

In the Matter of
J. GUADALUPE CAMPUZANO-CAZARES
Case No. 59-06
Final Order of Commissioner Brad Avakian
Issued September 4, 2008

SYNOPSIS

Although credible evidence established that Respondent employed at least one of the two wage claimants, the evidence was not sufficiently reliable to support the number of work hours claimed or to determine the amount of wages Respondent owed to either wage claimant. Based on the lack of credible evidence establishing Respondent failed to pay the wage claimants all wages owed, the order of determination alleging unpaid wages, penalty wages, and civil penalties was dismissed. ORS 652.140; ORS 652.150; ORS 653.055; ORS 653.025.

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 April 28, 2008, in the Bureau of Labor and Industries Conference Room, located at 3865 Wolverine NE, Bldg. E-1, Salem, Oregon.

Jeffrey Burgess, an Agency employee, represented the Bureau of Labor and Industries (“BOLI” or “Agency”). Agustin A. Garcia (“Claimant Garcia”) was present throughout the hearing and was not represented by counsel. Francisco A. Campos (“Claimant Campos”) was not present at the hearing. J. Guadalupe Campuzano-Cazares aka “Lupe” Campuzano-Cazares (“Respondent”) failed to appear for hearing in person or through counsel.

The Agency called as witnesses: Dianne Hays-Hatch, Claimant Garcia’s former employer; Amparo Arriaga, Claimant Garcia’s spouse; Claimant Garcia; Katy Bayless, BOLI Wage and Hour Division Compliance Specialist; and Philip Rheiner, U. S. Bureau of Land Management Law Enforcement Ranger.

The forum received as evidence:

- a) Administrative exhibits X-1 through X-7;
- b) Agency exhibits A-1 through A-19 (filed with the Agency's case summary).

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 August 16, 2005, Claimant Garcia filed a wage claim with the Agency alleging Respondent had employed him from September 5, 2004, through January 9, 2005, and failed to pay his wages for the hours he worked during that period. Garcia alleged he earned \$6,000 and that Respondent paid him \$990 during the wage claim period.

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

3) On August 16, 2005, a wage claim form and wage assignment were filed with the Agency on Claimant Campos's behalf alleging Respondent had employed Campos from October 2 through December 5, 2004, and failed to pay his wages for hours he worked during that period. The wage claim form included assertions that Campos earned \$2,500 and that Respondent paid him \$500 during the wage claim period.

4) On December 23, 2005, the Agency issued Order of Determination No. 05-2464. In the Order, the Agency alleged Respondent had employed Claimants during the period September 5, 2004, through January 15, 2005, failed to pay them for hours worked in that period, and was liable to them for \$12,233.58 in unpaid wages, plus

interest. The Agency also alleged Respondent's failure to pay all of the wages when due was willful and Respondent was liable to each Claimant for \$3,432 as penalty wages, plus interest. In addition to the penalty wages, the Agency alleged Respondent paid Claimants less than the wages to which they were entitled under ORS 653.010 to 653.261 and was therefore liable to each Claimant for \$3,432 in civil penalties, pursuant to ORS 653.055(1)(b), plus interest. The Order gave Respondent 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.

5) Respondent was personally served with the Order of Determination on December 29, 2005, at 509 S. River Street, Newberg, Oregon. On January 19, 2006, Respondent filed an answer that alleged in pertinent part:

"This answer and request for hearing regarding Order of Determination "#05-2464 in accordance with OAR 839-050-0110 [sic]. This contested hearing is to allow proof that the wages and penalties are not due the claimants in this case. Furthermore, to show that all monies due to labor performed were indeed paid in full. Also, the original claimant was not employed or contracted by myself. To wit, Francisco A. Campos, #05-2464 [sic]."

