In the Matter of

TALLON KUSTOM EQUIP., LLC

Case No. 11-05

Final Order of Commissioner Dan Gardner

Issued October 20, 2006

SYNOPSIS

Respondent failed to pay one wage claimant all wages earned and unpaid at the time he quit his employment with Respondent, including overtime wages, in violation of ORS 652.140(2). The forum ordered Respondent to pay the wages owed, penalty wages, pursuant to ORS 652.150, civil penalties, pursuant to ORS 653.055(1)(b), and interest on the wages owed and penalty amounts. The forum dismissed a second wage claimant's claim for unpaid wages based on the lack of credible evidence establishing a prima facie case. ORS 652.140; ORS 652.150; ORS 653.055; ORS 653.261; OAR 839-020-0030(1).

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 July 25, 2006, in the W.W. Gregg Hearing Room of the Bureau of Labor and Industries, located at 800 NE Oregon Street, Portland, Oregon.

Jeffrey C. Burgess, an Agency employee, represented the Bureau of Labor and Industries ("BOLI" or "the Agency"). Matthew Mace Bracken ("Claimant Bracken") and David D. Delker ("Claimant Delker") were present throughout the hearing and were not represented by counsel. Tallon Kustom Equip., LLC ("Respondent") failed to appear for hearing through counsel or an authorized representative and was held in default.

In addition to Claimants, the Agency called the following witnesses: John Hernandez, bus driver (telephonic); Kristy Gilkeson, Claimant Bracken's friend; and Stan Wojtyla, Wage and Hour Division compliance specialist.

The forum received as evidence:

a) Administrative exhibits X-1 through X-15;

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 February 18, 2004, Claimant Bracken filed a wage claim form on which he stated that Respondent had employed him from January 14 through January 30, 2004, and failed to pay him any wages for the hours he worked in that time period.

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

3) On March 19, 2004, Claimant Delker filed a wage claim form on which he stated that Respondent had employed him from January 16 through March 9, 2004, and failed to pay him any wages for the hours he worked in that time period.

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

5) On June 18, 2004, the Agency issued Order of Determination No. 04-0735. The Agency alleged Respondent had employed Claimant Bracken during the period January 14 to January 30, 2004, at the rate of $18 per hour and Claimant Delker during the period January 14 to January 30, 2004, at the rate of $7.05 per hour. Additionally, the Agency alleged Respondent willfully failed to pay Claimants any of the wages they were owed for the hours they worked during those periods and more than thirty days have elapsed since the wages became due and owing pursuant to ORS

652.140, and Respondent therefore owed Claimants the earned and unpaid wages, along with penalty wages of $4,320 (Bracken) and $1,692 (Delker), plus interest on the unpaid wage and penalty amounts. 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. A true copy of the Order of Determination was served on Casey Tallon, Respondent's "managing agent."

6) On July 21, 2004, Respondent, through counsel Richard W. Todd, timely filed an answer denying that wages were owed and alleging that Respondent was "financially unable to pay any wages or compensation at the time they accrued" and that Claimants were at all times material "subcontractors of the Employer and not employees." Respondent requested a hearing.

7) On March 22, 2006, the Agency requested a hearing. On March 27, 2006, the Hearings Unit issued a Notice of Hearing stating the hearing would commence at 9 a.m. on May 16, 2006. 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) On April 12, 2006, the hearing was reset to begin at 9 a.m. on May 31, 2006, following Respondent's unopposed request for postponement.

9) On April 12, 2006, 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; and 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 May 22, 2006, and notified them of the possible sanctions for failure to comply with the case summary order.

10) On May 22, 2006, the Agency and Respondent timely filed case summaries.

11) On May 23, 2006, the Agency filed a motion to amend the Order of Determination to increase the amount of wages owed Claimant Delker, reflecting the number of hours he worked and the agreed upon hourly rate, and to include overtime wages for both Claimants. The Agency's motion included an additional allegation that Respondent failed to pay Claimants overtime wages pursuant to OAR 839-020-0030(1) and was liable for civil penalties under ORS 653.055(1)(b). The motion was unopposed and on June 6, 2006, the ALJ granted the motion and amended the Order of Determination accordingly.

