behind the business in a trailer. He told the officer that his wages were \$2,000 per month. He admitted to using marijuana two days before arriving at the work release center. In January 2005, T. Skinner gave the work release center a check made out to "Tom Skinner" for \$675, dated January 4, 2004,ⁱ and signed by Respondent Pounds. In the memo portion, someone had written "LLC – paint shop." The check was used to pay T. Skinner's work release fees. During his stay at the work release center, T. Skinner brought in notes with Pounds's signature stating that T. Skinner was asked to work late in the evening on specific dates in late December 2004 and January 2005. Sometime thereafter, Pounds evicted T. Skinner and had T. Skinner escorted off the property by the police. After T. Skinner was evicted, Pounds discovered that a chain saw was missing from the premises and filed a small claims action against T. Skinner

for its return. Thereafter, Pounds was awarded a judgment against T. Skinner in the amount of \$818.00.

16) After T. Skinner was evicted, he filed for unemployment benefits with the Oregon Employment Department. His claim for benefits was denied and he appealed. After a hearing, a final order issued affirming the denial and concluding that T. Skinner was a self-employed independent contractor.

17) After Claimant filed his wage claim against Respondents in December 2004, and before T. Skinner was evicted from Respondents' premises, T. Skinner signed a statement stating:

“Regarding James Rumsey Claim

“I am Tom Skinner who works with Marlow Pounds. I operate an auto body shop on the facility and fill in as needed maintaining the trucks which operate on the road. First let me state that I have seen the reports which Marlow has written to you and agree that it is accurate of our dealings with James Rumsey. Except for my initially telling James he could help me out on a brake job in return for some food money, he was not employed here (I was going to give him some of my money if Marlow refused to pay for someone he had not approved of). James came back several times wanting work, but Marlow didn't need or want him. Finally Marlow allowed his offer to list some equipment on E-bay but he never did it. He used the situation to take over an empty office and ended up moving in without permission. We felt sorry for him and allowed him to temporarily stay after he said he would do odds and ends things around here to offset his being here. It turned out to be a bad deal because he wouldn't keep his word and got into things which he had no business with. James absolutely destroyed our phone system by disconnection [sic] many wires in the distribution box, broke our computers, made private long distance calls, and blamed his acts on me and others around here. He conned Marlow and John into letting him try to become a truck driver, but it turns out he wasn't capable or honest enough.

“I am sincerely disappointed in what James did and can't believe he has the gull [sic] to make a claim for wages he was not employed to do, nor did. He wasn't even around here that part of the claimed period. He may be my relative but I never want to be in any way involved with James again. He demonstrated a lack of integrity and played a real con game on Marlow and John. There is no basis for this claim.

“By the way, aren't you concerned about his collecting unemployment during this time? He kept asking me to file an electronic claim when he

wasn't around, dishonestly claiming he had made interviews for jobs and etc. that week. I chose to not be involved in his dishonest activities.

"Sincerely, Tom Skinner"

18) In 1999, Claimant was convicted of three felonies: distributing controlled substances; witness tampering, and child neglect.

19) Claimant's testimony was not credible. Notwithstanding his criminal history demonstrating felony convictions involving crimes of dishonesty, including witness tampering, his testimony was internally inconsistent, wholly self-serving, and, except for his admissions and statements against interest, altogether unpersuasive. His testimony that he recorded his hours in a "personal log" that he offered as an exhibit at hearing was contradicted by his testimony on cross-exam that he could not remember what work he performed for Respondents because it was "so long ago" and he "completely got rid of all [his] documents when [he] thought the case was over." His testimony that he asked Respondent Pounds for his wages after he was told to leave Respondents' property was contradicted by his testimony on direct and cross-exam that he never spoke to Respondent Pounds about anything, including purportedly unpaid wages, after that day. His testimony that he agreed to perform various odd jobs on the property for Respondent Pounds as rent for a place to sleep was contradicted by his testimony that Respondent Pounds agreed to pay him \$7.50 per hour for the odd jobs he performed on the property. His testimony that he turned in his work hours to Respondent Pounds every two weeks and that Pounds paid him for those hours was later contradicted by his testimony that he always turned in his hours to T. Skinner and it was T. Skinner who paid him for the work he performed. He also testified it was T. Skinner who told him what work to perform and when to do it. Contrary to the claims he made to the Agency, Claimant readily admitted that he was paid everything he was owed until the trip to Sand Point, Idaho, to deliver wood pellets. Claimant also readily