6) On February 20, 2008, the Agency submitted a request for hearing. On February 26, 2008, a Notice of Hearing issued from the Hearings Unit stating the hearing would commence at 9:30 a.m. on April 29, 2008. With the Notice of Hearing, the forum included copies of the Order of Determination, a language notice, a Servicemembers Civil Relief Act notification, and copies of the Summary of Contested Case Rights and Procedures and the Contested Case Hearing Rules, OAR 839-050-0000 to 839-050-0440. The Notice of Hearing was mailed to Respondent at the address denoted in the Agency's request for hearing: 509 S. River Road, Newberg, OR 97132. The mailing was not returned to the Hearings Unit by the U.S. Post Office.

7) At the Agency's request, the Hearings Unit appointed court certified Spanish speaking interpreter Terry Rogers to interpret witness testimony during the hearing.

8) On March 20, 2008, the ALJ ordered the Agency and Respondent 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 April 18, 2008, and notified them of the possible sanctions for failure to comply with the case summary order. On the same date, the ALJ issued a notice pertaining to fax filings and timelines.

9) The Hearings Unit mailed the case summary order and notice pertaining to fax filings and timelines to Respondent at 509 S. River Road, Newberg, OR 97132, and to 509 S. River Street, Newberg, OR 97132. Both mailings were returned to the Hearings Unit marked as "undeliverable as addressed."

10) The Agency timely submitted a case summary. Respondent did not submit a case summary.

11) Respondent did not appear at the time and place set for hearing and no one appeared on his behalf or advised the ALJ of any reason for his failure to appear. The ALJ ruled that Respondent was in default, having been properly served with the Notice of Hearing and having failed to appear at the hearing.

12) At the start of hearing, the ALJ explained the issues involved in the hearing and the matters to be proved.

13) The ALJ issued a proposed order on June 17, 2008, that notified the participants they were entitled to file exceptions to the proposed order within ten days of

its issuance. The proposed order was mailed to Respondent at 509 S. River Road, Newberg, OR 97132, and to 509 S. River Street, Newberg, OR 97132. Both mailings were returned to the Hearings Unit marked as “undeliverable as addressed.”ⁱⁱ Respondent did not file exceptions to the proposed order. The Agency requested and was granted an extension of time until June 30, 2008, to file exceptions. 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 was an individual who entered into three separate “negotiated cash sale contracts” with the U.S. Bureau of Land Management (“BLM”) to purchase a set number of vine maples in the Tillamook forest. Respondent signed the first two contracts on October 12 and 14, 2004, and both contracts expired on October 28, 2004. Respondent purchased 150 trees under the first contract. The third contract began and ended in early January 2005.

2) Claimant Garcia met Respondent while he was living with Respondent’s cousin. Garcia was living with both of them in Newberg, Oregon, when Respondent hired Garcia to perform work as a laborer in or around September 2004. At first, Garcia worked for Respondent in the Newberg area. Later, Garcia and Respondent harvested vine maples in the Tillamook forest near Tillamook, Oregon, under the contracts Respondent had with the BLM.

3) Claimant Garcia’s name appears as a “helper” on the first contract in the “Special Stipulations” section, along with the names: “Francisco Campus,” “Carlos Campusano,” “Raul Campusa,” and “Gloria Arreola.”ⁱⁱⁱ Respondent is shown as the purchaser and his name appears as “J. Guadalupe Campusano Cazares.” On the contract, Respondent’s address is listed as 23900 N. Highway 99W, Newberg, Oregon. When asked about the other names on the contract, Garcia told Wage and Hour compliance specialist Katy Bayless that Carlos Campuzano (“Campusano”) was

Respondent's son, Raul Campuzano ("Campusa") was Respondent's brother, and they were digging their own trees under the contract. Claimant Garcia's name also appears as a helper on the other two contracts.

4) While working for Respondent in 2004, Claimant Garcia did occasional landscaping projects for Dianne Hays-Hatch at her home. Respondent worked with Garcia on at least one occasion and told Hays-Hatch that Garcia was working for him in his nursery business, that his business was small, and that Garcia was a valued worker.