12) On May 23, 2006, the Agency filed a motion to postpone the hearing based on Claimant Bracken's out-of-state travel plans on the scheduled hearing date. Respondent did not oppose the motion and the hearing was rescheduled to begin on July 25, 2006.

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

14) 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.

15) After the hearing concluded on July 25, 2006, the Hearings Unit received a "Notice of Withdrawal of Attorney for Respondent" ("Notice") dated July 21, 2006, and

signed by Richard W. Todd. Along with the Notice was a letter from Todd dated June 29, 2004 that stated in pertinent part:

> "Dear Judge Lohr:
>
> "Casey Tallon, President of Tallon Kustom Equipment, LLC and myself agreed that I could withdraw as attorney for the Respondent in the above-entitled matter. Accordingly, I have submitted a Notice of Withdrawal of Counsel to relieve my obligation to be present at the upcoming hearing.
>
> "My understanding of the Rules was that a Motion and Order was not required. However, if that is not the case, I will appear at the hearing and request to be relieved at that time."

The letter and the Notice were mailed to the Salem BOLI office and were not sent to the Hearings Unit in Portland until July 28, 2006.

16) The ALJ issued a proposed order on September 18, 2006, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. Respondent did not file exceptions. The Agency filed exceptions that are addressed in the opinion section of this Final Order.

FINDINGS OF FACT – THE MERITS

1) At times material, Respondent was a duly registered Oregon limited liability company engaged in constructing custom motorcycle frames and parts and employed one or more persons in Oregon.

2) At times material, Casey Tallon was Respondent's owner and managing member.

3) On or about December 31, 2003, Claimant Bracken and Casey Tallon discussed Respondent's custom motorcycle business at a New Year's Eve party and exchanged telephone numbers. At Tallon's invitation, Bracken stopped by the motorcycle shop later in the week and Tallon showed him his drawings for custom frames. Bracken accepted Tallon's offer to construct motorcycle frames at Respondent's shop and gave his previous employer two weeks notice. Claimant Bracken began working for Respondent as a tube bender on January 14, 2004.

4) Claimant Bracken's primary job was to make custom motorcycle frames, which included bending tubes and lathing. Tallon agreed to pay Bracken 10 percent of the selling price for each frame Bracken constructed. The selling price for each frame was $545.50. Later, Tallon also agreed to pay Bracken $120 per day for those days that he performed work other than frame construction.

5) The first two days he worked, January 14-15, Claimant Bracken did not construct any motorcycle frames. Instead, Tallon provided some on-the-job training and gave him instructions on how to use the shop equipment. During the training period, Bracken performed some work, including helping Tallon clean up the shop. There was no agreement about how Bracken would be paid for the work he performed during the first two days of his employment. Bracken worked a total of 18 hours for both days.

6) In addition to the 18 hours he spent training and cleaning the shop, for the week ending January 17, 2004, Claimant Bracken worked an additional 20 hours constructing 5 motorcycle frames. By the first week's end, Bracken had worked a total of 38 hours.

7) For the week ending January 24, 2004, Claimant Bracken spent 35 hours over a 4 day period constructing 8 motorcycle frames. He also worked an additional 26 hours during the last 3 days of the week performing miscellaneous work, such as "grinding and cutting out neck pieces." In total, Bracken worked 61 hours from January 18 through January 24, 2004.

8) From January 25 through January 30, 2004, Bracken worked 34 hours over a four day period performing miscellaneous work for Respondent. Bracken did not construct any motorcycle frames during that week.

9) At Tallon's request, Bracken maintained a contemporaneous record of his work hours in a little notebook that showed the hours he worked and the number of motorcycle frames he constructed.

10) Tallon provided Claimant Bracken with the tools and equipment he needed to perform his job and told Bracken what hours to work. He also told Bracken "what to build and how to build it." Bracken was not working for anyone else at the time and had quit another job to work for Respondent.