admitted that he was receiving unemployment benefits while living on Respondents' premises and did not submit the hours he purportedly worked for Respondents to the Washington State Employment Department. Claimant's multiple inconsistencies, combined with some unusual admissions, illustrate the truth of the adage that "[i]f you tell the truth, you don't have to remember anything." Claimant could not remember from one minute to the next what he had just stated under oath; hence, his testimony was not believed unless it was an admission, a statement against interest, or was not contradicted by other credible evidence. In some instances, it was not believed even if it was not contradicted by other credible evidence.

20) T. Skinner was not a credible witness. Although he was candid about his drug use, felony convictions, and the fact that he currently uses "pain killers" regularly, his testimony that he was Respondent Pounds's employee was inconsistent with his prior statement submitted to the Agency that he was self-employed and that Claimant was not an employee but had worked for T. Skinner for some food money. Additionally, Brenda Dirks credibly testified that she had conducted business with T. Skinner and understood he was self-employed.ⁱⁱ Although T. Skinner testified he received a W-2 form from Respondent Pounds in 2004 and filed an income tax return through H & R Block, when given the opportunity to produce the income tax return for the record, he claimed he could not remember if he gave the 2004 W-2 to H & R Block. Although he was given 24 hours to obtain a copy of his 2004 income tax return from H & R Block, he failed to produce the document and offered no further explanation. Because he had owned and operated an auto body shop that had burned down prior to contacting Respondent Pounds about a job, and because he provided his own equipment to set up a business, the forum finds it more likely than not that T. Skinner was an independent business owner as he represented in his prior statement to the Agency. T. Skinner's

testimony was not credited unless it was an admission or consistent with other credible evidence in the record.

21) G. Skinner, T. Skinner's nephew and Claimant's "second cousin," had little to offer for the record. He admitted he had no knowledge of T. Skinner's or Claimant's pay arrangements with Respondent Pounds, could not remember what work Claimant was performing for Respondents, had never talked to Claimant about his trips in the semi-truck, and, although he lived across the street from Respondent Pounds's property and talked to Claimant and T. Skinner regularly, he knew only what Claimant and T. Skinner told him, which apparently was not much. Consequently, G. Skinner's testimony was given little, if any weight.

22) Although Troy Shupe was a credible witness, his testimony primarily was based on what Claimant had told him. He had no personal knowledge about who hired Claimant, Claimant's pay rate, the amount and extent of work Claimant performed for Respondents, or whether or not Claimant was paid for the work he performed. For those reasons, Shupe's testimony was given little, if any, weight.

23) Respondent Pounds's testimony, albeit somewhat less than candid at times, was more credible than Claimant's. Pounds's attempt to portray Claimant as a virtual interloper who conned his way onto the property was negated by Pounds's acquiescence to Claimant's presence on the property and the fact that he did nothing to remove Claimant until Claimant damaged one of Respondent LLC's trucks while driving with Bardan. Also, Pounds's testimony that he did not know T. Skinner was sent back to the work release center in December 2004 was impeached by Malheur County Community Corrections documents that confirm Pounds knew about the reassignment. However, whether or not Pounds knew about T. Skinner's troubles in December 2004, after Claimant had left the property, is not relevant to the issues and the forum finds that

his testimony otherwise was credible. The forum has credited his testimony when it was uncontroverted or supported by other credible evidence.

