

In the Matter of

OKECHI VILLAGE & HEALTH CENTER, INC.

Case Nos. 19-05 & 54-05

Final Order of Commissioner Dan Gardner

Issued February 14, 2006

SYNOPSIS

Respondent employed two wage claimants and willfully failed to pay them all of their earned, due and owing overtime wages. The forum ordered Respondent to pay the wages owed plus penalty wages and interest. The forum also ordered Respondent to pay civil penalties of \$2,000 for recordkeeping violations. ORS 652.140; ORS 652.150; OAR 839-020-0030

The above-entitled case came on regularly for hearing before Linda A. Lohr, designated as Administrative Law Judge (“ALJ”) by Dan Gardner, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on August 2, 2005, in the W.W. Gregg Hearing Room of the Bureau of Labor and Industries, located at 800 NE Oregon Street, Portland, Oregon.

Cynthia L. Domas, an Agency employee, represented the Bureau of Labor and Industries (“BOLI” or “the Agency”). Mohammad Longanga Onakoy and Jair Watenda Simmons (“Claimants”) were present throughout the hearing and were not represented by counsel. Okechi Village and Health Center LLC (“Respondent”) failed to appear for hearing in person or through counsel.

In addition to Claimants Onakoy and Simmons, the Agency called Margaret Trotman, Wage and Hour Division compliance specialist, and Betty Gambone, Department of Human Resources representative, as witnesses.

The forum received as evidence:

- a) Administrative exhibits X-1 through X-18;

b) Agency exhibits A-1 through A-22 (filed with the Agency's case summary).

Having fully considered the entire record in this matter, I, Dan Gardner, 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 17, 2003, Claimant Simmons filed a wage claim form in which he stated that Respondent had employed him from August 25, 2001, to October 2003, and failed to pay him for overtime hours he worked from January 1, 2002, to October 1, 2003.

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

3) On February 18, 2004, Claimant Onakoy filed a wage claim form in which he stated that Respondent had employed him from August 25, 2001, to October 2003, and failed to pay him for overtime hours he worked from January 1, 2002, to October 1, 2003.

4) At the time he filed his wage claim, Claimant Onakoy assigned to the Commissioner of the Bureau of Labor and Industries, in trust for Claimant, all wages due from Respondent.

5) On April 26, 2004, the Agency issued Order of Determination No. 03-2430. The Agency alleged Respondent employed Claimant Simmons during the periods October 2 through October 31, 2002, at the rate of \$8.00 per hour, and December 1, 2002, through June 19, 2003, at the rate of \$9 per hour. The Agency also alleged Respondent had employed Claimant Onakoy during the period June 1, 2002, through August 30, 2003, at the rate of \$9.15 per hour. Additionally, the Agency alleged

Respondent willfully failed to pay Claimants at one and one half their regular pay rates for each hour worked over 40 hours in a given work week, in violation of OAR 839-020-0030 and ORS 652.140, and owed Claimants the unpaid overtime wages, along with penalty wages of \$2,330.40 (Simmons) and \$2,630.40 (Onakoy), plus interest on the unpaid wage and penalty amounts. The Agency further alleged that Respondent paid Claimants less than the wages to which they were entitled under ORS 653.010 to 653.261, and therefore was liable to Claimants for the full amount of the unpaid wages, less any amount actually paid, and for civil penalties in the amount of \$2,330.40 (Simmons) and \$2,630.40 (Onakoy), as provided in ORS 652.150. The Order of Determination 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.

6) On June 1, 2004, the Agency issued a Notice of Intent to Issue Final Order by Default to Respondent's registered agent, Okechi Mary Nwaogu-Dupain. The Agency advised Respondent that if it did not file an "Answer or Request for Hearing or Court Trial" by June 11, 2004, the Agency would issue a final order by default. On June 11, 2004, Respondent, through counsel, filed an answer and request for hearing and alleged certain affirmative defenses and asserted two counter claims against Claimants.

