

In the Matter of
MASS TRAM AMERICA, INC. and Ben Missler
Case No. 16-09

Final Order of Commissioner Brad Avakian

Issued February 19, 2010

SYNOPSIS

Respondent Mass Tram America, Inc., a corporation, employed Claimant to work 211 hours between March 27 and May 15, 2007, at the agreed rate of \$10.00 per hour. Claimant worked 183.5 straight time hours and 27.5 overtime hours, earning \$1,835.00 in straight time wages and \$412.50 in overtime wages, for a total of \$2,247.50, and was only paid \$190.00. Respondent Mass Tram was ordered to pay Claimant \$2,057.50 in unpaid, due and owing wages. Respondent Mass Tram willfully failed to pay the wages due and was ordered to pay \$2,400.00 in penalty wages. Respondent Mass Tram was also ordered to pay a \$2,400.00 civil penalty based on its failure to pay earned overtime wages to Claimant. The Order of Determination was dismissed against Respondent Ben Missler because the Agency failed to prove that he was Claimant's employer or to pierce the corporate veil. ORS 652.140(2), ORS 652.150; ORS 653.055; ORS 653.261; OAR 839-020-0030.

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 for the State of Oregon. The hearing was held on Tuesday, December 15, 2009, at the W. W. Gregg Hearing Room of the Oregon Bureau of Labor and Industries, located at 800 NE Oregon Street, Portland, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by Chet Nakada, an employee of the Agency. Respondents did not appear at hearing and were held in default.

The Agency called the following witness: Wage claimant Rowan DeSantis (Claimant); Brenda Walsh, Claimant's co-worker; and Wage and Hour Division compliance specialist Margaret Pargeter.

The forum received into evidence:

- a) Administrative exhibits X-1 through X-11 (submitted or generated prior to hearing); and
- b) Agency exhibits A-1 through A-12 (submitted prior to hearing) and A-13 (submitted at hearing at the ALJ's request).

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 July 13, 2007, Claimant Rowan DeSantis ("Claimant") filed a wage claim with the Agency alleging that Respondents had employed her and failed to pay wages earned and due to her. At the time she filed her wage claim, Claimant assigned to the Commissioner of the Bureau of Labor and Industries, in trust for herself, all wages due from Respondents.

2) Claimant filed her wage claim within the statute of limitations.

3) On March 14, 2008, the Agency issued Order of Determination No. 07-2277 based upon Claimant's wage claim. The Order of Determination alleged:

(a) Claimant was employed by Respondents during the period March 26, 2007 through April 26, 2007, at the regular rate of \$10.00.00 per hour for each hour worked. During this period, Respondents were required by the provisions of ORS 653.261(1) and OAR 839-020-0030 to compensate Claimant at one and one-half times the regular rate of pay for each hour worked over 40 hours in a given work week. During the period March 26, 2007 through April 26, 2007, Claimant worked a total of 210.50 hours, 29.5 of which were hours worked over 40 hours in a given work week, and is entitled to \$2,062.50, no part of which has been paid except the sum of \$190.00, leaving a balance due and owing of \$2,062.50 in unpaid wages, together with interest thereon at the legal rate per annum from June 1, 2007, until paid.

(2) Respondents willfully failed to pay the wages and more than 30 days have elapsed since the wages became due and owing and since a written notice was sent to the employer pursuant to ORS 652.140 and ORS 652.150. Claimant's wage rate per day during the period of employment pursuant to ORS 652.150 was \$80.00 and there is now due and owing to the Claimant the sum of \$2,400.00 as penalty wages with interest thereon at the legal rate per annum from July 1, 2007, until paid. In addition to the penalty wages due pursuant to ORS 652.150, Respondents paid Claimant less than the wages to which the wage claimant was entitled under ORS 653.010 to 653.261 and are therefore also liable to Claimant for civil penalties pursuant to the provisions of ORS 653.055(1)(b) in the amount of \$2,400.00, with interest thereon at the legal rate per annum from July 1, 2007, until paid.

