

**In the Matter of  
VILLAGE CAFÉ, INC.**

**Case No. 25-08**

**Final Order of Commissioner Brad Avakian**

**Issued December 3, 2008**

**SYNOPSIS**

Respondent employed four wage claimants in 2006 at the minimum wage of \$7.50 per hour and did not pay them all wages earned and due. Claimants were awarded a total of \$3,420.90 in unpaid wages. Respondent's failure to pay the wages was willful, and each claimant was awarded \$1,800.00 in penalty wages, for a total of \$7,200.00 in penalty wages. Based on Respondent's failure to pay Claimants the minimum wage, each claimant was also awarded \$1,800.00 as a civil penalty, for a total of \$7,200.00 in civil penalties. ORS 652.140(1) & (2), ORS 652.150, ORS 653.055(1)(b); OAR 839-010-0470.

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The above-entitled case came on regularly for hearing before Alan McCullough, designated as Administrative Law Judge ("ALJ") by Brad Avakian, Commissioner of the Bureau of Labor and Industries ("BOLI") for the State of Oregon. The hearing was held on November 5, 2008, at BOLI's Eugene office located at 1400 Executive Parkway, Suite 200, Eugene, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by case presenter Jeffrey C. Burgess, an employee of the Agency. Claimants Huffman and Mears were present at the hearing until they finished testifying. Claimants Smith and Keller were not present at the hearing except during their telephonic testimony. Respondent did not appear at hearing and was held in default.

The Agency called the following witnesses: Fonda Smith (telephonic), Angela Keller (telephonic), Sue Huffman, and Pamela Mears, wage claimants; and Bernadette Yap-Sam, Wage & Hour Division compliance specialist.

The forum received into evidence:

a) Administrative exhibits X-1 through X-6 (submitted or generated prior to hearing); and

b) Agency exhibits A-1 through A-6 (submitted prior to hearing) and Agency exhibits A-7 and A-8 (submitted 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 December 11, 2006, Claimant Keller filed a wage claim with the Agency in which she alleged that Respondent had employed her and failed to pay wages earned and due to her. Along with her wage claim, Claimant Keller signed a BOLI form that assigned to the Commissioner of Labor and Industries, in trust for herself, all wages due from Respondent.

2) On January 11, 2007, Claimant Smith filed a wage claim with the Agency in which she alleged that Respondent had employed her and failed to pay wages earned and due to her. Along with her wage claim, Claimant Smith signed a BOLI form that assigned to the Commissioner of Labor and Industries, in trust for herself, all wages due from Respondent.

3) On January 22, 2007, Claimant Huffman filed a wage claim with the Agency in which she alleged that Respondent had employed her and failed to pay wages earned and due to her. Along with her wage claim, Claimant Huffman signed a BOLI form that assigned to the Commissioner of Labor and Industries, in trust for herself, all wages due from Respondent.

4) On February 13, 2007, Claimant Mears filed a wage claim with the Agency in which she alleged that Respondent had employed her and failed to pay wages earned and due to her. Along with her wage claim, Claimant Mears signed a BOLI form that assigned to the Commissioner of Labor and Industries, in trust for herself, all wages due from Respondent.

5) Claimants filed their wage claims within the statute of limitations.

6) On July 5, 2007, the Agency served Order of Determination No. 06-4278 on Respondent based upon the wage claim filed by Claimants Keller, Smith, Huffman, and Mears, and the Agency's investigation. The Order of Determination alleged that Respondent owed a total of \$3,562.40 in unpaid wages, plus interest;<sup>i</sup> \$7,200.00 in penalty wages pursuant to ORS 652.150, plus interest;<sup>ii</sup> and \$7,200.00 in civil penalties pursuant to ORS 653.055(1)(b), plus interest;<sup>iii</sup> and required that, within 20 days, Respondent either pay these sums in trust to the Agency, request an administrative hearing and submit an answer to the charges, or demand a trial in a court of law.

7) On July 5, 2007, Respondent, through its subsequently designated authorized representative John Dahlberg,<sup>iv</sup> filed an answer and request for hearing.