11) Every day that he worked for Respondent, Claimant Bracken drove from Vancouver, Washington, to Respondent's shop in Estacada, Oregon. His commute was approximately 80 miles round trip and he paid for his own gas to get to and from work. When Bracken asked for his wages, Tallon told him he had to wait until he was paid by his customers before he could pay Bracken. On or about January 30, 2004, Bracken told Tallon that he could not afford to continue driving back and forth to work unless he received his wages for the hours he had already worked. Tallon told Bracken that he had a customer who wanted a "custom stretched out chopper frame" and if Bracken helped him construct the frame, they could deliver the frame together, the "guy would cut him a $1,290 check," and Tallon would pay Bracken from the proceeds. Bracken agreed. After the job was completed, he and Tallon made the delivery and picked up the check. Tallon dropped Bracken off at the shop and went to the bank to cash the check. When Tallon returned to the shop, he made excuses for why he did not have Bracken's wages and told him he would pay him "tomorrow." Bracken did not believe him and did not return to work the next day.

12) For the week ending January 17, 2004, Claimant Bracken worked 38 hours and earned $399.40 ($54.50 x 5 pieces, plus 18 hours x $7.05, the minimum wage rate).

13) For purposes of calculating overtime, Claimant Bracken's regular rate of pay for the week ending January 24, 2004, was $13.05 per hour - total earnings during that week ($796) divided by hours worked that week (61).[i] His overtime rate was $19.58 for each hour in excess of 40 hours, which is one and one-half times the regular rate of $13.05.[ii] Bracken earned $522 at $13.50 per hour for 40 hours and $411.18 at $19.58 per hour for 21 hours of overtime, totaling $933.18 for the 61 hours he worked during the week ending January 24, 2004.

14) From January 25 through January 30, 2004, Bracken worked 34 hours and earned $480 ($120 daily rate x 4 days). Respondent has not paid Bracken anything for the hours Bracken worked.

15) Claimant Bracken's last day of work was January 30, 2004. When he quit, Respondent owed him $1,812.58, including overtime, for the hours he performed work for Respondent.

16) Claimant Bracken's testimony was generally credible and corroborated by Casey Tallon's admissions that he agreed to pay Bracken a piece rate to construct motorcycle frames, that Bracken worked on 13 frames "from January 20 to January 29," and that Bracken was not paid for the work he performed. Bracken's testimony was also corroborated by Gilkeson's credible testimony that Bracken began working for Respondent on January 14, 2004, and was promised 10 percent of the selling price of each motorcycle frame. The forum credited Bracken's testimony on all key issues.

17) Claimant Delker started working for Respondent at or near the end of Claimant Bracken's employment. Delker needed a job and had "hung around" Respondent's shop "hoping for work" until Tallon hired him to do miscellaneous shop work, including some "buffing," sanding, and grinding motorcycle parts. There was no wage agreement between Delker and Respondent when Delker started working.

18) When he filed his wage claim in March 2004, Claimant Delker included a handwritten statement that said, in pertinent part:

> "My name is David Delker and prior to January of 2004 I knew Casey Tallon on a friendly basis.
>
> "At the time I met Casey Tallon, I knew he made custom motorcycles. We discussed the process ideas etc.
>
> "Needing work I approached Casey Tallon about a job[,] however as he had just fired a guy by the name of Mace, Casey asked me if I wanted a job. He informed me that he had been paying (Mace) $125.00 a day to fabricate parts. No further mention of wage was discussed until mid-February when Casey informed me when I inquired about being paid, that I would be paid in a week. At this time he informed me that my pay would be calculated at $14.00 hr. My wage claim is based on this and my total hours worked, all hours over 40 hours I did not figure at time and a half because overtime was never discussed between Casey and myself [sic].
>
> "I believe at this time that Casey Tallon never planned to pay me or anyone else who has worked for him – he simply holds out paying until the person gets tired of working without pay, then he fires them."

