

In the Matter of

ADESINA ADENIJI, dba Oregon Janitorial,

Case No. 16-04

Final Order of Commissioner Dan Gardner

Issued February 18, 2004

SYNOPSIS

Respondent suffered or permitted Claimant to work 363 hours, including 251 straight time hours and 112 overtime hours between January 21 and March 4, 2003. Calculated at the minimum wage, Claimant earned \$2,891.10 and was only paid \$1,700. Respondent was ordered to pay Claimant \$1,191.10 in unpaid, due and owing wages. Respondent's failure to pay the wages was willful and Respondent was ordered to pay \$1,656 in penalty wages and \$1,656 in civil penalties. ORS 652.140(1), ORS 652.150, ORS 653.025(3), ORS 653.055; OAR 839-010-0470.

The above-entitled case came on regularly for hearing before Alan McCullough, designated as Administrative Law Judge ("ALJ") by Dan Gardner, Commissioner of the Bureau of Labor and Industries ("BOLI") for the State of Oregon. The hearing was held on December 16 and 17, 2003, at BOLI's Eugene office located at 1400 Executive Parkway, Suite 200, Eugene, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by case presenter Cynthia Domas, an employee of the Agency. Wage claimant Dennis Moore ("Claimant") was present and was not represented by counsel. Adesina Adeniji ("Respondent") was present and was not represented by counsel.

The Agency called the following witnesses: Claimant; Margaret Pargeter, Agency compliance specialist; and Armando Ebuka (telephonic), Claimant's former co-worker and Respondent's former employee.

Respondent called himself as his only witness.

The forum received into evidence:

- a) Administrative exhibits X-1 through X-7 (submitted or generated prior to hearing); and
- b) Agency exhibits A-1 through A-7, A-12 through A-17, and A-20 (submitted prior to hearing).
- c) Respondent exhibits R-1 through R-7 were offered but not received.

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 May 20, 2003, Claimant filed a wage claim with the Agency alleging that Respondent had employed him and failed to pay wages earned and due to him.
- 2) At the time he filed his wage claim, Claimant assigned to the Commissioner of the Bureau of Labor and Industries, in trust for Claimant, all wages due from Respondent.
- 3) On June 23, 2003, Miles Vincent filed a wage claim with the Agency alleging that Respondent had employed him and failed to pay wages earned and due to him.
- 4) At the time he filed his wage claim, Vincent assigned to the Commissioner of the Bureau of Labor and Industries, in trust for Vincent, all wages due from Respondent.
- 5) On July 22, 2003, the Agency issued Order of Determination No. 03-1793 based upon the wage claims filed by Claimants Moore and Vincent. The Order of Determination alleged that Respondent owed a total of \$2,088.13 in unpaid wages,ⁱ plus

interest, \$3,619.20 in penalty wages,ⁱⁱ plus interest, and civil penalties of \$3,619.20,ⁱⁱⁱ plus interest, and required that, within 20 days, Respondent either pay these sums in trust to the Agency, request an administrative hearing and submit an answer to the charges, or demand a trial in a court of law.

6) On August 15, 2003, Respondent filed an answer. On August 27, 2003, Respondent filed a request for hearing.

7) On October 30, 2003, the Hearings Unit issued a Notice of Hearing setting the hearing for December 16, 2003.

8) On November 10, 2003, the forum ordered the Agency and Respondent each to submit a case summary including: lists of all persons to be called as witnesses; identification and copies of all documents to be offered into evidence; a brief statement of the elements of the claim (for the Agency only); a brief statement of any defenses to the claim (for Respondent only); a statement of any agreed or stipulated facts; and any wage and penalty calculations (for the Agency only). The forum ordered the participants to submit case summaries by December 5, 2003, and notified them of the possible sanctions for failure to comply with the case summary order. Respondent received the case summary order.

9) On December 3, 2003, the Agency filed its case summary. Respondent did not file a case summary because he perceived the case would settle before hearing.

10) On November 28, 2003, the Agency moved for a discovery order requiring Respondent to provide the Agency with documents related to Claimant's employment with Respondent that included, among other things, all documents showing dates and hours worked by Claimant, all payments made by Respondent to Claimant, and Claimant's complete personnel records. Respondent did not object and on December 8, 2003, the ALJ issued a discovery order requiring Respondent to provide the Agency

with the documents requested in the Agency's motion no later than December 12, 2003. Respondent received the order before December 12, 2003. Respondent produced no documents in response to the discovery order because he perceived the case would settle before hearing and because he had attached some of the documents sought by the Agency to his original Answer.

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

12) During the hearing, the Agency moved to dismiss the wage claim of Miles Vincent without prejudice. The ALJ granted the Agency's motion.

13) During the hearing, Respondent offered exhibits R-1 through R-7. The Agency objected on the grounds that the exhibits all contained information that should have been included in Respondent's case summary and that was also subject to the forum's discovery order. The ALJ sustained the Agency's objection and did not admit Respondent's exhibits. The ALJ allowed Respondent to make an offer of proof concerning each exhibit. This ruling is affirmed for reasons stated in the proposed opinion.