8) On September 22, 2008, the Hearings Unit issued a Notice of Hearing to Respondent, the Agency, and Claimants stating the time and place of the hearing as November 5, 2008, at 9:00 a.m., in Eugene, Oregon. Together with the Notice of Hearing, the forum sent a copy of the Order of Determination, a document entitled "Summary of Contested Case Rights and Procedures" containing the information required by ORS 183.413, a Servicemembers Civil Relief Act Notification, and a copy of the forum's contested case hearings rules, OAR 839-050-000 to 839-050-0440.

9) At the start of the hearing, Respondent had not appeared or notified the forum that it would not be appearing at the hearing. The ALJ waited 30 minutes past

the time set for hearing before declaring Respondent in default and commencing the hearing.

10) At the start of the hearing, pursuant to ORS 183.415(7), the ALJ orally advised the Agency of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

11) During closing argument, the Agency made separate motions to amend the Order of Determination to lower the number of hours worked in Huffman's and Mears's wage claim periods from 128 to 120 and 266 to 255, respectively. The ALJ granted both motions.

12) The ALJ issued a proposed order on November 17, 2008, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. No exceptions were filed.

#### **FINDINGS OF FACT – THE MERITS**

1) Starting on May 2, 2006, and at all times material herein, Respondent Village Café, Inc. was an Oregon corporation doing business under the assumed business name of Village Café at 47691 Highway 58, Oakridge, Oregon. At that address, Respondent operated a café and a bar in the same building was open for business 24 hours a day.

2) At all times material herein, Respondent was an employer that suffered or permitted its employees, including Claimants, to work.

3) Claimant Smith went to work for Respondent in June 2006 as a waitress and bartender. She was hired by John Dahlberg, Respondent's corporate secretary/treasurer, who agreed to pay her \$7.50 per hour. While employed by Respondent, Smith's usual work schedule was 11 a.m. to 7 p.m.

4) Claimant Smith worked eight hours each day for Respondent on November 8-11, 15-16, and November 22, 2006, for a total of 54 hours, earning \$405 in

gross wages. She was not paid for any of those hours and November 22 was her last day of work. At the time of hearing, Respondent still had not paid her any wages for those 54 hours of work.

5) Respondent owes Claimant Smith \$405 in gross, unpaid wages.

6) Claimant Keller worked at the Village Café starting in 2004. She was hired as a waitress for Respondent when Respondent assumed ownership of the Village Café in May 2006. Keller was hired by John Dahlberg, who agreed to pay her \$7.50 per hour. While employed by Respondent, Keller's usual work schedule was 6 a.m. to 2 p.m.

7) Claimant Keller was paid all the wages she earned through October 20, 2006. After October 20, 2006, she worked eight hours each day for Respondent on October 21, October 25-28, November 1-4, and November 8-11, 2006, for a total of 104 hours, earning \$780 in gross wages. Keller was only paid \$200.00 of these wages. This occurred on November 12, 2006, when Dahlberg paid her \$200.00 and said he had no more money. Keller quit because Respondent did not pay her. At the time of hearing, Respondent still had not paid her any additional wages.

8) Respondent owes Claimant Keller \$580 in gross, unpaid wages.

9) Claimant Huffman went to work for Respondent on May 14, 2006,<sup>v</sup> as a cook and waitress. She was hired by John Dahlberg, who agreed to pay her \$7.50 per hour. While employed by Respondent, Huffman worked the same shift as Keller, from 6 a.m. to 2 p.m.

10) Claimant Huffman was paid all the wages she earned through October 20, 2006. After October 20, 2006, she worked eight hours each day for Respondent on October 22, October 25-28, November 1-5, and November 8-12, 2006, for a total of 120 hours, earning a total of \$900 in gross wages. Huffman was only paid \$200.00 of these

wages. This occurred on November 12, 2006, when Dahlberg paid Huffman \$200 and said he had no more money. Huffman quit because Respondent did not pay her. At the time of hearing, Respondent still had not paid her any additional wages.