19) During the wage claim investigation, Claimant Delker provided BOLI with a handwritten one page record of his work hours. He recorded that he worked 21.5 hours for the week beginning on January 14 and ending January 17, 2004; 54.5 hours for the week ending January 24, 2004; 63.5 hours for the week ending January 31, 2004; 55.5 hours for the week ending February 7, 2004; 59 hours for the week ending February 14, 2004; 43 hours for the week ending February 21, 2004; 55.5 hours for the week ending February 28, 2004; and 48 hours for the week ending March 6, 2004.

20) Claimant Delker's testimony that he began working for Respondent on January 14, 2004, conflicts with his statement on the wage claim form that his first work day was January 16, 2004, and is contradicted by his written statement that "Casey [Tallon] offered [him] a job" after Respondent "fired" Claimant Bracken. Bracken's credible testimony that his last day of work was January 30, 2004, was corroborated by Tallon's admission that Bracken had worked on 13 frames as late as January 29, 2004. Consequently, if Delker's statement is true that he began working for Respondent after

Bracken left his employment, then his representation to BOLI that he worked 130.5 hours between January 14 and January 30, 2004, must be false. On the other hand, if Delker's record of work hours accurately reflects the actual hours he worked, then his written statement that he began working for Respondent after Bracken was purportedly "fired" must be false. Both representations cannot be true. The forum finds Bracken's testimony that Delker started working for Respondent near the end of Bracken's employment more credible than either of Delker's representations. Moreover, Delker's claim that he worked what amounts to 400.5 hours without pay before he quit his job is unbelievable. The forum credited Delker's testimony only when it was supported by credible evidence or an admission by Respondent.

21) The remaining witnesses gave credible testimony.

22) On March 2, 2004, BOLI sent Respondent a "Notice of Wage Claim" stating that Claimant Bracken had filed a wage claim claiming unpaid minimum and overtime wages totaling $1,011.78 and gas expenses of $70 from January 14 to January 30, 2004. On March 22, 2004, BOLI sent a similar letter to Respondent stating that Claimant Delker was claiming unpaid wages totaling $4,935 at the rate of $14 per hour from January 14 to March 9, 2004. On May 7, 2004, BOLI compliance specialist Wojtyla sent a demand letter to Respondent by certified mail stating that Respondent owed a total of $6,622.28 in wages and $5,052 in penalty wages and gave Respondent the opportunity either to pay the wages and penalties or provide appropriate records if Respondent disputed the claims.

23) On May 24, 2004, Respondent, through Casey Tallon, sent a letter to BOLI that stated in pertinent part:

> "I apologize for not responding earlier. As I told the representative that called I was under the impression that the Bureau of Labor and Industries were not involved in dealings with independent contractors.
>
> "In regards to Mr. Bracken –

“My company, Tallon Kustom Equip., LLC, contracted with Mr. Bracken in January for services including tube bending, fabrication of engine plates and necks for 13 aftermarket Yamaha motorcycle frames. He told me that he had experience with general metal fabrication, and that what we needed him to do was not a problem at all. We agreed that he could work in the shop and use some of the shop equipment because he currently did not have any equipment or a shop of his own. We also agreed to pay him $50 per frame that he completed and that he would be paid when the orders were shipped out and paid for (most of our products are shipped COD). We never agreed to pay an hourly wage of any sort. He worked on 13 frames from January 20 to January 29. He completed the bending of the frame tubes, 5 frame necks and 9 sets of engine plates. Mr. Bracken then asked to be paid. I told him again that he would be paid after they were completed, shipped out and I received the payment for them. He got upset, told me that I should be welding them up, and subsequently left. When I started to assemble the frames in order to weld them, it became apparent that only 3 out of the 13 had been correctly bent. [Four] of the frames had to be completely scrapped and 6 of them needed extensive reworking in order to be viable. [Six] of the 9 frame necks were done correctly. [Five] of them had to be thrown out. In addition, he hadn’t completed the grinding of the engine plates. Approximately 1 week after Mr. Bracken left I received several threatening phone calls from him stating that, ‘If you don’t pay up you and your family will be sorry, I know where you live,’ and ‘you don’t know who you’re messing with, you better watch your back.’ I didn’t appreciate the threatening phone calls and told him so. I also told him again that I would let him know when I had been paid for the frames so he could come [*sic*] pick up his money.