The Order of Determination required that, within 20 days, Respondents 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.

4) On April 29, 2008, Respondents filed an answer and request for hearing. In pertinent part, Respondents alleged that Claimant was only allowed to charge up to 20 hours per week, that Claimant was trying to charge for work done for other projects not related to her employment with Respondents; that Claimant was never hired and "only on a 2 week trial basis," and that Claimant was trying to extort money from Respondents.

5) On August 17, 2009, the Agency filed a "BOLI Request for Hearing" with the forum.

6) On August 17, the Hearings Unit issued a Notice of Hearing to Respondents, the Agency, and Claimant stating the time and place of the hearing as December 15, 2009, at the office of the Oregon Bureau of Labor and Industries, W. W. Gregg Hearing Room, 1045 State Office Building, 800 NE Oregon St., Portland, 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 document entitled

“Servicemembers Civil Relief Act (SCRA) Notification, and a copy of the forum’s contested case hearings rules, OAR 839-050-000 to 839-050-0445.

7) At the time set for hearing, Respondents had not appeared and had not previously announced that they would not appear. Pursuant to OAR 839-050-0330(2), the ALJ waited 30 minutes before commencing the hearing. When Respondents did not appear or contact the hearings unit by telephone during that time, the ALJ declared Respondents in default and commenced the hearing.

8) At the outset of the hearing, the ALJ explained the issues involved in the hearing, the matters to be proved, and the procedures governing the conduct of the hearing.

9) After the Agency’s opening statement, but before any witnesses were called, the Agency moved to amend its Order of Determination to:

- a) Change the date of the issuance of the Order of Determination to March 14, 2008, instead of March 14, 2007.
- b) Change the wage claim paid to March 26, 2007 through May 15, 2007.
- c) Increase the total number of hours worked by Claimant to by .5 hours to 211 and the unpaid wages sought by \$5.00 to \$2,067.50.

The ALJ granted the Agency’s motion to change the date of issuance of the Order of Determination and reserved ruling on the other two proposed amendments for the proposed order. The Agency's other two proposed amendments are **GRANTED.**ⁱ

10) On January 8, 2010, the ALJ issued a proposed order to notify the participants they were entitled to file exceptions to the proposed order within 10 days of its issuance.

11) On January 12, 2010, the Agency filed a motion for two-week extension of time to file exceptions the proposed order and for an audio copy of the hearing to review for the purpose of filing exceptions. The ALJ granted both motions.

12) On February 2, 2010, the Agency timely filed exceptions to the proposed order. Those exceptions are addressed in the Opinion section of this Order.

FINDINGS OF FACT – THE MERITS

1) Respondent Mass Tram America, Inc. (“Mass Tram”) incorporated as an Oregon domestic business corporation on October 28, 2005, with Ben Missler as its registered agent. On December 29, 2006, Mass Tram was administratively dissolved by the Oregon Corporations Division. On May 15, 2008, Mass Tram, through Ben Missler, filed an application for reinstatement with the Corporation Division and was reinstated on the same day. On December 26, 2008, Mass Tram was again administratively dissolved by the Oregon Corporation Division.

2) Mass Tram's business was a project to build a mass transportation system based on a monorail that would be solar and wind powered, using old 747 and 727 airplane bodies as the vehicles that would run on the monorail.

3) In or around March 2007, Claimant applied for a job with Mass Tramⁱⁱ as project director. At Mass Tram’s office in Milwaukie Oregon, she was interviewed by Ben Missler and gave Missler her resume. At the end of the interview, Missler told Claimant that she was hired. Claimant, who usually worked at a higher rate of pay, agreed to work for \$10.00 per hour, plus a bonus to be paid when “the first investor wrote a check.” Missler told Claimant that she would be paid weekly for the work she had done each week.

4) Claimant started work for Mass Tram on March 26, 2007. Missler was her supervisor throughout her employment. (Testimony of Claimant, Walsh)

5) While she worked at Mass Tram, Claimant’s work week was Saturday through Friday.