11) Respondent owes Claimant Huffman \$700 in gross, unpaid wages.

12) Claimant Mears went to work for Respondent on August 12, 2006 as a waitress. She was hired by John Dahlberg, who agreed to pay her \$7.50 per hour. When first hired, she worked from 2p.m. to 10 p.m. Later, she began working from 10 p.m. to 6 a.m. as a waitress and cook.

13) Claimant Mears was paid all the wages she earned through October 10, 2006. After that date, she worked the following dates and hours for Respondent in October:

- October 11-14: 32 hours
- October 15-21: 33 hours
- October 22-23: 16 hours

Mears quit Respondent's employment on October 24.

14) In October 2006, Respondent provided Claimant Mears with food and cigarettes valued at \$40.20. Mears expected to pay for these items.

15) On November 4, Respondent rehired Claimant Mears. In November 2006, Mears worked the following dates and hours for Respondent:

- November 4-5: 16 hours
- November 6-12: 35 hours
- November 13-19: 56.5 hours
- November 20: 8 hours
- November 27-31: 24 hours

Mears was fired on November 23, but rehired again on November 27.

16) In November 2006, Respondent provided Claimant Mears with food and cigarettes valued at \$87.00. Mears expected to pay for these items. Respondent also

gave Mears \$15.00 from the till so Mears would have enough money to purchase a plumbing part for her residence.

17) In December 2006, Mears worked the following dates and hours for Respondent:

- December 1-2: 6 hours
- December 3-9: 39 hours
- December 10: 8 hours

18) Claimant Mears quit Respondent's employment on December 11, 2006.

19) In December 2006, Respondent provided Claimant Mears with food and cigarettes valued at \$34.40. Mears expected to pay for these items.

20) Claimant Mears worked a total of 273.5 hours in the time period beginning October 11 and ending December 10, 2006. In total, she earned \$2,051.25 in gross wages, less \$176.60 for \$15.00 in cash, and food and cigarettes valued at \$161.60, leaving \$1,874.65 in unpaid, due, and owing wages.

21) Calculated at 255 hours x \$7.50 per hour,<sup>vi</sup> Respondent owes Claimant Mears \$1,912.50 in gross wages, less \$176.60 for the food, cigarettes, and cash she received from Respondent in the wage claim period, for a total of \$1,735.90 in gross, unpaid wages.

22) Respondent has not paid Claimant Mears any wages for the work she performed between October 11 and December 10, 2006.

23) On December 19, 2006, the Agency mailed a written "Notice of Wage Claim" to Respondent. In the Notice, the Agency stated that Claimant Keller had filed a wage claim with the Bureau of Labor and Industries alleging she was owed \$624.00 in unpaid statutory minimum wages.

24) On January 24, 2007, the Agency mailed a second written "Notice of Wage Claim" to Respondent. In the Notice, the Agency stated that Claimant Smith had

filed a wage claim with the Bureau of Labor and Industries alleging she was owed \$405.00 in unpaid statutory minimum wages.

25) On February 7, 2007, the Agency mailed a third written "Notice of Wage Claim" to Respondent. In the Notice, the Agency stated that Claimant Huffman had filed a wage claim with the Bureau of Labor and Industries alleging she was owed \$700.00 in unpaid statutory minimum wages.

26) On February 22, 2007, the Agency mailed a fourth written "Notice of Wage Claim" to Respondent. In the Notice, the Agency stated that Claimant Mears had filed a wage claim with the Bureau of Labor and Industries alleging she was owed \$1,532.50 in unpaid statutory minimum wages.

27) Penalty wages are computed for all four claimants as follows: \$7.50 per hour x 8 hours = \$60 x 30 days = \$1,800.00.

28) In 2006, Oregon's minimum wage was \$7.50 per hour.

29) Respondent paid all four Claimants less than the minimum wage to which Claimants were entitled under ORS 653.025.

30) Civil penalties under ORS 653.055(1)(b) are computed for all four claimants as follows: \$7.50 per hour x 8 hours = \$60 x 30 days = \$1,800.