“Of the 13 frames that he worked on only 3 were completed correctly. It took several months to complete the welding and fabrications work on the 6 other frames that were viable. [Four] frames had to be thrown out because they were beyond repair. I am sending the tracking #s for the frames that were sent out, two of which I still haven’t received payment for. They were all Yamaha frames, which is noted on the invoices and tracking information.

“ * * * * *

“I am willing to pay Mr. Bracken $50 for the 3 frames that he completed correctly and $30 for each of the 6 frames that were partially done which comes to a total of $330. When I receive payment for the last 2 frames there will be a check waiting at the shop for Mr. Bracken, or if the Bureau of Labor and Industries prefers, I can send the check to them. I do not have Mr. Bracken’s SSN, which I was planning on getting from him when he picked up his check.

“In regards to Mr. Delker –

> "I am assuming that Mr. Delker is the person I know only as 'Dave.' He was a vagrant who hung around the shop and occasionally asked Mr. Robin Dean (the person who rents the other half of the shop) and myself to do odd jobs for cash. He was receiving his mail here for a time. I would let him sweep the floor, grind parts, and do polishing work, etc., and would pay him in cash the same day. Mr. Dean found him in the shop one evening after shop hours smoking marijuana. Mr. Delker had also been drinking and there was an argument. Mr. Dean told him that he was not allowed on the premises without someone else there under any circumstances. After that altercation (I can't remember the exact date, but approximately first week of March) he was grinding some parts for me and purposely directed the sparks towards Mr. Dean's Corvette which was parked inside the shop at the time, causing damage to the windshield and paint on the hood of the car. He also kicked the exhaust pipes of the car, bending them down. Mr. Dean has said the damage would be approximately $2000-$2500 to repair and would be happy to supply a statement and pictures if necessary. Neither Mr. Dean nor myself have any idea where Mr. Delker is currently residing. Since Mr. Delker does not seem to have a permanent residence, and it is unlikely that Mr. Dean will ever be able to recover any money from him to fix the car, my company, Tallon Kustom Equip., LLC will be ultimately responsible for the damage done to Mr. Dean's car.
>
> "I do not know why Mr. Delker decided to go to the Bureau of Labor and Industries with this claim, but it is completely false. It is my belief that he got the idea after seeing the letter regarding Mr. Bracken, because he was present when I received it.
>
> "I do not believe I owe Mr. Delker any money whatsoever.
>
> " * * * * *
>
> "Again, I apologize for the delay in responding – I would be happy to provide any other information the Bureau of Labor and Industries would like in resolving this matter.
>
> "Sincerely,
>
> "Casey Tallon[,] Tallon Kustom Equip., LLC"

ULTIMATE FINDINGS OF FACT

1) At times material, Respondent conducted business in Oregon and employed one or more persons in the operation of that business.

2) Respondent, through its owner and managing member Casey Tallon, employed Claimant Bracken from January 14 through January 30, 2004.

3) Respondent and Claimant Bracken agreed to a piece rate of $54.50 for each motorcycle frame Bracken constructed and $120 per day for miscellaneous shop work that did not include constructing motorcycle frames.

4) Respondent and Claimant Bracken had no wage agreement for Bracken's first two days (18 hours) of employment that included on-the-job training and clean-up work in Respondent's shop.

5) At times material, the state minimum wage was $7.05 per hour.

6) For the week ending January 17, 2004, Claimant Bracken worked 38 hours and earned $399.40 (18 hours @ $7.05 per hour and 5 pieces @ $54.50 per piece).

7) For the week ending January 24, 2004, Claimant Bracken worked 61 hours and earned $933.18 (40 hours @ $13.05 per hour and 21 hours of overtime @ $19.58 per hour).