6) While she worked for Mass Tram, Claimant's job duties as project director included putting together an investment package, coordinating volunteers, upgrading Mass Tram's business plan, and putting together business presentations.

7) Initially, Missler expected Claimant to work 20 hours per week. She was not given a set schedule, but was expected to work five days a week. Claimant found it impossible to accomplish the job duties assigned to her in that time and began to work more hours almost immediately.

8) Throughout her employment, Claimant maintained a contemporaneous written record of the hours she worked and job duties that she performed and gave this record to Missler.

9) During her employment, Claimant assumed she was working for Mass Tram and was never told that the corporation had been administratively dissolved.

10) As of April 27, 2007, Missler had only paid Claimant \$190.00 for her work. One payment was by a check dated March 30, 2007, that was made out for \$100.00 and signed by Missler. Printed on the check were the words "Mass Tram America, Inc.," together with Mass Tram's address. The other payments were in cash.

11) During her employment, Claimant repeatedly asked to be paid and Missler kept telling her that he would pay her the following week. On April 27, 2007, both Claimant and her co-worker Brenda Walsh quit because they were not being paid for their work. On May 15, 2007, Claimant worked 3 ½ more hours for Mass Tram while making a sales presentation. Overall, she worked the following hours during each week of her employment:

March 26 - March 30:	29.5 hours.
March 31 - April 6:	34.5 hours
April 7 - April 13:	51 hours
April 14 - April 20:	56.5 hours

April 21 - April 27:	36 hours
May 15:	3.5 hours

In total, she worked 211 hours, including 183.5 straight time hours and 27.5 overtime hours, earning \$1,835.00 in straight time wages and \$412.50 in overtime wages, for a total of \$2,247.50.

12) Claimant was only paid \$190.00 for work, leaving a balance due and owing of \$2,057.50 in unpaid, due and owing wages.

13) On August 2, 2007, the Agency sent a Notice of Wage Claim to Respondent Mass Tram America, Inc. The letter stated that Claimant had filed a wage claim alleging she was owed unpaid wages in the amount of \$2,100.50 at the rate of \$10.00 per hour from March 26, 2007 to May 15, 2007, plus unpaid bonus compensation of \$16,033.50 for that same time period.

14) On August 24, 2007, the Agency received an unsworn, completed "Wage Claimant Investigation/Employer Response" form from Mass Tram America, Inc. that was filled out and signed by Ben Missler. On the form, Missler handwrote that he agreed to pay Claimant \$10.00 per hour but claimed it was only for a two-week trial and that "she did not work out." He also stated that he kept no records of any hours worked by the Claimant.

15) Mass Tram failed to pay Claimant all earned, due, and payable wages within five days, excluding Saturdays, Sundays and holidays, after Claimant quit, and more than 30 days have elapsed from the date her wages were due.

16) Penalty wages for claimant under ORS 652.150 are computed by multiplying Claimant's hourly wage of \$10.00 per hour x 8 hours x 30 days = \$2400.00.

17) Civil penalties are computed in accordance with ORS 653.055 by multiplying Claimant's hourly wage of \$10.00 per hour x 8 hours x 30 days (\$10.00 x 8 x 30 = \$2400.00).

18) Pargeter, Claimant and Walsh were credible witnesses.

ULTIMATE FINDINGS OF FACT

1) Respondent Mass Tram Inc., registered as an Oregon domestic business corporation on October 28, 2005, with Ben Missler as its registered agent. On December 29, 2006, the Oregon Corporation Division administratively dissolved Mass Tram.

2) Missler continued to operate Mass Tram after its dissolution, including during the period of Claimant's employment.

3) Missler was served with the Agency's Order of Determination on March 20, 2008. On May 15, 2008, Missler, acting on behalf of Mass Tram, filed an application for reinstatement with the Corporation Division, and Mass Tram was reinstated on the same day. On December 26, 2008, Mass Tram was again administratively dissolved by the Corporation Division.