31) Smith, Keller, Huffman, Mears, and Yap-Sam were credible witnesses.

#### **ULTIMATE FINDINGS OF FACT**

1) During all times material herein, Respondent was an Oregon employer that suffered or permitted Claimants Smith, Keller, Huffman, and Mears to work.

3) Claimant Smith worked for Respondent from June 2006 through November 22, 2006, at the minimum wage rate of \$7.50 per hour. She worked 54 hours in the time period from November 8 to November 22, 2006, her last day of work, earning \$405.00 in gross wages. She was not paid for those hours of work, leaving \$405.00 in unpaid, due, and owing wages.

4) On January 24, 2007, the Agency mailed a written notice to Respondent stating that Claimant Smith had filed a wage claim with the Bureau of Labor and Industries alleging she was owed \$405.00 in unpaid statutory minimum wages and demanding payment of those wages. At the time of hearing, Respondent had not paid any additional wages.

5) Respondent willfully failed to pay Claimant Smith \$405.00 in earned, due, and owing wages.

6) Claimant Keller worked for Respondent from May 2006 through November 11, 2006, at the minimum wage rate of \$7.50 per hour. She worked 104 hours in the time period from October 21 to November 11, 2006, her last day of work, earning \$780.00 in gross wages. She was only paid \$200.00 for those hours of work, leaving \$580.00 in unpaid, due, and owing wages.

7) On December 19, 2006, the Agency mailed a written notice to Respondent stating that Claimant Keller had filed a wage claim with the Bureau of Labor and Industries alleging she was owed \$624.00 in unpaid statutory minimum wages and demanding payment of those wages. At the time of hearing, Respondent had not paid any additional wages.

8) Respondent willfully failed to pay Claimant Keller \$580.00 in earned, due, and owing wages.

9) Claimant Huffman worked for Respondent from May 2006 through November 12, 2006, at the minimum wage rate of \$7.50 per hour. She worked 120 hours in the time period from October 22 to November 12, 2006, her last day of work, earning \$900.00 in gross wages. She was only paid \$200.00 for those hours of work, leaving \$700.00 in unpaid, due, and owing wages.

10) On February 7, 2007, the Agency mailed a written notice to Respondent stating that Claimant Huffman had filed a wage claim with the Bureau of Labor and Industries alleging she was owed \$700.00 in unpaid statutory minimum wages and demanding payment of those wages. At the time of hearing, Respondent had not paid any additional wages.

11) Respondent willfully failed to pay Claimant Huffman \$700.00 in earned, due, and owing wages.

12) Claimant Mears worked for Respondent from August 2006 through December 10, 2006, at the minimum wage rate of \$7.50 per hour. She worked a total of 273.5 hours in the time period beginning October 11 and ending December 10, 2006, her last day of work, earning \$2,051.25 in gross wages. In this time period, Respondent gave her \$15.00 in cash, and food and cigarettes valued at \$161.60, leaving \$1,874.65 in unpaid, due, and owing wages.

13) On February 22, 2007, the Agency mailed a written notice to Respondent stating that Claimant Mears had filed a wage claim with the Bureau of Labor and Industries alleging she was owed \$1,532.50 in unpaid statutory minimum wages and demanding payment of those wages. At the time of hearing, Respondent had not paid any additional wages.

14) Respondent willfully failed to pay Claimant Mears \$1,874.65 in earned, due, and owing wages.

15) ORS 652.150 penalty wages are computed for all four Claimants as follows:  $\$7.50 \text{ per hour} \times 8 \text{ hours} = \$60.00 \times 30 \text{ days} = \$1,800.00$ .

16) Respondent paid all four Claimants less than the minimum wage to which Claimants were entitled under ORS 653.025. Civil penalties under ORS 653.055(1)(b)

are computed for all four Claimants as follows: \$7.50 per hour x 8 hours = \$60.00 x 30 days = \$1,800.00.