8) For the week ending January 30, 2004, Claimant Bracken worked 34 hours over a four day period and earned $480 (4 days @ $120 per day).

9) Claimant Bracken quit his employment with Respondent on January 30, 2004.

10) From January 14 through January 30, 2004, Claimant Bracken earned a total of $1,812.58 and Respondent failed to pay Bracken that amount when he quit his employment.

11) On March 2, 2004, BOLI's Wage and Hour Division sent Respondent a written notice of nonpayment of wages on Claimant Bracken's behalf. Respondent did not pay Claimant Bracken any wages in response to BOLI's notice and, to date, has not paid the wages earned and due.

12) Respondent owes Claimant Bracken $1,812.58 in due and unpaid wages.

13) Respondent willfully failed to pay Claimant Bracken the $1,812.58 in earned, due and payable wages and more than 30 days have elapsed from the date the wages were due.

14) For purposes of calculating penalty wages, Claimant Bracken's hourly rate was $13.63 per hour ($1,812.58 - total amount earned during wage claim period - divided by 133 - total hours worked).

15) Penalty wages for Claimant Bracken, computed pursuant to ORS 652.150, equal $3,271 ($13.63 x 8 hours per day x 30 days, rounded to the nearest dollar).

16) Respondent failed to pay Claimant Bracken the overtime wages to which he was entitled under OAR 839-020-0030(1), and civil penalties, computed pursuant to ORS 652.150, equal $3,271.

17) Respondent, through its owner and managing member Casey Tallon, employed Claimant Delker in or around January 2004.

18) There is no credible evidence from which the forum can determine the number of hours Claimant Delker worked or how much, if anything, he was paid.

CONCLUSIONS OF LAW

1) At all times material herein, Respondent was an employer and Claimants Bracken and Delker were employees subject to the provisions of ORS 652.110 to 652.200, 652.310 to 652.405, and ORS 653.010 to 653.261.

2) The actions, inaction, and statements of Casey Tallon are properly imputed to Respondent.

3) 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.

4) Respondent violated ORS 652.140(2) by failing to pay Claimant Bracken all wages earned and unpaid after he quit Respondent's employment.

5) Respondent is liable for penalty wages under ORS 652.150 for willfully failing to pay all wages or compensation earned and due to Claimant Bracken when his employment terminated, as provided in ORS 652.140(2).

6) Respondent is liable for civil penalties under ORS 653.055 for failing to pay Claimant Bracken the overtime wages to which he was entitled pursuant to OAR 839-020-0030(1).

7) 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 Claimant Bracken his earned, unpaid, due and payable wages, penalty wages, and civil penalties, plus interest on those 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 Claimant Delker's wage claim and that portion of the Agency's Order of Determination filed against Respondent that pertains to Claimant Delker's wage claim.

OPINION

Respondent failed to appear at hearing and the forum found Respondent in default pursuant to OAR 839-050-0330. Consequently, the Agency 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 a defaulting respondent's answer, but those assertions are overcome whenever controverted by other credible evidence. *Id*.

WAGE CLAIM

The Agency's prima facie case must include 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 Claimants performed for Respondent. *Id*.

A. Respondent employed Claimants.

Respondent's unsworn assertion in its answer that Claimants were independent contractors is overcome by credible evidence in the record establishing that both Claimants were Respondent's employees during the wage claim periods.

B. Respondent agreed to pay Claimant Bracken a piece rate and, alternatively, a fixed daily rate for the days he did not perform piece work. Claimant Delker was entitled to minimum wage for the hours he performed work for Respondent.

Claimant Bracken's credible testimony that Respondent agreed to pay him a piece rate for each motorcycle frame he constructed and a fixed rate of $120 per day on the days Bracken performed miscellaneous work only was bolstered in part by Respondent's admission and was sufficient to establish that Respondent agreed to a wage rate that exceeded the minimum wage rate. The forum concludes that Bracken is entitled to receive wages in the agreed upon amount. The forum also concludes that Bracken was entitled to the minimum wage of $7.05 per hour for the hours he worked during the first two days he was employed without a wage agreement.