7) On June 21, 2005, the Agency requested a hearing. On June 23, 2005, the Hearings Unit issued a Notice of Hearing stating the hearing would commence at 9:30 a.m. on July 26, 2005. With the Notice of Hearing, the forum included a copy 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.

8) By letter dated June 28, 2005, the Agency advised the forum that the Notice of Hearing contained an incorrect case number and the forum on its own motion

amended the Notice of Hearing by interlineation to change the case number from 54-05 to 19-05.

9) On July 5, 2005, Respondent, through counsel, requested that the hearing date be moved to August 2, 2005, due to a trial previously set to begin on the scheduled hearing date. The Agency agreed to the new date and on July 6, 2005, the ALJ issued an order granting Respondent's request and rescheduling the hearing for Tuesday, August 2, 2005.

10) On July 12, 2005, the ALJ ordered the Agency and Respondent each to submit a case summary that included: lists of all persons to be called as witnesses; identification and copies of all documents to be offered into evidence; a statement of any agreed or stipulated facts; a brief statement of the elements of the claim; and any wage and penalty calculations (for the Agency only). The ALJ ordered the participants to submit their case summaries by July 22, 2005, and notified them of the possible sanctions for failure to comply with the case summary order.

11) On July 13, 2005, the Agency requested a hearing based on a Notice of Intent to Assess Civil Penalties, Case No. 54-05, that was served on Respondent on May 23, 2005, and to which Respondent, through counsel, filed an appearance on June 10, 2005, and an answer on July 11, 2005. In the Notice of Intent, the Agency alleged recordkeeping violations and sought civil penalties of \$3,000 against Respondent. In its request for hearing, the Agency included a copy of the Notice of Intent, Respondent's responses, and service documents. On the same date it requested a hearing, the Agency moved to consolidate the civil penalty case (54-05) with the wage claim case (19-05) because they involved the same events, time periods, and participants. Respondent agreed to consolidation and the ALJ granted the Agency's motion on July 18, 2005.

12) On July 22, 2005, the Agency moved to amend the Order of Determination to include citations to ORS 279.334 pertaining to overtime payments on public service contracts, ORS 279.051 pertaining to personal service contracts, and OAR 125-020-0010 through 125-020-0130 pertaining to personal service contracts.

13) On July 25, 2005, the Agency timely filed its case summary. Respondent did not file a case summary.

14) By letter dated July 25, 2005, the Agency advised the ALJ that Respondent's counsel had sent the Agency case presenter a letter by facsimile transmission stating that counsel was "forced to withdraw from legal representation in this consolidated matter * * * due to [Respondent's] inability to continue paying for legal representation and inability to maintain sufficient contact with this office."

15) On July 26, 2005, Respondent's counsel advised the ALJ that his firm was withdrawing as legal counsel and that he did not know whether Respondent would appear at the hearing or default on the matters. Based on counsel's letter, the ALJ issued an order requiring Respondent to either retain new legal counsel or submit a letter authorizing a representative to appear on Respondent's behalf.

16) On July 27, 2005, the Agency advised the ALJ that it planned to call an additional witness at the scheduled hearing.

17) On July 28, 2005, the Agency submitted an addendum to its case summary listing additional exhibits.

18) On August 1, 2005, the Hearings Unit received a hand delivered document entitled "Interim Order Postponing Trial to September 15, 2005," stating:

"I am relying to [sic] a copy of an order received from my prior attorney, Dolan Griggs LLP. It states that OKECHI Village & Health Center, Inc. must be represented by an attorney or an authorized representative in order to contest this case.

"A. Please bear in mind the following circumstances:

"1. OKECHI Village & Health Center closed for business on January 12th 2005, the offices are closed and the premises vacated.

"2. OKECHI Village & Health Center has no funds nor income nor any assets and cannot pay for an attorney or an authorized representative at this time.

"3. OKECHI Village & Health Center is trying to obtain the services of an unpaid competent authorized representative at this time but this is proving to be a difficult task at this short notice.