5) After Respondent obtained the BLM contract to harvest vine maples, Respondent and Garcia drove to and from the Tillamook forest in Respondent's truck. They spent their work days pulling up plants, rolling them into "little balls," and loading them on the truck. When the truck was loaded, they delivered the plants to "where they were to go."

6) After he filed a wage claim with BOLI in August 2005, Claimant Garcia told Bayless that Respondent told him he would pay him \$3,000 per month and "if they earned a lot," he would pay him \$4,000 per month. Garcia told Bayless that Respondent would give him \$50 or \$100 and tell him that he would get paid the full amount "next time." Garcia also told her that Respondent "always paid him in cash" and "always paid in advances, he never paid the wages," and if Garcia had bills or rent due, Respondent paid the bills and rent on his behalf.

7) In a later interview, Claimant Garcia told Bayless that he does not read or write, but can write numbers. Garcia told Bayless that he wrote down "his numbers" each day on a piece of paper to track the number of hours he worked for Respondent. He also told Bayless that after his wife wrote the numbers on the wage claim calendar they "threw away the paper." During the interview, Garcia told Bayless that he and

Respondent left each morning at 4 a.m. and often did not return from work until 10 p.m. after working in the forest from 6 a.m. until 7 p.m.

8) During a telephone conversation in December 2005, Bayless asked Claimant Garcia if the hours he reported on the wage claim calendar included a lunch period and he said the lunch periods were “taken out” and the calendar showed work hours only. When Bayless asked Garcia if the 14 hours per day recorded in October included travel time, he told her that Respondent told him that his pay included travel time and that he understood that he was paid from the time they started in the morning until “the time that they got back and were done.” He told her that they loaded the truck before they left in the morning and unloaded the truck at night when they returned. Garcia also told her that they could dig up 100 to 200 trees per day and that altogether they dug up 2,000 trees to sell “bare root” and 6,000 trees that they planted in pots.

9) Claimant Garcia’s wife, Amparo Arriaga, recorded the following weeks and hours in 2004 and 2005 on the wage claim calendar that was included with Garcia’s wage claim:

2004

- Week ending September 11 = 57 hours
- Week ending September 18 = 44.5 hours
- Week ending September 25 = 61 hours
- Week ending October 2 = 34 hours
- Week ending October 9 = 69 hours
- Week ending October 16 = 80 hours
- Week ending October 23 = 84 hours
- Week ending October 30 = 84 hours
- Week ending November 6 = 74 hours
- Week ending November 13 = 72 hours
- Week ending November 20 = 72 hours
- Week ending November 27 = 72 hours

Week ending December 4 = 72 hours
Week ending December 11 = 72 hours
Week ending December 18 = 72 hours
Week ending December 25 = 72 hours

2005

Week ending January 1 = 84 hours
Week ending January 8 = 84 hours
Week ending January 15 = 84 hours

According to the wage claim calendar, Garcia worked 12 and 14 hour days, six or seven days per week from October through mid-January. During the weeks ending Saturday, December 25, 2004, and January 1, 2005, Garcia represented that he worked 12 hours per day, Monday through Saturday.

10) Winter solstice occurs some time between December 20 and December 23 each year in the Northern hemisphere. The winter solstice began on December 21 in 2004.

11) When she completed the wage claim investigation, Bayless determined that given the number of hours Claimant Garcia reported on the wage claim calendar, the \$3,000 per month wage agreement he claimed on the wage claim form amounted to less per hour than the 2004 and 2005 statutory minimum wage rates.ⁱⁱⁱ For that reason, she computed Garcia's wages owed by multiplying the hours he recorded on the wage claim calendar for 2004 by \$7.05 per hour, and the hours he recorded for 2005 by \$7.25 per hour. Bayless also used the 2004 and 2005 minimum wage rates when she computed Garcia's daily rate for the purpose of calculating penalty wages. Based on her investigation, Bayless determined that Garcia was exempt from overtime wages during the wage claim period.