Claimant Delker's testimony alone was not sufficiently reliable to allow the forum to conclude that Respondent agreed to pay Delker $14 per hour as the Agency alleged. However, Delker was entitled to receive the minimum wage rate of $7.05 per hour for any hours he performed work for Respondent.

C. <u>Claimant Bracken performed work for which he was not properly compensated.</u>

Respondent admitted and credible evidence shows Claimant Bracken did not receive all of the wages he earned for the work he performed between January 14 and January 30, 2004.

D. <u>There is insufficient evidence to conclude Claimant Delker performed work for which he was not properly compensated.</u>

A respondent's unsworn assertions are not considered when controverted by credible evidence. In this case, however, Claimant Delker's testimony alone was not sufficiently reliable to controvert Casey Tallon's statement that Delker occasionally asked Tallon if he could do "odd jobs for cash" and that he "let [Delker] sweep the floor, grind parts, and do polishing work, etc., and would pay him in cash the same day." Tallon readily admitted that he did not pay Claimant Bracken for the piece work he performed and his admission in that case lends some credence to his claim that Delker's wage claim was "completely false." Bracken credibly testified that near the end of his employment, he observed Delker "buffing and stuff," but he did not have personal knowledge of the hours Delker worked or of the amount or whether Delker was paid for his work. Absent any corroboration of his claim that he was not paid wages, Delker's inconsistent statements and exaggerated work hours preclude a finding that Delker worked any hours for which he was not properly compensated. The Agency has not established a necessary element of its prima facie case as it pertains to Claimant Delker and, accordingly, Claimant Delker's wage claim is hereby dismissed.

E. <u>Claimant Bracken credibly established the amount and extent of the work he performed.</u>

When, as in this default case, a respondent produces no record of dates or hours worked, the forum may rely on a wage claimant's credible testimony to show the amount and extent of the work performed. *Barbara Blair*, 24 BOLI at 97. Here,

Claimant Bracken credibly testified that he kept a written record of his work hours in a "little notebook" at Tallon's request. When he filed his wage claim, he relied on his record to show the dates and hours he worked for Respondent. The forum accepts Bracken's record that established he worked 133 hours, 21 of which were overtime hours, earning wages totaling $1,812.58. Respondent has paid Bracken nothing to date and owes him $1,812.58.

PENALTY WAGES - 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).

Casey Tallon's admission that Respondent did not pay Claimant Bracken for the work he performed demonstrates that Respondent knew Bracken performed the work and was owed wages. Tallon's unsworn assertion that Bracken's work did not meet his expectations and that he could not pay Bracken because he had not received payment from the customers to whom the motorcycle frames were shipped is not a defense. In his initial response to the wage claim, Tallon stated he told Bracken he would "let him know when [he] had been paid for the frames so [Bracken] could come pick up his money." His admission is sufficient to show that Respondent acted intentionally and as a free agent. Consequently, Respondent is liable to Claimant for penalty wages in the amount of $3,271 ($13.63 x 8 hours per day x 30 days).

CIVIL PENALTIES - ORS 653.055

If an employer pays an employee "less than the wages to which an employee is entitled under ORS 653.010 to 653.161," the forum may award civil penalties to the employee. ORS 653.055. The Agency alleged Respondent failed to pay Claimant Bracken overtime for the hours he worked in excess of 40 hours during the week ending January 24, 2004. The Commissioner's rules governing overtime requirements were promulgated pursuant to ORS 653.261 and are within the range of wage entitlements encompassed by ORS 653.055. The Agency presented sufficient evidence to show Respondent failed to pay Bracken at one and one-half times his regular rate of pay for the hours he worked in excess of 40 hours per week as required under OAR 839-020-0030(1). Respondent is therefore liable to Claimant for $3,271 in civil penalties, computed pursuant to ORS 652.150 ($13.63 x 8 hours per day x 30 days). *See* ORS 653.055(1)(b).