"4. OKECHI Village & Health Center instructed Dolan Griggs LLP to request a postponement until September 15th 2005 to enable time to find funds for an attorney or find an authorized representative and give enough time for the new appointment to review all the facts concerning this matter. Either this instruction was not carried out or the Bureau of Labor and Industries refused the request.

"5. The principal witness for OKECHI Village & Health Center Inc. spends most of his time out of town but has given an assurance to be present from September 15th through September 30th 2005.

"B. In view of the above please consent to the following:

"1. Postpone the hearing until September 15th 2005 or a date thereafter convenient to the court.

"2. Allow time for the submission of either the appointment of a new attorney or the appointment of an authorized representative.

"IT IS SO ORDERED

"Entered at Portland, Oregon with copies mailed to:

" * * * * *

"Linda A. Lohr, Administrative Law Judge"

The document was not signed and the identity of the courier is unknown. The ALJ left messages at Respondent's two known telephone numbers, advising that Respondent must appear at the hearing on August 2, 2005, with counsel or an authorized representative, or be found in default.

19) Respondent did not appear at the time and place set for hearing and no one appeared on its behalf. The ALJ placed the substance of the prehearing telephone contact with Respondent on the record, found Respondent to be in default, and commenced the hearing.

20) At the start of hearing, the ALJ granted the Agency's July 22, 2005, motion to amend the Order of Determination to include the additional citations: ORS 279.334 pertaining to overtime payments on public service contracts, ORS 279.051 pertaining to personal service contracts, and OAR 125-020-0010 through 125-020-0130 pertaining to personal service contracts.

21) The Agency waived the ALJ's recitation of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

22) The ALJ issued a proposed order on December 5, 2005, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. Neither Respondent nor the Agency filed exceptions.

FINDINGS OF FACT – THE MERITS

1) At times material, Respondent was a domestic business corporation that provided short term residential care for "at risk" teenage boys in Portland, Oregon, and employed one or more persons in Oregon.

2) At times material, Mary N. Dupain was Respondent's president and registered agent and Marc Willard-Dupain was Respondent's secretary.

3) At times material, Respondent was licensed to provide short-term care for troubled youths ("clients") placed by the Oregon Department of Human Resources ("DHS"). DHS has placed with Respondent "high risk" youth who required "one on one" attention. Respondent's contract with DHS was "per child" for up to 30 days per child and could be renewed for an additional period up to 30 days. DHS paid Respondent for services billed per child. DHS paid Respondent over \$500,000 in 2004.

4) Respondent employed Claimant Onakoy as a caregiver in August 2001. Sometime in 2002, Respondent's business closed down for a period following a DHS investigation and Claimant Onakoy did not work at the care facility for two or three months. He resumed working for Respondent in or around June 2002 until in or around

August 2003. His duties included transporting Respondent's clients to and from school, counseling and medical appointments, and other outside activities; cooking meals for the clients and occasionally washing their clothes; and performing minor maintenance at Respondent's facility. The number of clients varied at the facility, but during the last few months of his employment Claimant Onakoy cared for as many as 12 clients, including "high risk" youth who needed personal attention.

5) When Claimant Onakoy was hired, Respondent agreed to pay him \$8.00 per hour. Later, Respondent increased his pay to \$9.15 per hour, which he was earning at the time he left his employment. When he inquired about overtime, Mary Dupain told him that the "government did not allow [the payment of] overtime."

6) Claimant Onakoy's work shifts varied according to the schedule Marc or Mary Dupain posted each week. Often his assigned shift overlapped with other shifts because other caregivers needed help, arrived late, or failed to show up for a shift. Whenever someone failed to appear for a shift, Claimant Onakoy remained at work because he was aware of his responsibility to the clients. On those occasions, he contacted the Dupains but they would not relieve him or send anyone else to take over the shift.