4) In March 2007, Missler hired Claimant as Mass Tram's project director at the wage rate of \$10.00 per hour, with the agreement that Claimant would be paid a bonus when "the first investor wrote a check."

5) Claimant worked for Mass Tram from March 26 through April 27, 2007, when she quit. On May 15, 2007, she worked another 3 ½ hours as an employee of Mass Tram.

6) Missler, who supervised Claimant, only paid her \$190.00 for her work. One payment was by a check dated March 30, 2007, that was made out for \$100.00 and signed by Missler. Printed on the check were the words "Mass Tram America, Inc.," along with Mass Tram's address. The other payments were in cash.

7) In total, Claimant worked 211 hours, including 183.5 straight time hours and 27.5 overtime hours, earning \$1,835.00 in straight time wages and \$412.50 in

overtime wages, for a total of \$2,247.50, leaving a total of \$2,057.50 in unpaid, due and owing wages.

8) On August 2, 2007, the Agency sent a Notice of Wage Claim to Respondent Mass Tram, stating that Claimant had filed a wage claim alleging she was owed unpaid wages in the amount of \$2,100.50, computed at the rate of \$10.00 per hour from March 26, 2007, to May 15, 2007, plus unpaid bonus compensation of \$16,033.50 for that same time period. Missler received and responded to the Notice.

9) Mass Tram failed to pay Claimant all earned, due, and payable wages within five days, excluding Saturdays, Sundays and holidays, after Claimant quit, and more than 30 days have elapsed from the date her wages were due.

10) Penalty wages for Claimant under ORS 652.150 are computed by multiplying Claimant's hourly wage of \$10.00 per hour x 8 hours x 30 days = \$2400.00.

11) Civil penalties are computed in accordance with ORS 653.055 by multiplying Claimant's hourly wage of \$10.00 per hour x 8 hours x 30 days (\$10.00 x 8 x 30 = \$2400.00).

CONCLUSIONS OF LAW

1) During all times material herein, Respondent Mass Tram was an employer subject to the provisions of ORS 652.110 to 652.200, 652.310 to 652.405, and ORS 653.010 to 653.261, and Claimant was Mass Tram's employee.

2) The actions, inaction, and statements of Respondent Ben Missler are properly imputed to Respondent Mass Tram.

3) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter and Respondents herein. ORS 652.310 to 652.414.

4) Respondent Mass Tram violated ORS 652.140(2) by failing to pay Claimant all wages earned and unpaid within five days, excluding Saturdays, Sundays

and holidays, after Claimant quit. Mass Tram owes Claimant \$2,057.50 in unpaid, due and owing wages, including \$412.50 in overtime wages.

5) Respondent Mass Tram's failure to pay Claimant all wages due and owing was willful and Mass Tram owes \$2,400.00 in penalty wages to Claimant. ORS 652.150.

6) Respondent Mass Tram did not pay Claimant overtime wages for 27.5 overtime hours worked and Mass Tram is liable for a \$2,400.00 civil penalty to Claimant. ORS 653.055.

7) 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 Mass Tram to pay Claimant her earned, unpaid, due and payable wages, penalty wages, and a civil penalty, plus interest on all sums until paid. ORS 652.332.

8) 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 Order of Determination as to Respondent Ben Missler. ORS 652.332.

OPINION

INTRODUCTION

Respondents defaulted when they did not make an appearance at the hearing. When a respondent defaults, the agency must present a prima facie case on the record to support the allegations of its charging document in order to prevail. *In the Matter of Okechi Village & Health Center*, 27 BOLI 156, 161 (2006). This consists of credible evidence of the following: 1) Respondent(s) employed Claimant; 2) The pay rate upon which Respondent(s) and Claimant agreed, if it exceeded the minimum wage; 3) Claimant performed work for which she was not properly compensated; and 4) The

amount and extent of work Claimant performed for Respondent(s). *In the Matter of MAM Properties, LLC, 28 BOLI 172, 188 (2007).*