12) Based on Claimant Garcia's representations on the wage claim calendar that was prepared by his wife at his request, Bayless concluded that Claimant Garcia

worked 1,151.5 hours from September 5 through December 31, 2004, and earned \$8,118.08 based on the statutory minimum wage of \$7.05 per hour. She concluded that Garcia worked an additional 180 hours through January 15, 2005, and earned \$1,305 based on the statutory minimum wage of \$7.25 per hour. After deducting the \$990 Garcia claimed he was paid by Respondent, Bayless determined that Garcia was owed \$8,433.08.

13) On or about August 15, 2005, Amparo Arriaga, Claimant Garcia's wife, filled out a wage claim form and wage claim calendar on Claimant Campos's behalf. Except for two days, the wage claim calendar represents that between October 12 and December 5, 2004, Campos worked the same hours, days, and weeks that Claimant Garcia worked. Campos's name is printed on the signature line of the wage claim form and on the wage assignment in what appears to be the same handwriting used to fill out the wage claim form.

14) On October 6, 2005, the Agency mailed a "NOTICE OF WAGE CLAIM" to Respondent at 509 S. River, Newberg, OR 97132 that stated in pertinent part:

"You are hereby notified that FRANCISCO A. CAMPOS has filed a wage claim with the Bureau of Labor and Industries alleging:

"Unpaid wages of \$2,500 at the rate of \$50 per day from October 12, 2004 to December 5, 2004.

"IF THE CLAIM IS CORRECT, you are required to IMMEDIATELY make a negotiable check or money order payable to the claimant for the amount of wages claimed, less deductions required by law, and send it to the Bureau of Labor and Industries at the above address.

"IF YOU DISPUTE THE CLAIM, complete the enclosed 'Employer Response' form and return it together with the documentation that supports your position, as well as payment of any amount which you concede is owed the claimant to the Bureau of Labor and Industries within ten (10) days of the date of this Notice.

"If your response to the claim is not received on or before October 21, 2005, the Bureau may initiate action to collect these wages in addition to penalty wages, plus costs and attorney fees."

15) On October 25, 2004, Bayless sent Respondent a certified letter that stated in pertinent part:

“Since you have not responded to our letter of October 6, 2005, it has become necessary to begin the Administrative Process in which we will serve upon you an Order of Determination and ultimately a judgment in this matter.

“You are advised that as of this date, in addition to the \$12,021.33 in wages owed to Agustin A. Garcia and Francisco A. Campos, penalty wages have accrued to the amount of \$6,960.00. This amount does not include interest or attorney fees.

“Please provide a daily work records [sic] for both wage claimants. If you do not have such records, there may be civil penalties of \$2,000.00 assessed for each person. Please provide copies of the payroll records to show total amounts paid to the wage claimants.”

16) On October 26, 2006, Bayless contacted Respondent by telephone and documented the conversation in a contact report. Bayless noted in her report that Respondent stated he had received a demand for unpaid wages based on Claimant Campos’s claim, but did not know about Claimant Garcia’s wage claim.^{iv} He stated that Campos never worked for him and that he thought Campos was related to Garcia’s wife. Bayless also noted that Respondent told her that Garcia started working for him on October 10, 2004, worked “only for a few days,” and that Respondent has not worked since he was involved in a car accident on January 18, 2005. Respondent told Bayless that he had no proof of payments he made to Garcia.

17) Bayless relied on the wage claim form and calendar Arriaga prepared to compute Claimant Campos’s unpaid wages. Bayless concluded that Claimant Campos worked 610 hours from October 12 through December 5, 2004, and earned \$4,300.50 based on the statutory minimum wage of \$7.05 per hour. Based on Arriaga’s representation on the wage claim form that Respondent paid Campos \$500, Bayless concluded that Respondent owed Campos \$3,800.50.