14) During the hearing, the Agency moved that Respondent's testimony concerning the specific contents of Exhibits R-1 through R-7 be disregarded as an appropriate sanction for Respondent's failure to submit a case summary or comply with the ALJ's discovery order. The ALJ reserved ruling on this motion until the proposed order. The Agency's motion is **GRANTED**. All testimony given by Respondent that concerns the specific contents of Exhibits R-1 through R-7 is regarded by the forum solely as an offer of proof and the forum has not considered it in this Final Order.

15) On January 29, 2004, the ALJ issued a proposed order that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. No exceptions were filed.

FINDINGS OF FACT – THE MERITS

1) At all times material herein, Respondent Adesina Adeniji owned and operated a janitorial business out of Eugene, Oregon, under the assumed business name of Oregon Janitorial and was an employer who employed at least one person in the state of Oregon. (Testimony of Respondent, Claimant, Ebuka; Exhibits A-13, A-20)

2) On or about January 21, 2003, Respondent and Claimant agreed that Claimant would perform janitorial work for Respondent at the pay rate of \$60 per shift. Respondent and Claimant agreed that Claimant would be an independent contractor. (Testimony of Respondent, Claimant)

3) In January, February, and March 2003 Respondent had contracts with various businesses in Oregon, including Starbucks, Circle K, Bed Bath & Beyond, and Office Depot, to perform janitorial work at their retail business stores. These stores were located in a number of different cities in Oregon, including Eugene, Albany, Sweet Home, Corvallis, Stayton, Independence, Salem, Tigard, Gresham, Portland, Medford, and Ashland. Respondent's contracts called for him to service each store twice a month after each store was closed for the night and before it opened the next morning. (Testimony of Respondent, Claimant, Ebuka)

4) Claimant's first day of work was Tuesday, January 21, 2003. In January 2003, he worked eight shifts for Respondent. In February 2003, he worked 22 shifts for Respondent. In March 2003, he worked three shifts for Respondent. In all, Claimant worked 33 shifts. (Testimony of Claimant; Exhibits A-3, A-7)

5) While working for Respondent, Claimant's primary co-worker was Armando Ebuka, who worked most of Claimant's shifts with him. Claimant also worked a few shifts with Respondent. (Testimony of Claimant, Respondent, Ebuka)

6) Claimant and Ebuka reported for work on each shift at approximately 5 p.m. at Respondent's house. At Respondent's house, they received a map and work order from Respondent detailing the work they were to perform that night and giving them directions to the job sites. Claimant and Ebuka then checked Respondent's van to make sure it had all the equipment they needed to perform their work. Finally, Respondent would give them gas money and they would go to a gas station and fill the van with gas and check the oil before leaving for their first job site. (Testimony of Claimant, Ebuka, Respondent)

7) At the job sites, Claimant and Ebuka's regular duties consisted of cleaning windows, power washing the walks outside the store, and washing each store's floor mats. Sometimes they also mopped and cleaned the inside of the stores. (Testimony of Claimant, Ebuka)

8) Claimant wrote down the time he and Ebuka arrived at and left each store on the work order given to them by Respondent at the beginning of their shift. After Claimant and Ebuka completed their work, they drove back to Eugene. When they arrived at Respondent's house, they left the van and the completed work orders. (Testimony of Claimant)

9) Respondent had a large wall calendar on which he wrote down the time that Claimant and Ebuka returned from work at the end of each shift. (Testimony of Respondent)

10) Claimant and Ebuka worked an average of 11 hours per shift.^{iv} (Testimony of Ebuka; Exhibit A-1; Calculation of ALJ)

11) In total, Claimant worked 363 hours for Respondent (33 shifts x 11 hours) between January 21 and March 4, 2003. (Testimony of Ebuka, Claimant)

12) Respondent did not have a regular work week. (Entire Record)

13) Based on a work week that began on Tuesday and ended the next Monday,^v Claimant worked 251 straight time hours and 112 overtime hours, earning a total of \$2,891.10 computed at Oregon's minimum wage of \$6.90 per hour (251 x \$6.90 = \$1,731.90; 112 x \$10.35 = \$1,159.20; \$1,731.90 + \$1,159.20 = \$2,891.10).

14) Respondent paid Claimant \$1700 for his work. Claimant was paid in three separate checks issued on February 10, 2003 (\$420), February 20, 2003 (\$660), and March 5, 2003 (\$620). No deductions were taken from Claimant's checks. The printed notation "Nonemployee compensation:Payment to Subcontr" appears on two of Claimant's pay stubs. (Testimony of Respondent, Claimant; Exhibit A-6)

15) Claimant's last day of work for Respondent was March 4, 2003. He quit without notice because he believed Respondent was not paying him all the wages he had earned. (Testimony of Claimant)

16) On June 2, 2003, the Agency sent a "Notice of Wage Claim" form letter to Respondent's correct address stating that Claimant had filed a wage claim with BOLI alleging that Respondent owed him "[u]npaid statutory minimum and overtime wages of \$1,944.92 at the rate of \$6.90 per hour from January 21, 2003 to March 4, 2003." (Testimony of Pargeter, Respondent; Exhibit A-14)

17) Pargeter was assigned to investigate Claimant's wage claim. On June 24, 2003, she sent a letter to Respondent's correct address stating, among other things, that Claimant's wage claim had been assigned to her for resolution, that she had reviewed the information submitted by Respondent and Claimant, and that she had

concluded that Claimant was an employee, not an independent contractor. In the letter, Pargeter instructed Respondent to:

“Please take one of the following actions by July 7, 2003:

“1. Submit to me a check payable to Dennis Moore in the gross amount of \$1,944.93, along with an itemized statement of lawful deductions, if any.