7) On or about August 30, 2003, Claimant Onakoy quit his employment. Before he filed his wage claim with the Agency, he twice asked the Dupains for his unpaid overtime wages and copies of his time cards. The Dupains did not pay him the wages owed and Mary Dupain told him that she did not have his time cards. When he filed his wage claim, the Agency asked him to estimate the hours he worked each week.

8) After investigation, the Agency determined that between June 1, 2002, and August 30, 2003, Claimant Onakoy worked an estimated 3,964 hours, including 1,395 overtime hours, earning an estimated total of \$42,659.70. The Agency also

determined that during that period Respondent paid Claimant Onakoy estimated wages totaling \$36,270.60 (3,964 hours paid at the \$9.15 straight time rate), leaving an estimated \$6,389.10 in unpaid wages.

9) Respondent employed Claimant Simmons as a caregiver from in or around August 2002 until in or around July 2003. His duties included client medication supervision, refilling prescriptions, cooking meals, teaching "life skills," and generally functioning as a "babysitter to teen boys." Respondent had 3 to 4 clients when Claimant Simmons began his employment in August 2002 and 10 to 12 when he left in July 2003. The clients ranged in age from 9 to 17 years old.

10) Respondent agreed to pay Claimant Simmons \$8.00 per hour.

11) Claimant Simmons was scheduled to work from 11 p.m. to 7 a.m., six or seven days per week, but also was often scheduled to work from 11 a.m. the following day until 11 p.m. As a result, he worked numerous overtime hours that Respondent paid at the straight time rate of \$8.00 per hour.

12) Throughout his employment, Claimant Simmons recorded the dates and time that he clocked in and out on his time cards on his home computer. He recorded the time because the Dupains often made computation errors and sometimes his paychecks were for fewer hours than those recorded on his time cards. Before he left his employment, he copied all of his time cards.

13) Based on Claimant Simmons's documentation and records that Respondent provided, the Agency determined that Claimant Simmons worked an estimated 2,219 hours, including 951.25 overtime hours, earning approximately \$21,557 between October 2 and October 31, 2002, and December 1, 2002, through June 19, 2003. The Agency also determined that Respondent paid Claimant Simmons wages totaling \$11,818 during that period, leaving an estimated \$9,739 in unpaid wages.

14) During the investigation, the Agency conferred with DHS and determined that the contracts between Respondent and DHS were “personal service” contracts subject to ORS 279.334(6).ⁱ Consequently, when computing Claimants’ wages, the Agency included overtime pay for legal holidays and for overtime after 40 hours in a workweek.

15) As of the date of hearing, Respondent still owed Claimants \$16,128.10 in unpaid wages.

16) During the wage claim investigation, Agency compliance specialist Trotman made numerous attempts to obtain all payroll records pertaining to Claimants Onakoy and Simmons from Respondent. Beginning in early November 2003, via numerous letters and telephone calls to Marc and Mary Dupain, Trotman requested time and payroll records and other documents that established Claimants’ employment status, hours worked, and the amount of wages Respondent paid to each. Trotman granted the Dupains several extensions of time to provide the requested documents. On December 14, 2003, Marc Dupain sent to Trotman Claimant Simmons’s original time cards and a copy of one check dated December 6, 2002, payable to “Jaire Simmons.” In the letter, Dupain stated that he had ordered “all cancelled checks and copies of bank statements * * * [that] will completely negate this whole issue.” On January 13, 2004, Trotman wrote to the Dupains, acknowledging receipt of the records, and notified them that the records were incomplete. She reiterated her previous requests and requested additional information to be provided by January 28, 2004. Between January and August 2004, Trotman spoke by telephone to Mary Dupain, who claimed that she had not received Trotman’s January 13 letter and was forced into bankruptcy because of the wage claims. Trotman confirmed with the bankruptcy trustee that Respondent was not part of Mary Dupain’s Chapter 13 bankruptcy that was filed on June 28, 2002. In later

telephone calls, Mary Dupain's attorney, Eric Wilborn, advised Trotman that Respondent had filed a Chapter 11 bankruptcy petition and that Respondent was an "S" corporation, therefore, Mary Dupain was liable for the corporate debt as an individual and her business debt was covered under her bankruptcy. Trotman subsequently confirmed that Respondent had not filed a Chapter 11 bankruptcy. Despite Trotman's requests, Wilborn failed to provide documentation that supported his claim that Respondent was an "S" corporation. As of the hearing date, Trotman had not received all of the requested documents or information from Respondent or its counsel. Trotman never received any records that showed the actual number of hours Claimant Onakoy worked during his employment with Respondent.