24) William Eccles was a credible witness. His testimony that he drove a truck for Respondent LLC under a lease agreement that required him to haul cargo at least 18 days per month in exchange for 25 percent of every load he hauled was corroborated by credible documentary evidence. He credibly testified that he procured loads through a broker – Service Transport - that was not affiliated with Respondent LLC or any other trucking company and that the proceeds from each haul was divided amongst Service Transport, Respondent LLC and Eccles. Additionally, he credibly testified that Respondent LLC paid him his share of the load once a week or every two weeks and that Respondent LLC did not control when he drove, how far he drove, or what cargo he hauled. Eccles's testimony on those matters was straightforward, unembellished, and not impeached. His testimony, therefore, was credited in its entirety.

25) John Bardan was a credible witness. His testimony that he drove a truck for Respondent LLC under a lease agreement that required him to haul cargo at least 18 days per month in exchange for 25 percent of every load he hauled was corroborated by credible documentary evidence. His testimony that he helped Claimant obtain his CDL, permitted Claimant to ride with him as a student driver, and paid him a percentage of the amount he made on each load was not disputed. The forum has credited Bardan's testimony in its entirety.

26) Brenda Dirks credibly testified that T. Skinner repaired her car in his shop after she hit a deer. According to Dirks, T. Skinner gave her a bid and when the repairs were completed, she wrote a check to T. Skinner as payment for the repairs. Although she acknowledged she has been preparing mileage taxes for Respondent LLC's trucks

since 2004, her testimony was straightforward and not impeached and the forum credits her testimony in its entirety.

27) John Smellage was a credible witness. Smellage, 73 years old and undergoing cancer treatment at times material, lived in a trailer on the property when T. Skinner lived there. He credibly testified that he had observed T. Skinner operating a paint and auto body shop on the premises and that he also saw Claimant hanging around “a lot,” but never observed him performing any work. His testimony that he never saw Respondent Pounds and Claimant together and never heard Pounds direct T. Skinner to do any work was credible. Smellage’s testimony was straightforward, limited to his firsthand observations, and not impeached in any way. The forum credits his testimony in its entirety.

28) Duane Smith testified he did not know Claimant or have any knowledge about Claimant’s relationship with Respondents. Smith’s testimony that T. Skinner was self-employed when he met him in late December 2004 is not relevant to the issue of whether one or both Respondents employed Claimant during the alleged wage claim period between October 31 and December 10, 2004. For that reason, Smith’s testimony was given little, if any weight.

29) Jim Warren authenticated Malheur County Community Corrections documents that showed T. Skinner was placed in a work release program, beginning on December 16, 2004, after he violated his probation. Although Warren’s testimony was credible, the documents are not relevant to Claimant’s wage claim because they concern events that occurred after Claimant was ordered to leave Respondents’ premises. At best, the documents show that Respondent Pounds wrote a check to T. Skinner in January 2005, referring to “LLC – Paint Shop” in the memo section, and that he wrote notes on T. Skinner’s behalf indicating T. Skinner “was asked” to work late on

certain dates in late December 2004 and January 2005. Even if those documents could be construed as evidence demonstrating an employment relationship between T. Skinner and Respondents, T. Skinner's employment status during that period is not relevant to Claimant's claim that one or both Respondents employed him between October 31 and December 10, 2004. For that reason, the documents and Warren's testimony about the documents were given little, if any, weight.

30) Margaret Pargeter was a credible witness. She testified that she had not investigated Claimant's wage claim and could only authenticate documents that were in the Agency's file when she received it from her supervisor. Her testimony was credited in its entirety.

ULTIMATE FINDINGS OF FACT

1) At times material, Respondent Pounds was the managing member of Respondent LLC, located in Ontario, Oregon. Respondent LLC leased commercial building space to various businesses and owned two tractor trailers that were leased to drivers in exchange for a percentage of the value of loads the drivers hauled to various locations in and out of Oregon.

2) Respondent LLC leased building space to T. Skinner who was attempting to rebuild his auto body business after a fire destroyed his previous business known as Skinner's Auto Body in Payette, Idaho.

3) At times material, T. Skinner was self-employed and dealt directly with customers, some of whom were referred by Respondent Pounds.