### **CONCLUSIONS OF LAW**

1) During all times material herein, Respondent was an employer and Claimants Smith, Keller, Huffman, and Mears were employees subject to the provisions of ORS 652.110 to 652.200, 652.310 to 652.405, and 653.010 to 653.261. During all times material, Respondent employed Claimants.

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, ORS 653.040, ORS 653.256, ORS 653.261.

3) Respondent violated ORS 652.140(2) by failing to pay Claimants Smith, Keller, Huffman, and Mears all wages earned and owing within five days after they voluntarily left their employment, excluding Saturdays, Sundays and holidays. Respondent owes unpaid, due and owing wages to Claimants in the following amounts: Claimant Smith - \$405.00; Claimant Keller - \$580.00; Claimant Huffman - \$700.00; and Claimant Mears- \$1,735.90.

4) Respondent's willful failure to pay the unpaid, due and owing wages to Claimants Smith, Keller, Huffman, and Mears makes Respondent liable to pay \$1,800.00 in penalty wages to each Claimant, for a total of \$7,200.00 in penalty wages. ORS 652.150.

5) Respondent paid Claimants Smith, Keller, Huffman, and Mears less than the wages to which they were entitled under ORS 653.010 to 653.261 by failing to pay them Oregon's minimum wage for all hours worked and is liable to pay a civil penalty in the amount of \$1,800.00 to each Claimant, for a total of \$7,200.00 in civil penalties. ORS 653.055(1)(b).

6) Under the facts and circumstances of this record, and according to the law applicable to this matter, the Commissioner of the Bureau of Labor and Industries has the authority to order Respondent to pay Claimants Smith, Keller, Huffman, and Mears their earned, unpaid, due and owing wages, plus penalty wages and civil penalties, plus interest on all sums until paid. ORS 652.332.

### **OPINION**

In its Order of Determination, the Agency seeks unpaid wages, penalty wages, and civil penalties for each of the four wage claimants. Respondent filed an answer and request for hearing, but defaulted by failing to appear at the hearing. Consequently, the Agency needs only to establish a prima facie case supporting the allegations of the charging document in order to prevail. *In the Matter of MAM Properties, LLC*, 28 BOLI 172, 187 (2007). The forum may consider any unsworn and unsubstantiated assertions contained in respondent's answer, but those assertions are overcome whenever they are contradicted by other credible evidence in the record. *Id*

### **UNPAID WAGES**

A prima facie case for unpaid wages consists of credible evidence of the following elements: 1) respondent employed claimants during the wage claim period 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 each claimant performed for respondent. *In the Matter of Sue Dana*, 28 BOLI 22, 29 (2006).

The Agency relied on the testimony of the four Claimants and documentary evidence showing the hours they worked before and during the wage claim periods to prove its case. In its investigation, the Agency requested that, if Respondent disputed the claims, Respondent provide any documentation it had supporting its position. In response, Respondent produced no evidence except for the unsworn assertions in the

answer filed on its behalf by John Dahlberg. In pertinent part, those assertions were that: (1) Claimants Keller and Huffman quit on October 27, 2006; (2) Mears was never employed by Respondent; and (3) the claims are “totally invalid.” Respondent’s assertions were all contradicted by credible evidence produced by the Agency and the forum gives them no weight whatsoever.

When an employer produces no records of hours or dates worked by the wage claimant, the commissioner may rely on evidence presented by the Agency, including credible testimony by a claimant, to show the amount and extent of work performed by the claimant. *In the Matter of Stan Lynch*, 23 BOLI 34, 44 (2002). As discussed below, the forum has relied on the credible testimony of each Claimant, as well as supporting documentation, to determine that Claimants are owed wages and the amount owed to each.

**A. Claimant Keller**

Claimant Keller credibly testified that she was employed by Respondent both before and during her wage claim period. This testimony was supported by a statement of itemized deductions created by Respondent showing that Keller worked for Respondent for the period beginning “10/7/2006” and ending “10/20/2006” and that she had earned \$5,415.00 in gross wages in the “year to date.” In addition, Claimants Smith and Huffman credibly testified that Keller was employed by Respondent in 2006.