17) Respondent has a history of prior wage claims and complaints that includes a wage claim in 1999, a wage claim and one complaint in 2000, a wage claim in 2001 and a complaint in 2003.

18) All of the witnesses gave credible testimony.

ULTIMATE FINDINGS OF FACT

1) Respondent at all times material herein conducted a business in Oregon and engaged the personal services of one or more employees in the operation of that business.

2) Respondent employed Claimant Onakoy between June 1, 2002, and August 30, 2003, and agreed to pay him \$9.15 per hour.

3) Respondent employed Claimant Simmons between October 2 and October 31, 2002, and between December 1, 2002, and June 19, 2003, and agreed to pay him \$8.00 per hour.

4) During their employment, Claimant Onakoy worked 951.25 hours and Claimant Simmons worked 1,395 hours in excess of 40 hours per week. Respondent

did not pay Claimants one and one half times their pay rate for any of the hours they worked in excess of 40 per week.

5) When Claimants voluntarily quit their employment, Respondent owed and still owes Claimant Onakoy unpaid overtime wages of \$6,389.10 and Claimant Simmons unpaid overtime wages of \$9,739.

6) Respondent willfully failed to pay the wages due and owing Claimants and more than 30 days have elapsed since the wages were due.

7) Penalty wages, computed in accordance with ORS 652.150, equal \$2,196 (Onakoy: \$9.15 per hour x 8 hours per day x 30 days) and \$1,920 (Simmons: \$8.00 per hour x 8 hours per day x 30 days).

8) Civil penalties under ORS 653.055, computed in accordance with ORS 652.150, equal \$2,196 (Onakoy: \$9.15 per hour x 8 hours per day x 30 days) and \$1,920 (Simmons: \$8.00 per hour x 8 hours per day x 30 days).

9) Respondent failed to make a record of the actual hours Claimant Onakoy worked each week and each pay period, and also failed to make any records showing the actual hours Claimants worked each week available to the Agency for inspection. Respondent's failure to make and keep required records was willful.

CONCLUSIONS OF LAW

1) At all times material herein, Respondent was an employer and Claimants were employees subject to the provisions of ORS 652.110 to 652.200 and 652.310 to 652.405.

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 violated ORS 652.140(2) by failing to pay Claimants Onakoy and Simmons all wages earned and unpaid after they quit their employment without notice.

4) Respondent is liable for penalty wages under ORS 652.150 for willfully failing to pay all wages or compensation earned and due to Claimants Onakoy and Simmons when their employment terminated as provided in ORS 652.140(2).

5) Respondent is liable for civil penalties under ORS 652.055 for failing to pay Claimants Onakoy and Simmons one and one half their regular rate of pay for the work they performed in excess of 40 hours per week in violation of ORS 653.261 and OAR 839-020-0030(1).

6) Respondent violated ORS 653.045(1)(b) by failing to maintain a record of the actual hours Claimant Onakoy worked each week and each pay period and is liable for \$1,000 in civil penalties under ORS 653.256.

7) Respondent violated ORS 653.045(2) by failing to keep required records available for the Agency's inspection and is liable for \$1,000 in civil penalties under ORS 653.256.

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 order Respondent to pay Claimants their earned, unpaid, due and payable wages, penalty wages, and civil penalties, plus interest on all sums until paid. ORS 652.332.

9) 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 order Respondent to pay \$2,000 in civil penalties, plus interest on those sums until paid. ORS 653.256.