18) Claimant Garcia speaks Spanish and testified through a certified court interpreter. There were no objections to the interpreter's translations during the hearing and the forum finds the interpreter's translations accurate and reliable. With this in mind and taking into account the limitations, difficulties, and inaccuracies sometimes associated with translations, the forum finds Claimant Garcia's testimony about the amount he was paid and the hours he worked unreliable. His testimony about the amount Respondent paid him during the wage claim period was inconsistent with his prior statements to the Agency. During the wage claim investigation, Garcia told Bayless that Respondent always paid him advances of \$50 or \$100, always paid in cash, and paid his bills and rent as well. Although he stated on the wage claim form that Respondent paid him \$990 in wages, he testified at hearing that he was paid only \$50 in cash during his employment. In an apparent attempt to explain the remaining \$940, Garcia testified that Respondent told him he was "taking rent off his pay." However, there is no evidence Garcia gave that information to Bayless during the investigation. In fact, his prior statement to Bayless suggests that he received more than one cash advance and that the cash amounts were over and above the rent and bills Respondent paid on Garcia's behalf. The Agency's suggestion that Garcia's contradictory testimony may be attributed to a language problem between Bayless and Garcia is not supported by any evidence in the record.

Additionally, Claimant Garcia's testimony that he was never told what the monthly rent was on the house he shared with Respondent was not convincing. If he knew Respondent was "taking rent off his pay," a reasonably prudent person would make some effort over a four and a half month period, if not from the outset, to find out how much Respondent intended to deduct from his monthly wages for rent. Furthermore, his testimony begs the question of how he arrived at the \$940 figure if he

did not know how much rent Respondent was paying on his behalf. His certainty about the amount Respondent agreed to pay him monthly and that it included his travel time was not congruent with his vague understanding about what he owed in rent each month and how it was paid.

Finally, Claimant Garcia's wage claim calendar and testimony about the hours he worked were inconsistent with the information he provided on the wage claim form. In response to three different questions on the wage claim form, Garcia stated his last work day for Respondent was January 9, 2005. On the wage claim calendar he submitted with the wage claim form, he claimed 72 additional hours between January 10 and January 15, 2005. He gave no testimony that accounts for the additional hours and there is no other evidence that supports his claim for additional hours. Although he claimed he maintained a contemporaneous record of his actual hours worked, he did not at any time provide that record to the Agency and, in fact, stated that he "threw away" the "piece of paper" on which he purportedly recorded his daily hours. Notably, he had the wherewithal to produce photographic evidence to support his claim that Respondent employed him to harvest vine maples, but could not produce the very evidence that presumably would have supported his claim for all of the hours he claimed he worked. Raising further questions about the hours he worked, Claimant Garcia claimed he worked 72 hours per week harvesting trees in November and December 2004 which contradicts other credible evidence showing that Respondent's tree harvesting contracts allowed harvesting of a set number of trees for a finite period in October 2004 and a finite period in January 2005. Overall, Garcia's testimony was unreliable and credited only when it was a statement against interest or corroborated by other credible evidence.

19) Amparo Arriaga's testimony that Claimant Garcia, her husband, could not read or write numbers and used "hatch marks" to track his work hours in "a notebook" was inconsistent with Claimant Garcia's prior statement to Bayless that, although he cannot read or write, he knows how to write numbers and had written the numbers on a piece of paper that he threw away after Arriaga wrote the numbers on the wage claim calendar. Also, Arriaga acknowledged that she prepared Garcia's and Campos's wage claim forms, including the wage assignments, and although she testified that Campos signed the wage assignment, Campos's name, printed once on the wage claim and twice on the wage assignment form, appears to be in the same handwriting Arriaga identified as her own.^v For those reasons, Arriaga's testimony was not reliable and was credited only when it was corroborated by credible evidence.

20) Bayless's testimony was credible. Although her present recollection was not certain, and her conclusion that Claimant Garcia was exempt from overtime was not correct based on the information she had at the time,^{vi} she credibly testified that the contact reports entered into evidence were prepared during the investigation and were an accurate representation of what she was told by Respondent, Claimant Garcia, and others she interviewed during the investigation. To the extent that she testified earnestly to her knowledge and belief, Bayless's testimony was credited in its entirety.