4) Neither Respondent Pounds nor Respondent LLC directed or controlled T. Skinner's work or work hours.

5) T. Skinner lived in an empty trailer on the property and performed odd jobs around the property in lieu of paying rent.

6) Claimant, T. Skinner's cousin, first appeared at the property when Respondent Pounds was visiting his dying daughter in Idaho. Claimant helped T. Skinner fix a truck for Respondent Pounds. When Pounds returned from Idaho, T. Skinner asked him to make out a check to Claimant as payment for his work on the truck. Pounds gave T. Skinner a check and deducted the amount from T. Skinner's invoice.

7) Claimant moved into one of the offices next to T. Skinner's shop with Respondent Pounds's tacit permission and performed odd jobs around the property in lieu of paying rent.

8) Claimant told Respondent Pounds he was interested in becoming a truck driver and Pounds referred him to John Bardan, a long haul truck driver who leased a truck from Pounds.

9) Bardan agreed to help Claimant obtain his CDL and Claimant used the truck Bardan leased from Respondent LLC to practice for the driving test.

10) Between November 1 and December 10, 2005, Claimant rode with Bardan as a student driver and continued to ride with him after he got his license. Bardan paid Claimant a percentage of the amount he made on each load.

11) Claimant was asked to leave Respondents' property after he damaged the truck Bardan leased from Respondent LLC while delivering a load to Sand Point, Idaho.

12) Claimant was paid for all of the work he performed prior to the trip to Sand Point, Idaho.

13) There is insufficient evidence to determine if Claimant was paid in full for the Sand Point, Idaho, trip.

14) Respondents did not engage Claimant's services as a truck driver, did not agree to pay him \$7.50 per hour, and are not liable for Claimant's unpaid wages, if any.

CONCLUSIONS OF LAW

- 1) At all times material herein, Respondents did not employ Claimant and were not employers subject to the provisions of ORS 652.110 to 652.200, 652.310 to 652.405, and ORS 653.010 to 261.
- 2) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter and Respondents herein. ORS 652.310 to 652.414.
- 3) Respondents are not liable for unpaid wages under ORS 652.140 for failure to pay Claimant wages.
- 4) Respondents are not liable for penalty wages under ORS 652.150 for willful failure to pay wages or compensation to Claimant as provided in ORS 652.140.
- 5) Respondents are not liable for civil penalties under ORS 653.055 for failing to pay Claimant the minimum wage pursuant to ORS 653.025. ORS 653.055.
- 6) Under the facts and circumstances of this record, and according to the applicable law, the Commissioner of the Bureau of Labor and Industries has the authority to dismiss the wage claim filed by Claimant. ORS 652.332.

OPINION

To prevail on a wage claim, the Agency must prove by a preponderance of evidence that: 1) Respondents employed Claimant; 2) any pay rate upon which Respondents and Claimant agreed, if it exceeded the minimum wage; 3) Claimant performed work for which he was not properly compensated; and 4) the amount and extent of work Claimant performed for Respondents. *In the Matter of Kurt E. Freitag*, 29 BOLI 164, 197 (2007).

Based on Claimant's admission that he was paid for the work he performed prior to his trip to Sand Point, Idaho, to deliver wood pellets, the only issues are whether Respondents employed Claimant as a truck driver, and, if so, whether Respondents owe Claimant \$7.50 per hour for the hours he worked during the trip to and from Idaho.

ORS chapter 652 governs claims for unpaid agreed wages. Under that chapter, “employer” means any person who engages the personal services of one or more employees. “Employee” means any individual who, other than a co-partner or independent contractor, renders personal services in Oregon to an employer who pays or agrees to pay the individual a fixed pay rate. ORS 652.310(1)(a)&(b).