There is no dispute that Keller’s wage rate was \$7.50 per hour.

The Agency established the number of hours Keller worked in her wage claim period by offering a calendar created by Keller on the Agency’s form WH-127<sup>vii</sup> when she filed her wage claim. Keller credibly testified that she maintained a contemporaneous record of the hours she worked on a home calendar, that the hours she recorded on the WH-127 were the same as those on her home calendar, and that

those hours were an accurate record of the hours she worked. Keller's calendar shows that she worked 104 hours during her wage claim period. At \$7.50 per hour, she earned \$780.00. Keller credibly testified that she was only paid \$200.00, leaving \$580.00 in unpaid, due, and owing wages.

**B. Claimant Smith**

Claimant Smith credibly testified that she was employed by Respondent during her wage claim period. This testimony was supported by five statements of itemized deductions created by Respondent showing that Smith worked for Respondent from "6/17/2006" to "6/30/2006" and from "8/26/2006" through "10/20/2006," and that she had earned \$3,750.00 in gross wages in the "year to date." In addition, Claimants Keller and Mears credibly testified that Smith was employed by Respondent in 2006.

There is no dispute that Smith's wage rate was \$7.50 per hour.

The Agency established the number of hours Smith worked in her wage claim period by providing Respondent's timecard on which Smith recorded her hours while working for Respondent, complemented by Smith's testimony that the timecard was an accurate record of the hours she worked. That timecard shows that she worked 54 hours during her wage claim period. At \$7.50 per hour, she earned \$405.00. Smith credibly testified that she was paid nothing for this work, leaving \$405.00 in unpaid, due, and owing wages.

**C. Claimant Huffman**

Claimant Huffman credibly testified that she was employed by Respondent during her wage claim period. This testimony was supported by a statement of itemized deductions created by Respondent showing that Huffman worked for Respondent from "10/7/2006" to "10/20/2006," and that she had earned \$4,897.50 in gross wages in the

“year to date.” In addition, Claimants Smith and Keller credibly testified that Huffman was employed by Respondent in 2006.

There is no dispute that Huffman’s wage rate was \$7.50 per hour.

The Agency established the number of hours Huffman worked in her wage claim period by providing Huffman’s home calendar on which Huffman had contemporaneously noted her daily work schedule and hours worked for Respondent in October and November 2006. Huffman credibly testified that those hours were accurate. Huffman’s calendar shows that she worked 120 hours during her wage claim period. At \$7.50 per hour, she earned \$900.00. Huffman credibly testified that she was only paid \$200.00, leaving \$700.00 in unpaid, due, and owing wages.

**D. Claimant Mears**

Claimant Mears credibly testified that she was employed by Respondent from August 2006 through December 10, 2006. This testimony was supported by a statement of itemized deductions created by Respondent showing that Mears worked for Respondent from “9/9/2006” to “9/22/2006,” as well as copies of two of Respondent’s timecards on which Mears recorded the hours she worked in November and December 2006. In addition, Claimants Smith, Keller, and Huffman credibly testified that Mears was employed by Respondent in 2006.

There is no dispute that Mears’s wage rate was \$7.50 per hour.

The Agency established the number of hours Mears worked in her wage claim period by providing a WH-127 form on which Mears wrote the days and hours that she worked and the two timecards on which Mears recorded her hours while working for Respondent. Mears credibly testified that she worked the hours shown on the calendar and timecards. Although some of the handwriting on the WH-127 and timecards is difficult to read, the forum concludes from the record as a whole that Mears worked a

total of 273.5 hours during her wage claim period. At \$7.50 per hour, she earned \$2,051.25 in gross wages. She was paid nothing. However, during the wage claim period Respondent gave Mears \$15.00 in cash, and food and cigarettes valued at \$161.60, leaving \$1,874.65 in unpaid, due, and owing wages (\$2,051.25 - \$176.60 = \$1,874.65).