21) Rheiner and Hays-Hatch were credible witnesses.

ULTIMATE FINDINGS OF FACT

1) At times material, Respondent was a person who employed one or more persons to perform work in Oregon.

2) Respondent employed Claimant Garcia as a laborer in Oregon sometime between September 2004 and January 2005.

3) In 2004, the state minimum wage was \$7.05 per hour and in 2005 it was \$7.25 per hour.

4) Respondent paid Claimant Garcia at least \$990 between September 2004 and January 2005.

5) There is insufficient reliable evidence with which to determine the approximate number of hours Claimant Garcia worked for Respondent or how much he was paid for actual hours worked.

6) There is insufficient reliable evidence with which to determine whether Claimant Campos was employed by Respondent or, if so, approximately how many hours he may have worked for Respondent or what he may have been paid.

7) BOLI sent Respondent written notice of nonpayment of wages to Claimant Campos on October 6, 2005, before issuing an Order of Determination on February 17, 2006.

8) There is insufficient evidence to conclude that Respondent is liable for unpaid wages to either Claimant.

CONCLUSIONS OF LAW

1) At all times material herein, Respondent was an employer and 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 the Respondent herein. ORS 652.310 to 652.414.

3) Respondent is not liable for unpaid wages under ORS 652.140 for failure to pay Claimants any wages earned and unpaid after their employment terminated.

4) Respondent is not liable for penalty wages under ORS 652.150 for willful failure to pay wages or compensation to Claimants as provided in ORS 652.140.

5) Respondent is not liable for civil penalties under ORS 653.055 for failing to pay Claimants 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 claims filed by Claimants Garcia and Campos. ORS 652.332.

OPINION

Respondent failed to appear at hearing and was declared in default pursuant to OAR 839-050-0330. When a respondent defaults, the Agency must establish a prima facie case on the record to support the allegations in its charging document. *In the Matter of Sue Dana*, 28 BOLI 22, 29 (2006). The forum may consider unsworn assertions contained in a defaulting respondent's answer when making factual findings, but those assertions are overcome whenever controverted by other credible evidence. *Id.*

The Agency's prima facie case must include credible evidence of the following elements: 1) Respondent employed Claimants during the wage claim periods claimed; 2) the pay rate upon which Respondent and Claimants agreed, if it exceeded the minimum wage; 3) Claimants performed work for which they were not properly compensated; and 4) the amount and extent of work Claimants performed for Respondent. *Id.*

CLAIMANT GARCIA

The Agency presented sufficient credible evidence to support its contention that Respondent employed Claimant Garcia in late 2004. In his answer, Respondent acknowledged employing Garcia "for a few days," denied owing any wages, but, despite his obligation to maintain proper records, failed to produce any records showing the hours Garcia worked. See *In the Matter of Tina Davidson*, 16 BOLI 141, 148 (1997)(determining that it is the employer's duty to maintain an accurate record of an employee's time worked). The Agency therefore relied, in part, on Garcia's

representations on the wage claim form and during the wage claim investigation to determine that Garcia performed work for which he was not properly compensated and that he was owed \$8,433.08 for 1,331.5 hours of work performed from September 5, 2004, through January 15, 2005, when computed at the minimum hourly wage rate.