There is no credible evidence demonstrating that Respondent LLC or Respondent Pounds engaged Claimant’s services as a truck driver at the agreed rate of \$7.50 per hour. Credible evidence establishes that Claimant told Respondent Pounds he wanted to become a truck driver and Pounds referred him to John Bardan, an independent truck driver who leased a truck from Pounds. Based on Claimant’s representations that he had prior experience as a truck driver, Bardan agreed to help him obtain a Commercial Drivers License (“CDL”). To that end, Bardan allowed Claimant to ride with him in the truck he leased from Respondent LLC, paid for Claimant’s licensing fees, and trained Claimant in truck driving basics. After obtaining a learner’s permit, Claimant drove with Bardan for approximately 10 days before he caused an accident resulting in damage to the leased truck. Claimant acknowledged, albeit inadvertently, that he was paid for the work he performed prior to the Idaho trip and Bardan credibly testified he paid Claimant a percentage of what he made on each load that involved Claimant, including \$100 he gave Claimant following the last trip. Even if the \$100 payment was not equal to the percentage Bardan and Claimant agreed upon – and there is no evidence in the record establishing what that percentage was - neither Respondent Pounds nor Respondent LLC is liable for the difference because neither one engaged Claimant’s personal services for an agreed upon rate. Based on those facts, there is no basis for Claimant’s claim and his wage claim hereby is dismissed.

AGENCY'S EXCEPTIONS

The Agency's exceptions noted three technical errors in the proposed order that have been corrected. The remaining exceptions pertain to factual findings, including credibility findings, related to Respondents' defense that T. Skinner employed Claimant rather than Respondents. Based on Claimant's admission that he was paid for all of the work he performed before his trip to Sand Point, Idaho, the forum found that the ultimate issue was whether Respondents engaged Claimant's services as a truck driver and failed to pay him. The Agency's exceptions do not challenge that finding or the conclusion that Claimant performed work for John Bardan at times material to the ultimate issue. However, to the extent the Agency's exceptions challenge particular credibility findings that may or may not indirectly bear on the findings and conclusions herein, the exceptions are addressed below.

Exception 1 –Duane Smith's Testimony.

The Agency contends Smith's testimony was not relevant to Claimant's wage claim and correctly observes that although there was no credibility finding pertaining to Smith, his testimony was relied upon as "one of several witnesses" supporting the finding that T. Skinner was self employed and not Respondents' employee. The omission has been corrected and the factual finding adjusted accordingly. However, the Agency's contention that Smith's testimony otherwise was impeached by Respondent Pounds's 2004 income tax return that shows "no record of Western Mechanical or Smith" and by documents "signed by Marlow Pounds and given to Malheur County Community Corrections that [show] T. Skinner worked for Respondents in December 2004 and January 2005," has no merit. The 2004 income tax return was filed by Pounds Farm LLC and is not relevant to any issues in this case. Pounds Farm LLC is not a named respondent in this case and there is nothing in the record suggesting that

Smith's name or business name should appear on that document. Smith testified he leased space from Respondent LLC for a truck repair business and the Agency has not impeached that testimony with any evidence demonstrating otherwise.

Exception 2 – Troy Shupe's Testimony.

The Agency contends Shupe's testimony should have been accorded greater weight. The fact that Shupe once accompanied Claimant on a trip to an auto parts store and "went to Boise with Claimant to pick up a trailer that had hauled Christmas trees for Respondents" does not establish an employment relationship between Claimant and Respondents. Claimant's own testimony and that of T. Skinner shows Claimant performed work for T. Skinner's auto body shop and may have performed odd jobs for Respondent Pounds in exchange for a place to stay. Shupe's testimony did not establish that the trip to the auto parts store or the trip to pick up a trailer in Boise was for Respondents. Shupe's testimony was based on what Claimant told him and not on his personal knowledge. The Agency's exception is **DENIED**.

Exception 3 – John Smellage's Testimony.

The Agency challenges Smellage's ability to perceive the matters to which he testified, particularly whether he had the ability to make observations "from his living quarters, while having cancer treatments, and observing from the outdoors in November and December, in all types of weather when he is obviously hard of hearing." First, there is no evidence in the record that Smellage had a hearing problem in 2004. Moreover, his testimony primarily was about what he had observed and not what he had heard. Second, there is nothing in the record about the number and extent of Smellage's cancer treatments or whether they affected his ability to observe activities taking place on the property. Third, Smellage credibly testified that he routinely walked around the property each day and there is nothing in the record about the weather

conditions during that time. Smellage had both the opportunity and the capacity to perceive the matters to which he attested and the character of his testimony was not impeached in any way. The Agency's exception is **DENIED**.