The forum notes that Mears worked 56.5 hours in the week beginning Sunday, November 13, 2006,<sup>viii</sup> a schedule that would appear to entitle Mears to 16.5 hours of overtime pay. However, the forum does not award overtime pay because the Agency did not include a request for overtime pay for Mears in the Order of Determination.<sup>ix</sup>

Although \$1,874.65 in unpaid, due, and owing wages was owed to Mears when she left Respondent's employment, the forum can only award \$1,735.90. In a default case, the charging document sets a limit on the damages that the forum can award. *In the Matter of Majestic Construction*, 19 BOLI 59, 62 (1999). In the Order of Determination, the Agency requested \$1,817.40 in unpaid wages for Mears, based on 266 hours of work at \$7.50 per hour, less \$177.60 as an offset for the cash, food, and cigarettes Respondent provided to Mears. At hearing, the Agency amended its Order of Determination to reduce the number of hours worked by Mears from 266 to 255. Because of that amendment, the forum is limited to awarding 255 hours of unpaid wages at \$7.50 per hour, or \$1,912.50, less an offset of \$176.60 for the cash, food, and cigarettes Respondent provided to Mears. In total, the forum awards Mears \$1,735.90 in unpaid, due, and owing wages.

## **PENALTY WAGES**

The forum may award penalty wages when a respondent's failure to pay wages is willful. Willfulness does not imply or require blame, malice, or moral delinquency. Rather, a respondent commits an act or omission willfully if he or she acts, or fails to

act, intentionally, as a free agent, and with knowledge of what is being done or not done. *MAM Properties, LLC*, at 189 (2007).

In this case, Respondent's agent Dahlberg hired all four Claimants and also paid them. All four Claimants filled out timecards provided by Respondent and were paid on the basis of those timecards. There is no credible evidence that Respondent was unaware of the hours that Claimants worked, or that Dahlberg acted other than voluntarily or as a free agent in failing to pay all four Claimants their unpaid, due, and owing wages when they left Respondent's employment

ORS 652.150(2) provides that if the employee or person acting on behalf of the employee fails to send a written notice of nonpayment of wages, penalty wages "may not exceed 100 percent of the employee's unpaid wages." If a written notice is sent and the employer pays the full amount of wages within 12 days after receiving the notice, penalty wages "may not exceed 100 percent of the employee's unpaid wages." In this case, the Agency sent written notices on behalf of all four Claimants and Respondent has paid nothing. Consequently, the forum computes penalty wages using the formula provided in ORS 652.150: 8 hours x \$7.50 (Claimant's hourly wage) x 30 days = \$1,800.00 in penalty wages owed to each Claimant.

## **CIVIL PENALTIES**

Under ORS 653.055(1), an employer who pays an employee less than the minimum wage is liable to the employee for civil penalties that are computed in the same manner as penalty wages under ORS 652.150. *Id.*, at 190; *Cornier v. Paul Tulacz, DVM PC*, 176 Or App 245 (2001). A *per se* violation occurs when an employee's wage rate is the minimum wage, the employee is not paid all wages earned, due, and owing under ORS 652.140(1) or 652.140(2), and no statutory exception applies.<sup>x</sup>

The wage rate for all four Claimants was \$7.50, the statutory minimum wage in Oregon in 2006. None of the Claimants were paid all wages earned, due, and owing under ORS 652.140(1) or 652.140(2), and no statutory exception applies that would excuse Respondent from paying the minimum wage to Claimants. Accordingly, each Claimant is entitled to a civil penalty of \$1,800.00 (8 hours x \$7.50 x 30 days = \$1,800.00).