In this forum a claimant is not penalized by an employer's failure to produce records of hours or dates worked. The forum may rely on credible evidence produced by the agency, including a claimant's credible testimony, to determine the amount and extent of the claimant's work "as a matter of just and reasonable inference" and "may then award damages * * * even though the result may be only approximate." *In the Matter of Francisco Cisneros*, 21 BOLI 190, 213-214 (2001). A claimant is not denied recovery on the ground that the claimant is unable to prove the precise extent of uncompensated work *when the inability is based on an employer's failure to keep proper records in conformance with the employer's statutory duty.*

However, contrary to the Agency's contention in its exceptions to the proposed order, the forum need not "fashion a remedy" when a claimant claims to have maintained a contemporaneous record of the precise number of uncompensated hours worked. The only issue in such a case is whether the claimant's contemporaneous records and related testimony are credible. *See In the Matter of Stephanie Nichols*, 24 BOLI 107, 120 (2002)(when respondent did not keep the required record of claimant's work hours, the forum found claimant's contemporaneous records and testimony credible and relied on both to determine the amount and extent of claimant's work). The same holds true in a default case. *See In the Matter of G & G Gutters, Inc.*, 23 BOLI 135, 145 (2002)(when respondent did not appear at the hearing, but admitted in its answer that it employed claimants, the forum relied on the claimants' credible testimony

and reliable contemporaneous records created by each claimant to determine the extent of the work they performed for respondent).

The only issue in this case was whether Claimant Garcia's testimony and contemporaneous record he claimed he maintained were credible. Having found that Garcia's testimony was inconsistent with his prior statements to the Agency and that there is no credible evidence corroborating his testimony that he maintained a daily record of the actual hours he worked, the forum will not speculate or draw inferences about wages owed to Garcia. See *In the Matter of Burrito Boy, Inc.*, 16 BOLI 1, 12 (1997)(the forum will not speculate or draw inferences about wages owed based on insufficient or unreliable evidence). Absent any credible evidence showing Garcia was improperly compensated, or the extent to which he was not paid for approximate hours worked, the forum concludes that Respondent is not liable to Claimant Garcia for any unpaid wages. Moreover, absent a valid wage claim, the Agency's allegation that Respondent is liable for penalty wages under ORS 652.150 and civil penalties under ORS 653.045 fails.

CLAIMANT CAMPOS

Claimant Campos did not appear at the hearing and there is no evidence in the record that compliance specialist Bayless ever interviewed Campos about his wage claim or employment with Respondent. Furthermore, Arriaga's testimony that she prepared Campos's wage claim form and the forum's observation that there is a noticeable similarity between Campos's purported "signature" and Arriaga's handwriting raise a question about whether Campos made the claim or was even aware that a wage claim had been prepared and filed on his behalf.^{vii} The only evidence addressing the issues raised in Campos's wage claim is Claimant Garcia's testimony and that was deemed not credible. For those reasons, the forum concludes that Respondent is not

liable for any wages allegedly earned and owed to Campos and therefore is not liable for penalty wages or civil penalties as the Agency alleged.

AGENCY'S EXCEPTIONS

The Agency's exceptions include objections to specific factual findings, certain credibility findings, and the ALJ's application of law to certain facts.

Factual Findings

1. Finding of Fact – The Merits 3

The Agency's assertion that Claimant Campos's name appears in the "Special Stipulations" section of the first tree harvesting contract cannot be confirmed in the record. Although the Agency argues that "Francisco Campos is identified, but the letter 'o' in his last name is simply not closed at the top," the record shows that the letter is more similar to the "u" in Campusano and other similar names that appear on the document than it is to the "o" in the other names, including Carlos Campusano's name. For that reason, the forum cannot find as a matter of fact that Campos's name appears on the document. Contrary to the Agency's argument, the tree harvesting contract does not conclusively establish that Respondent employed Campos.

Even if the Agency had established that Respondent employed Campos, there is no evidence the compliance specialist confirmed the wage claim by interviewing Campos at any time before or after the wage claim was filed. Campos did not fill out the wage claim form and there is no evidence he personally filed the form Arriaga prepared on his behalf. Campos did not appear as a witness at the hearing and no explanation was offered for his failure to appear. Other than uncorroborated and otherwise unreliable hearsay statements, there is no evidence showing the hours he allegedly worked or the amount Respondent allegedly paid. The Agency's exceptions regarding

the factual finding and related findings about the lack of evidence supporting Campos's wage claim are **DENIED**.