Exception 4 – T. Skinner's Testimony.

The Agency notes that the forum determined T. Skinner was self-employed based on "other credible evidence" and "respectfully asks, what evidence did the forum conclude was credible?" The finding speaks for itself and the Agency's exception is **DENIED**.

Exception 5 – John Bardan's Testimony.

The Agency "disagrees" with the finding "in which John Bardan's testimony was credited in its entirety." The Agency's argument that Bardan's testimony was "directly contradicted by other documents in evidence contemporaneously tracking T. Skinner's contact with the Malheur County as well as documents signed by Pounds saying he employed T. Skinner" has no merit. There are no documents in the record in which Respondent Pounds states he employed Claimant. In fact, Respondent Pounds has consistently denied he employed Claimant and the Agency has provided no evidence to prove otherwise. The Malheur County documents are not relevant to Claimant's wage claim and do not in any way impeach Bardan's testimony. The Agency's exception therefore is **DENIED**.

Exception 6 – Claimant's Testimony.

The Agency "disagrees" with the finding discrediting Claimant's testimony based on its own assessment that Claimant's testimony was credible. The Agency overlooks Claimant's multiple inconsistencies and admissions that contradict his previous statements to the Agency. Notably, the Agency fails to recognize the significance of Claimant's admission that he was convicted of tampering with witness testimony which

demonstrates a proclivity for dishonesty. The Agency's exception is not well taken and therefore is **DENIED**.

Exception 7 – Respondent Pounds's Testimony.

The Agency contends that Respondent Pounds's testimony should be given little, if any, weight because "the record is replete with evidence of Pounds's attempts to orchestrate" witness testimony. The Agency refers to several exhibits showing Pounds prepared witness statements that were signed by T. Skinner, John Bardan, John Smellage, Brenda Dirks, and Rick Rios. While the witness statements were admitted as evidence in the record, they were accorded some weight only when the witness gave testimony at hearing and affirmed the accuracy of the contents. The Agency's exception is **DENIED**.

Exception 8 – Claimant's Washington State Patrol Citation.

The Agency proffers no basis for its contention that Respondent Pounds's handwritten response to the citation Claimant received from the Washington State Patrol demonstrates Pounds's lack of credibility. Rather, the Agency asks why "if Bardan was the true lessee of this truck" did Pounds "not have Bardan pay this ticket?" There is nothing in the record that shows anyone paid the ticket and Pounds's response to the Washington State Patrol only reiterates his position that Claimant was not his or Respondent LLC's employee. The Agency has not established how Pounds's response to the citation contradicts his defense that he did not employ Claimant. For that reason, the Agency's exception is **DENIED**.

Exception 9 – Respondents' Defense.

The Agency objects to the finding that T. Skinner was self-employed and operated an auto body shop during times material to this case. The finding was based in part on T. Skinner's prior written statement that he operated an auto body shop at

Respondents' facility. Although the prior statement was not sworn, T. Skinner acknowledged he was not under any duress when he signed the statement and that he had previously owned an auto body shop that had burned down before he began doing auto body work at Respondents' facility. The statement, plus credible testimony from one of T. Skinner's customers and witnesses to whom he represented himself as self-employed, was sufficient to support the finding. The Agency's exception is **DENIED**.

ORDER

NOW, THEREFORE, as Respondents have been found not to owe Claimant James Rumsey wages, the Commissioner of the Bureau of Labor and Industries hereby orders that James Rumsey's wage claim against **Best Concrete and Gravel, LLC, and Marlow Pounds** be and is hereby dismissed.

ⁱ The date on the check apparently was a typographical error.

ⁱⁱ See *supra* Finding of Fact – The Merits 26.