OPINION

Respondent failed to appear at hearing and the forum found Respondent in default pursuant to OAR 839-050-0330. The Agency, therefore, was required to establish a prima facie case on the record to support the allegations in its charging

documents. *In the Matter of Barbara Blair*, 24 BOLI 89, 96 (2002). When making factual findings, the forum may consider unsworn assertions contained in Respondent's answers to the charging documents, but those assertions are overcome whenever they are controverted by credible evidence in the record. *Id.*

WAGE CLAIMS

The Agency's prima facie case supporting its allegations in the Order of Determination includes credible evidence showing: 1) Respondent employed Claimants; 2) Respondent agreed to pay Claimant Onakoy \$9.15 per hour and Claimant Simmons \$8.00 per hour; 3) Claimants performed work for which they were not properly compensated; and 4) the amount and extent of work Claimants performed for Respondent. *In the Matter of Barbara Coleman*, 19 BOLI 230, 262-63 (2000). In its answer, Respondent admits it employed Claimants as "direct care workers" during the wage claim periods and that it agreed to pay the hourly rates claimed. The only issues in dispute are whether Claimants performed work for which they were not properly compensated and, if so, the amount and extent of the work they performed.

Claimants contend they were not paid for any hours they worked that exceeded 40 hours per week. In its answer, Respondent alleged that "[t]his is because all hours worked by claimants in excess of forty hours per week were covered by the independent contractor agreement between claimants and [Respondent]." Additionally, Respondent denied it owes wages for the excess hours and contended that "Claimants have already been paid at least \$64,981.67, which is \$764.97 more than the amount which BOLI claims is due to claimants." Respondent's unsubstantiated assertions are overcome by Claimants' credible testimony that there was no such agreement and that their overtime hours were an extension of their caregiver duties for Respondent and remain unpaid to date. Additionally, the forum infers from Respondent's statements that

it knew Claimants worked hours that exceeded 40 per week and, based on Claimants' credible testimony, concludes that Claimants performed work for which they were not properly compensated.

When a respondent produces no records or, as in this case, incomplete records of dates and hours a wage claimant worked, the forum may rely on the wage claimant's credible testimony to show the amount and extent of the hours worked. See *e.g.*, *In the Matter of John M. Sanford*, 26 BOLI 73, 81, *as amended* 26 BOLI 111 (2004). Here, the forum found that both Claimants credibly testified about the number of hours they worked during the wage claim periods. Their testimony was bolstered, in part, by the few records Respondent produced during the wage claim investigation. Additionally, Claimant Simmons credibly testified that he maintained a contemporaneous computer record of his hours and also produced at hearing the copies he made of all his time cards before he left his employment. Although Claimant Onakoy did not keep a contemporaneous record of his work hours, he provided credible information to the Agency during the wage claim investigation that enabled the Agency to make a reasonable estimate of the number of hours he worked. Claimants' evidence is all the more believable because, despite the assertions in its lengthy and fact specific answer filed through counsel, Respondent failed to appear or otherwise provide a scintilla of evidence to support those contentions. If the assertions were true, Respondent could have appeared at the hearing with the requisite proof.ⁱⁱ Consequently, the forum concludes that between June 1, 2002, and August 30, 2003, Claimant Onakoy worked 1,395 overtime hours, earning \$6,389.10 in unpaid overtime wages, and that between October 2 through October 31, 2002, and December 1, 2002, through June 19, 2003, Claimant Simmons worked 951.25 overtime hours, earning \$9,739 in unpaid overtime wages.

PENALTY WAGES UNDER ORS 652.150

The forum may award penalty wages when it determines that a respondent's failure to pay wages was willful. Willfulness does not imply or require blame, malice, or moral delinquency. A respondent commits an act or omission "willfully" if the respondent acts or fails to act intentionally, as a free agent, and with knowledge of what is being done or not done. *Sabin v. Willamette Western Corp.*, 276 Or 1083, 557 P2d 1344 (1976).