### ORDER

NOW, THEREFORE, as authorized by ORS 652.332 and as payment of the unpaid wages, penalty wages, and civil penalties Respondent owes as a result of its violations of ORS 652.140(1), ORS 652.140(2), and ORS 653.055(1)(b), the Commissioner of the Bureau of Labor and Industries hereby orders **Village Café, Inc.** to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 1045 State Office Building, 800 NE Oregon Street, Portland, Oregon 97232-2180, the following:

(1) A certified check payable to the Bureau of Labor and Industries in trust for Claimant Fonda Mae Smith in the amount of FOUR THOUSAND FIVE DOLLARS (\$4,005.00), less appropriate lawful deductions, representing \$405.00 in gross earned, unpaid, due and payable wages; \$1,800.00 in penalty wages; and \$1,800.00 as a civil penalty; plus interest at the legal rate on the sum of \$405.00 from December 1, 2006, until paid, and interest at the legal rate on the sum of \$3,600.00 from January 1, 2007, until paid.

(2) A certified check payable to the Bureau of Labor and Industries in trust for Claimant Angie Alma Keller in the amount of FOUR THOUSAND ONE HUNDRED EIGHTY DOLLARS (\$4,180.00), less appropriate lawful deductions, representing \$580.00 in gross earned, unpaid, due and payable wages; \$1,800.00 in penalty wages; and \$1,800.00 as a civil penalty; plus interest at the legal rate on the sum of \$580.00 from December 1, 2006, until paid, and interest at the legal rate on the sum of \$3,600.00 from January 1, 2007, until paid.

(3) A certified check payable to the Bureau of Labor and Industries in trust for Claimant Sue Ellen Huffman in the amount of FOUR THOUSAND THREE HUNDRED DOLLARS (\$4,300.00), less appropriate lawful deductions, representing \$700.00 in gross earned, unpaid, due and payable wages; \$1,800.00 in penalty wages; and \$1,800.00 as a civil penalty; plus interest at the legal rate on the sum of \$700.00 from

December 1, 2006, until paid, and interest at the legal rate on the sum of \$3,600.00 from January 1, 2007, until paid.

(4) A certified check payable to the Bureau of Labor and Industries in trust for Claimant Pamela Mears in the amount of FIVE THOUSAND THREE HUNDRED THIRTY-FIVE DOLLARS AND NINETY CENTS (\$5,335.90), less appropriate lawful deductions, representing \$1,735.90 in gross earned, unpaid, due and payable wages; \$1,800.00 in penalty wages; and \$1,800.00 as a civil penalty; plus interest at the legal rate on the sum of \$1,735.90 from January 1, 2007, until paid, and interest at the legal rate on the sum of \$3,600.00 from February 1, 2007, until paid.

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<sup>i</sup> The Agency alleged the following amounts were due to each Claimant: Keller - \$580.00; Huffman - \$760.00; Mears - \$1,817.40; and Smith - \$405.00.

<sup>ii</sup> The Agency alleged \$1,800.00 was due to each Claimant.

<sup>iii</sup> The Agency alleged \$1,800.00 was due to each Claimant.

<sup>iv</sup> At the time Dahlberg filed the answer and request for hearing, Respondent did not designate him as its authorized representative. After BOLI issued a Notice of Insufficient Answer, Dahlberg filed a statement authorizing him to act as Respondent's authorized representative.

<sup>v</sup> Huffman testified that she began work for Respondent on Mother's Day in 2006. The forum takes judicial notice that Mother's Day in 2006 was May 14.

<sup>vi</sup> See Procedural Finding of Fact #11.

<sup>vii</sup> A WH-127 is a blank monthly calendar on which wage claimants are instructed to record their hours worked during their wage claim period when they file a wage claim with the Bureau of Labor and Industries.

<sup>viii</sup> The WH-127 that Mears completed is formatted so that Sunday is the first day of every workweek.

<sup>ix</sup> See *In the Matter of Gary Lee Lucas*, 26 BOLI 198, 213 (2005) (the forum rejected the Agency's claim for overtime pay when the Order of Determination did not cite ORS 653.261 or OAR 839-020-0030, the statute and rule requiring overtime pay, and contained no mention that overtime was a factor in computing wages due to two wage claimants).

<sup>x</sup> An example of a statutory exception is ORS 653.035, which provides that employers may deduct from the minimum wage "the fair market value of lodging, meals, other facilities or services furnished by the employer for the private benefit of the employee."