AGENCY'S EXCEPTIONS

In its exceptions, the Agency requests that the forum reconsider the dismissal of Claimant Delker's wage claim. In order to reconsider and reverse its decision, the forum would have to find that the Agency presented sufficient credible evidence to support each element of its prima facie case and that is not the case here. Claimant Delker was found to be not credible on the issue of when and how many hours he worked in January 2004 and this forum has long applied ORS 10.095(3) which states: "That a witness false in one part of the testimony of the witness is to be distrusted in other parts." *In the Matter of Dan Cyr Enterprises*, 11 BOLI 172, 179 (1993). Delker's claim that he worked 130.5 hours from January 14 through January 30, 2004, was controverted by credible evidence showing that, but for a day or two, he did not work for Respondent in January 2004. By his own written statement, he did not start working for

Respondent until after Claimant Bracken left Respondent's employ which was on January 30, 2004. His false claim for wages in January 2004 is enough to deem his other testimony untrustworthy, including his claim that he was not paid for the hours he worked.

The Agency argues that Delker's testimony was "bolstered by the fact that he limited his claim to straight-time wages only." The fact that Delker limited his claim to straight time wages does not improve his credibility. Delker represented to the Agency that he had worked 99 overtime hours between January 14 and March 6, 2004.[iii] He claimed Respondent promised him $14 per hour which at the time of his wage claim amounted to $2,079 in unpaid overtime wages ($21 per hour overtime rate x 99 hours of overtime). Even at the minimum wage rate of $7.05 per hour, he would have been entitled to $1,047.42 in overtime wages had his wage claim been found credible ($10.58 per hour overtime rate x 99 hours of overtime). It is unbelievable that Claimant Delker would forego overtime wages for legitimate overtime hours worked, particularly at the purported overtime rate of $21 per hour, just as it is unbelievable that he worked over 400 hours, including 99 overtime hours, without pay before he quit his job.

Finally, even if Respondent had admitted in its answer that Delker was not paid any wages for the work he performed, the forum cannot award damages based on mere speculation. Delker's testimony was not trustworthy and the hours he claimed were not substantiated independently by other credible evidence. Thus, there is no credible evidence from which the forum can rely to determine the hours Delker worked "as a matter of just and reasonable inference." *See In the Matter of G & G Gutters, Inc.*, 23 BOLI 135, 145 (2002)(When an employer fails to produce records of the hours and dates worked by an employee, the commissioner may rely on the agency's evidence, including the employee's *credible* testimony, "to show the amount and extent of the

employee's work as a matter of just and reasonable inference," and "may then award damages to the employee, even though the result be only approximate").

For the reasons stated above, the Agency's exceptions are **DENIED**.

ORDER

NOW, THEREFORE, as authorized by ORS 652.332, and as payment of the unpaid wages, penalty wages, and civil penalties, Respondent **Tallon Kustom Equip. LLC** is hereby ordered 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:

> A certified check payable to the Bureau of Labor and Industries, in trust for Claimant Matthew Mace Bracken, in the amount of EIGHT THOUSAND THREE HUNDRED FIFTY FOUR DOLLARS AND FIFTY EIGHT CENTS ($8,354.58), less appropriate lawful deductions, representing $1,812.58 in gross earned, unpaid, due and payable wages, $3,271 in penalty wages, and $3,271 in civil penalties, plus interest at the legal rate on the sum of $1,812.58 from March 1, 2004, until paid, and interest at the legal rate on the sum of $6,542 from April 1, 2004, until paid.

FURTHERMORE, as Respondent has been found not to owe Claimant David Delker wages, the Commissioner of the Bureau of Labor and Industries hereby orders that David Delker's wage claim against **Tallon Kustom Equip. LLC** be and is hereby dismissed.

---

[i] Bracken's total earnings were computed by multiplying $54.50 by 8 pieces ($436) and $120 per day by 3 days ($360) and adding those sums together for a total of $796. OAR 839-020-0030(2)(b).
[ii] OAR 839-020-0030(3)(b).
[iii] See Finding of Fact – The Merits 19