In its answer, Respondent admitted Claimants worked hours exceeding 40 per week, but denied owing overtime wages because Claimants were performing "cleaning and maintenance" duties during those hours under an independent contractor agreement. Respondent's unsworn and unsubstantiated statement is overcome by credible evidence to the contrary. There is no evidence that Respondent acted other than voluntarily and as a free agent when it failed to pay Claimants all of the wages earned and due when they voluntarily ended their employment. The forum concludes that Respondent's failure to pay was willful and Respondent is liable to each Claimant for penalty wages under ORS 652.150(1) (providing that "as a penalty for such [willful] nonpayment, the wages or compensation of such employee shall continue from the due date thereof at the same hourly rate for eight hours per day until paid or until action therefor is commenced. However, in no case shall such wages or compensation continue for more than 30 days from the due date"). In accordance with ORS 652.150(1), the forum has determined that Claimant Onakoy's penalty wages total \$2,196 (computed by multiplying his hourly rate of \$9.15 per hour by 8 hours per day multiplied by 30 days) and Claimant Simmons' penalty wages total \$1,920 (computed by multiplying his hourly rate of \$8.00 per hour by 8 hours per day multiplied by 30 days.)ⁱⁱⁱ

CIVIL PENALTIES UNDER ORS 653.055

The Agency also alleged in its Order of Determination that Respondent paid both Claimants less than the wages to which they were entitled under ORS 653.010 to 653.261, and was subject to civil penalties under ORS 653.055(1)(b). Having found that Claimants were entitled to receive overtime wages pursuant to ORS 653.261 and that Respondent failed to pay the overtime wages Claimants earned during the applicable wage claim periods, the forum concludes that under ORS 653.055(1)(b), Respondent is liable to each Claimant for civil penalties as provided in ORS 652.150. The forum concludes that Claimants Onakoy and Simmons are entitled to recover civil penalties of \$2,196 and \$1,920, respectively, from Respondent, calculated pursuant to ORS 652.150.

RECORDKEEPING VIOLATIONS

In its Notice of Intent to Assess Civil Penalties, the Agency seeks to impose a \$2,000 civil penalty against Respondent for willfully failing to make required records showing the hours that Claimants Onakoy and Simmons worked each week and pay period, in violation of ORS 653.045(1). The Agency also seeks a \$1,000 civil penalty against Respondent for its willful failure to make required records available for the Agency's inspection, in violation of ORS 653.045(2).

The hearing record includes evidence that Respondent maintained and provided the Agency with a record of Claimant Simmons's actual work hours, including his original time cards. However, despite the Agency's repeated requests and ample opportunity to do so, Respondent failed to make Claimant Onakoy's payroll records available for the Agency's inspection. The forum infers that Respondent did not make records pertaining to Claimant Onakoy or it would have provided them when it provided Claimant Simmons's payroll records.

ORS 653.256 authorizes the Commissioner to assess civil penalties for each willful violation of ORS 653.045. OAR 839-020-0004(33) states:

“‘Willfully’ means knowingly. An action is done knowingly when it is undertaken with actual knowledge of a thing to be done or omitted or action undertaken by a person who should have known the thing to be done or omitted. A person ‘should have known the thing to be done or omitted’ if the person has knowledge of facts or circumstances which, with reasonably diligent inquiry, would place the person on notice of the thing to be done or omitted to be done. A person acts willfully if the person has the means to inform himself or herself but elects not to do so. For purposes of these rules, the employer is presumed to know the requirements of ORS 653.010 to 653.261 and these rules.”

In this case, Respondent knew or should have known it was required to make and keep records of Claimant Onakoy’s work hours. The fact that Respondent kept records of the hours Claimant Simmons worked and provided those records to the Agency is evidence that Respondent knew of the requirement. Respondent, as an employer, has a duty to know the laws that regulate employment in this state.