RESPONDENT MASS TRAM AMERICA, INC. WAS CLAIMANT'S EMPLOYER

In its Order of Determination, the agency alleged that Respondents Ben Missler, an individual, and Mass Tram America, Inc., an Oregon corporation, were jointly and severally liable for Claimant's unpaid wages. At hearing, the agency argued that Missler was liable for two reasons. First, since Mass Tram had been administratively dissolved by the Corporation Division prior to Claimant's employment, it did not exist as a legal entity during Claimant's employment and could not have been Claimant's employer. Second, Missler's May 15, 2008, application for Mass Tram's reinstatement as an active corporation was a sham that should allow the agency to pierce the corporate veil. The agency bases the second argument on two facts: (1) Missler let Mass Tram's registration with the Corporations Division lapse at the end of 2006 and did not attempt to reinstate it until seven weeks after service of the Order of Determination; and (2) Missler let Mass Tram's registration with the Corporations Division lapse again at the end of 2008. Under these circumstances, the agency argues that it is entitled to pierce the corporate veil and attain a judgment against Missler individually and Mass Tram. Although creative, the agency's argument is legally flawed.

In Oregon, an administratively dissolved corporation has five years from the date of dissolution to apply to the Secretary of State for reinstatement. When a corporation is reinstated, as Mass Tram was on May 15, 2008, the reinstatement "relates back to and takes effect as of the effective date of the administrative dissolution and the corporation resumes carrying on its business as if the administrative dissolution had never occurred." ORS 60.654(3). See *In the Matter of 82nd Street Mall, Inc.*, 30 BOLI 140, 148-49 (2009). As a result, Mass Tram's reinstatement on May 15, 2008, dated

back to December 29, 2006, the effective date of Mass Tram's original dissolution. Because of this reinstatement, Mass Tram became Claimant's employer, albeit retroactively, and Mass Tram's subsequent administrative dissolution on December 26, 2008, only potentially affected actions taken by Missler under Mass Tram's corporate name *after that date* and did not rescind Claimant's retroactive status as an employee of Mass Tram.

Due to Mass Tram's May 15, 2008, reinstatement, Missler can only be held individually liable by "piercing the corporate veil." Oregon courts have consistently held that disregarding a legally established corporate entity is an extraordinary measure subject to specific conditions and limitations, including proof that a shareholder acted improperly and that the improper conduct caused the corporation to fail in its obligation to creditors. *In the Matter of Jorge E. Lopez*, 28 BOLI 10, 18-19 (2006). In this case, the Agency neither alleged nor proved any "improper conduct," examples of which include inadequate capitalization, "milking," and misrepresentation. *Id.* at 19, *citing Amfac Foods, Inc. v. International Systems & Controls Corporation*, 294 Or 94, 108-09, 654 P2d 1092, 1101-02 (1982). Absent any evidence of improper conduct, the forum concludes that Respondent Mass Tram is solely liable for Claimant's unpaid wages and any penalty wages or civil penalties resulting from the failure to pay wages.ⁱⁱⁱ

in its exceptions, the Agency contended, as an alternative to establishing Missler's liability by piercing the corporate veil, that respondent Missler was Claimant's sole employer in law and in fact. The Agency argued that the only evidence connecting Mass Tram to Claimant's employment was Claimant's lone paycheck, on which the words "Mass Tram America, Inc." and Mass Tram's address were imprinted. The Agency also highlights the facts that Claimant was interviewed by Ben Missler, Missler told Claimant that she was hired, Claimant negotiated her salary and schedule with

Missler, and that Missler paid Claimant in cash. Although those facts are undisputed, the record also indicates that Claimant interviewed at the office of Mass Tram, Inc. and that during her employment, Claimant assumed she was working for Mass Tram and was never told that the corporation had been administratively dissolved. While an employee's impression about the identity of the employer is not dispositive, in this case it was consistent with other indicia of employer identity, such as the name imprinted on the paycheck.