2. Finding of Fact – The Merits 5

The Agency objects to the factual finding describing Claimant Garcia's job duties contending that the "testimony was that the claimants rolled the root balls of the vine maples into burlap" and that "they did not roll the vine maples into little balls." That particular finding is based on Garcia's testimony that his job was to "pull up plants, roll them in little balls that they come in, or that they put them in, and take them to the truck and once they were in the truck we would take them to where they were supposed to go." However, for clarity, the reference to "little balls" in the factual finding has been modified with the addition of quotation marks indicating that the reference is verbatim. The Agency's exception otherwise has no merit and is **DENIED**.

Credibility Findings

The Agency's objections to the credibility findings primarily focused on those findings involving testimony the forum deemed implausible, inconsistent, or contradictory. Some of the Agency's points regarding the findings related to implausibility were well taken and those findings were removed from the order. The credibility findings based on inconsistent or contradictory testimony were modified for clarity.

ALJ's Application of Law to Facts

The Agency primarily argues that because Respondent never produced required time records and failed to appear at hearing, "some measure of deference for the [Claimants] seems appropriate." The Agency cites long held principles that the forum recognized in the proposed order. For clarity, the opinion section of this order has been modified to distinguish this case from those cases involving a claimant whose inability to

prove the precise extent of uncompensated work is because the employer failed to keep proper records pursuant to the employer's statutory duty.

Having considered the Agency's arguments, other than the modifications to the factual findings, credibility findings, and opinion section of this order, the Agency's remaining exceptions are **DENIED**.

NOW, THEREFORE, as Respondent has been found not to owe Claimant Agustin Garcia wages, the Commissioner of the Bureau of Labor and Industries hereby orders that Agustin Garcia's wage claim against **J. Guadalupe Campuzano-Cazares aka Lupe Guadalupe Campuzano-Cazares** be and is hereby dismissed.

FURTHERMORE, as Respondent has been found not to owe Claimant Francisco Campos wages, the Commissioner of the Bureau of Labor and Industries hereby orders that Francisco Campos's wage claim against **J. Guadalupe Campuzano-Cazares aka Lupe Guadalupe Campuzano-Cazares** be and is hereby dismissed.

ⁱ The proposed order also was mailed to an address that appeared on one of the Agency's exhibits and that mailing was not returned to the Hearings Unit by the U.S. Post Office.

ⁱⁱ The Agency submitted an exhibit (A-15) that was a copy of a facsimile transmission and the names of "Francisco Campus" and "Raul Campusa" appear to be cut off from the margin.

ⁱⁱⁱ Pursuant to OAR 839-020-0004(29), "salary" means "a predetermined amount consisting all or part of the employee's compensation for each pay period of one week or longer (but not to exceed one month) and in no instance will be any amount less than required to be paid pursuant to ORS 653.025." Based on the number of hours Claimant Garcia reported on the wage claim calendar and the amount he claimed was the agreed upon rate, and according to the ALJ's computations, Garcia's hourly rate never went below \$8.33 per hour during each pay period, and was as high as \$18.46 per hour in September 2004.

^{iv} There is no evidence in the record that the Agency mailed a Notice of Wage Claim to Respondent pertaining to Claimant Garcia's wage claim.

^v The Agency filed an exception objecting to the forum "rendering an opinion about whether handwriting on the wage claim forms is genuine without an exemplar from [Claimant Campos]." Arriaga testified that she filled out the forms and she authenticated her handwriting. The handwriting on the forms and the purported Campos "signatures" are sufficiently similar that any reasonable person could conclude that they were written by the same person, Arriaga, with or without Campos's knowledge and consent.

^{vi} Evidence showed Claimant Garcia performed work as a laborer in a nursery and in the Tillamook forest and not as an agricultural employee as agriculture is defined in OAR 839-020-0004(3).

^{vii} See Findings of Fact – The Merits 13 & 19.