The actual amount of the civil penalty the Commissioner assesses depends on the mitigating and aggravating circumstances set forth in OAR 839-020-1020. See OAR 839-020-1010. In this case, Respondent offered no mitigating evidence in its answer for the forum to consider when determining the amount of the civil penalty. On the other hand, the Agency alleged, and the forum finds, that Respondent knew or should have known of the violation and that the Agency gave Respondent ample opportunity to correct the violation but it failed to do so. Additionally, the forum finds that Respondent’s failure to make and keep a record of Claimant Onakoy’s actual work hours hampered the Agency’s investigation and its ability to determine whether Claimant Onakoy was paid correctly or to determine the amount of any additional wages owed. As such, the violations are serious and the forum finds \$1,000 for each of two violations, (1) ORS 653.045(1) – failure to make a record of Claimant Onakoy’s actual

work hours each week and each pay period, and (2) ORS 653.045(2) – failure to make records available for the Agency’s inspection, is an appropriate civil penalty in this case.

ORDER

NOW, THEREFORE, as authorized by ORS 652.332, and as payment of the unpaid wages, Respondent **Okechi Village & Health Center LLC** is hereby ordered to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232-2180, the following:

A certified check payable to the Bureau of Labor and Industries, in trust for Claimant Mohammad Longanga Onakoy, in the amount of TEN THOUSAND SEVEN HUNDRED EIGHTY ONE DOLLARS AND TEN CENTS (\$10,781.10), less lawful deductions, representing \$6,389.10 in gross earned, unpaid, due and payable wages, \$2,196 in penalty wages, and \$2,196 in civil penalties; plus interest at the legal rate on the sum of \$6,389.10 from October 1, 2003, until paid, and interest at the legal rate on the sum of \$2,196 (penalty wages) from November 1, 2003, until paid; and interest at the legal rate on the sum of \$2,196 (civil penalties) from October 1, 2003, until paid.

A certified check payable to the Bureau of Labor and Industries, in trust for Claimant Jair Watenda Simmons, in the amount of THIRTEEN THOUSAND FIVE HUNDRED AND SEVENTY NINE DOLLARS (\$13,579), less appropriate lawful deductions, representing \$9,739 in gross earned, unpaid, due and payable wages, \$1,920 in penalty wages, and \$1,920 in civil penalties; plus interest at the legal rate on the sum of \$9,739 from July 1, 2003, until paid, interest at the legal rate on the sum of \$1,920 (penalty wages) from August 1, 2003, until paid, and interest at the legal rate on the sum of \$1,920 (civil penalties) from July 1, 2003, until paid.

NOW, THEREFORE, as authorized by ORS 652.256, and as payment of the civil penalties assessed as a result of its violations of ORS 653.045, Respondent **Okechi Village & Health Center LLC** is hereby ordered to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232-2180, the following:

A certified check payable to the Bureau of Labor and Industries in the amount of TWO THOUSAND DOLLARS (\$2,000), plus accrued interest at the legal rate on that amount from a date ten days after issuance of the

Final Order and the date Respondent Okechi Village & Health Center complies with the Final Order.

ⁱ ORS 279.334(6) provides in pertinent part: “This section shall not apply to contracts for personal services * * * provided that persons employed under such contracts shall receive at least time and a half pay for work performed on the legal holidays specified in * * * this section and for all overtime worked in excess of 40 hours in any one week, except for individuals under those contracts who are excluded under ORS 653.010 to 653.261 or under 29 U.S.C. sections 201 to 209 from receiving overtime.”

ⁱⁱ In addition to unsworn assertions in its answer, Respondent alleged certain defenses that are not substantiated by any evidence in the record. Instead, credible evidence controverts those defenses and the forum has not considered them in this Order.

ⁱⁱⁱ In its Order of Determination, the Agency alleged a higher amount of penalty wages that had been calculated pursuant to an Agency policy or interpretation that this forum deemed contrary to wage and hour statutes and rules. See *In the Matter of John M. Sanford*, 26 BOLI 72, 82-85 (2004). Consequently, the forum recomputed the penalty wages to conform to the formula set forth in ORS 652.150(1).