In its exceptions, the Agency also argues that Ben Missler must be the employer because Mass Tram did not legally exist either at the time of Claimant's employment or on the day of the hearing. The Agency is mistaken. Under ORS 60.654(3), a corporation is reinstated retroactively and is liable for all acts of the corporation during any period when the corporation was dissolved. There is no exception for liability or debts. Consequently, Respondent Missler cannot be held liable for Respondent Mass Tram's failure to pay wages to Claimant during the period of time when it was administratively dissolved, Respondent Mass Tram's involuntary dissolution in December 2008 does not change this result.

CLAIMANT WAS HIRED AT THE AGREED RATE OF \$10.00 PER HOUR

Claimant credibly testified that Missler, Respondent's agent, agreed to pay her \$10.00 per hour, and Missler acknowledged that agreement in his response to the Agency's Notice of Wage Claim.

CLAIMANT PERFORMED WORK FOR WHICH SHE WAS NOT PROPERLY COMPENSATED

Claimant's credible testimony and contemporaneous time records established that she worked a total of 211 hours, including 183.5 straight time hours and 27.5 overtime hours. In his response to the Agency's Notice of Wage Claim, Missler admitted that Claimant worked for two weeks, with a maximum of 20 hours per week, at

the wage rate of \$10.00 per hour. Claimant was only paid \$190.00 for her work. Even if Claimant only worked two weeks as Respondents claim, she could have earned \$400.00 (20 hours x 2 weeks x \$10.00 = \$400.00) based on Respondents' admission. Claimant's credible testimony and records prove that Claimant performed work for which she was not properly compensated. Respondents' admission corroborates that conclusion.

THE AMOUNT AND EXTENT OF WORK CLAIMANT PERFORMED FOR RESPONDENT

The final element of the agency's prima facie case requires proof of the amount and extent of work performed by claimant. The agency's burden of proof can be met by producing sufficient evidence from which a just and reasonable inference may be drawn. A claimant's credible testimony may be sufficient evidence. *In the Matter of Ilya Simchuk*, 22 BOLI 186, 196 (2001). When the forum concludes that an employee was employed and improperly compensated, the burden shifts to the employer to produce evidence of the precise amount of work performed or with evidence to negate the reasonableness of the inference to be drawn from the employee's evidence. *In the Matter of David Creager*, 17 BOLI 102, 109 (1998). In this case, Claimant provided a contemporaneous record of her work hours and credibly testified that it accurately reflected the hours she worked. This evidence, along with her testimony establishing Mass Tram's work week as Saturday through Friday, proves that she worked 211 hours, including 183.5 straight time hours and 27.5 overtime hours. In contrast, Respondents provided no records or evidence whatsoever concerning the number of hours worked by Claimant, other than the admission mentioned in the previous section. The forum concludes that Claimant worked a total of 211 hours including 183.5 straight time hours and 27.5 overtime hours.

WAGES OWED TO CLAIMANT

Claimant earned a total of \$1,835.00 in straight time wages and \$412.50 in overtime wages. She was only paid \$190.00, leaving a balance due and owing of \$2,057.50.

PENALTY WAGES

An employer is liable for penalty wages when it willfully fails to pay any wages or compensation of any employee whose employment ceases. Willfulness does not imply or require blame, malice, wrong, perversion, or moral delinquency, but only requires that that which is done or omitted is intentionally done with knowledge of what is being done and that the actor or omittor be a free agent. *In the Matter of Carl Odoms*, 27 BOLI 232, 240-41 (2006).

Claimant credibly testified that she kept records of her hours worked and gave them to Missler during her employment. This establishes that Mass Tram, through its agent Missler, was aware of the hours that Claimant worked. Despite this awareness, Missler made no effort to pay Claimant the wages he knew she was entitled to. This amounts to a willful failure to pay Claimant the wages she was owed.

ORS 652.150(2) provides that “[i]f the employee or a person on behalf of the employee sends a written notice of nonpayment, the penalty may not exceed 100 percent of the employee’s unpaid wages * * * unless the employer fails to pay the full amount of the employee’s unpaid wages * * * within 12 days after receiving the written notice.” On August 2, 2007, the Agency sent such a written notice of nonpayment to Respondents that Missler received. In response, Mass Tram failed to pay any of the unpaid wages sought in the notice. Therefore, penalty wages are not limited to 100% of Claimant’s unpaid wages and are calculated pursuant to ORS 652.150(1): \$10.00 per hour x 8 hours x 30 days = \$2,400.00.

ORS 653.055 CIVIL PENALTIES

ORS 653.055 provides that the forum may award civil penalties to an employee when the employer pays that employee less than the wages to which the employee is entitled under ORS 653.010 to 653.261. Here, Claimant earned a total of \$2,057.50, including \$412.50 in overtime wages, and was paid only \$190.00, leaving a minimum of \$222.50 in overtime wages due and owing.^{iv} Under ORS 653.055(1), an employer who fails to pay an employee overtime wages is liable to the employee for civil penalties that are computed in the same manner as penalty wages under ORS 652.150. *MAM Properties, LLC*, at 190. “Willfulness” is not an element of a violation of ORS 653.055. *In the Matter of Captain Hooks, LLP*, 27 BOLI 211, 2225 (2006). Respondent Mass Tram’s failure to pay the minimum wage to Claimant entitles her to a civil penalty under ORS 653.055, calculated as follows: \$10.00 per hour x 8 hours x 30 days = \$2,400.00.

ORDER

NOW, THEREFORE, as authorized by ORS 652.140(2), ORS 652.150, ORS 653.055, and ORS 652.332 and as payment of the unpaid wages, penalty wages, and civil penalties, the Commissioner of the Bureau of Labor and Industries hereby orders Respondent **MASS TRAM AMERICA, 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 Rowan DeSantis, in the amount of SIX THOUSAND EIGHT HUNDRED AND FIFTY-SEVEN DOLLARS AND FIFTY CENTS (\$6,857.50), less appropriate lawful deductions, representing \$2,057.50 in gross earned, unpaid, due and payable wages, plus interest at the legal rate on that sum from June 1, 2007, until paid; \$2,400.00 in penalty wages, plus interest at the legal rate on that sum from July 1, 2007, until paid; and \$2,400.00 in civil penalties, plus interest at the legal rate on that sum from July 1, 2007, until paid.

ADDITIONALLY, as Respondent Ben Missler has been found not to owe Claimant DeSantis any wages, the Commissioner of the Bureau of Labor and Industries hereby orders that Rowan DeSantis's wage claim against Ben Missler be and is hereby dismissed.

ⁱ The Commissioner has the authority to award damages in excess of those sought in the charging document when the damages are awarded as compensation for statutory violations, *e.g.*, unpaid wages, that the agency alleged in its Order of Determination. *In the Matter of Contractor's Plumbing Service, Inc.*, 20 BOLI 257, 273 (2000).

ⁱⁱ Although Mass Tram and Missler are both named as respondents, this order concludes that Mass Tram was Claimant's sole employer. Accordingly, the Findings of Fact – The Merits refer to Mass Tram as Claimant's employer.

ⁱⁱⁱ *Cf. In the Matter of Blue Ribbon Christmas Trees, Inc.*, 12 BOLI 209, 222 (1994) (When an individual was the sole owner and shareholder of a corporation and evidence indicated that he operated in a corporate capacity, the commissioner found that, despite some personal assurances to employees that they would be paid, the corporation was the employer, noting that “[c]orporate immunity exists to foster legitimate business risk. Unfortunately, it may also form a shield for the unscrupulous.”).

^{iv} The forum need not determine whether Respondent Mass Tram was obligated to pay the straight time wages (\$1,835.00) or overtime wages (\$412.50) first because the actual amount paid by Mass Tram was less than either sum.