“2. Submit to me evidence he did not work the hours claimed, or that he has been paid.

“3. Submit evidence my computations are incorrect.”

Respondent has not paid Claimant any additional wages since he filed his wage claim and owes Claimant \$1,191.10 in unpaid wages. (Testimony of Pargeter, Claimant; Exhibit A-15)

18) Penalty wages, computed in accordance with ORS 652.150, equal \$1,656 (\$6.90 per hour x 8 hours x 30 days). (Calculation of ALJ)

19) Claimant only used Respondent’s tools and equipment in performing work for Respondent. Claimant drove or rode in Respondent’s van to and from Respondent’s job sites. (Testimony of Claimant)

20) Respondent was the only business Claimant worked for between January 21 and March 4, 2003. (Testimony of Claimant)

21) Claimant had no financial interest in Respondent’s business. (Testimony of Claimant)

22) Claimant’s job duties required no specific skills other than the on-the-job training provided by Respondent, and Claimant had no professional license or business cards. (Testimony of Claimant)

23) Respondent did not set any limit on the length of time Claimant would work for him. (Testimony of Claimant)

24) Claimant’s testimony was credible regarding the type of work that he performed and stores that he cleaned, his pay agreement with Respondent, and the

dates that he worked. However, his claim that he averaged 13.5 hours work per shift was inconsistent with the more contemporaneous statement on his wage claim that he “worked 10-13 hrs. per day” and with Ebuka’s more credible statement that he and Claimant averaged “10-12 hours” per shift. Based Claimant’s more contemporaneous statement on his wage claim and Ebuka’s testimony, the forum has credited Claimant with having worked an average of only 11 hours per shift. (Testimony of Claimant)

25) Ebuka was a credible witness. He had nothing to gain from the proceeding and the forum has credited his testimony in its entirety. (Testimony of Ebuka)

26) Pargeter was a credible witness and the forum has credited her testimony in its entirety. (Testimony of Pargeter)

27) Respondent’s testimony was internally consistent for the most part. However, his credibility regarding the hours worked by Claimant was undermined by his failure to provide existing original records in his control^{vi} subject to the ALJ’s discovery order that would have provided conclusive evidence as to Claimant’s start and finish time each shift. The number of hours worked by Claimant was the key issue in this case. Respondent’s failure to produce those original records has caused the forum to discredit his testimony on this issue in its entirety except where it was corroborated by Claimant’s or Ebuka’s testimony. (Testimony of Respondent; Observation of ALJ)

ULTIMATE FINDINGS OF FACT

1) At all times material herein, Respondent Adesina Adeniji owned and operated a janitorial business out of Eugene, Oregon, under the assumed business name of Oregon Janitorial and was an employer who employed at least one other person in the state of Oregon.

2) Respondent hired Claimant on or about January 21, 2003, and suffered or permitted Claimant to work for him from January 21, 2003, through March 4, 2003. Claimant was not an independent contractor.

3) Respondent and Claimant agreed that Respondent would pay Claimant \$60 per shift.

4) In all, Claimant worked 33 shifts for Respondent, averaging 11 hours per shift.

5) Claimant worked 363 hours for Respondent, including 251 straight time hours and 112 overtime hours.

6) Claimant earned a total of \$2,891.10 and had only been paid \$1,700 at the time of the hearing. Respondent owes Claimant \$1,191.10 in unpaid wages.

7) On June 2, 2003, and June 24, 2003, the WHD sent written notices to Respondent's correct address demanding that Respondent send a check for Claimant's unpaid wages in the respective amount of \$1,944.92 and \$1,944.93. Respondent did not pay Claimant any more wages after receiving these letters.

8) Penalty wages, computed in accordance with ORS 652.150, equal \$1,656 (\$6.90 per hour x 8 hours x 30 days).

9) Respondent failed to pay Claimant the minimum wage to which Claimant was entitled under ORS 653.055 and Claimant is entitled to civil penalties of \$1,656.

CONCLUSIONS OF LAW

1) At all times material herein, Respondent was an Oregon employer who suffered or permitted Claimant to work. ORS 653.010(3) & (4).

2) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter and Respondent. ORS 652.310 to ORS 652.332, ORS 653.025.

3) Respondent violated ORS 652.140(2) by failing to pay Claimant all wages earned and unpaid by March 11, 2003, five days, excluding Saturdays and Sundays, after Claimant quit. Respondent owes Claimant \$1,191.10 in unpaid, due and owing wages.

4) Respondent is liable for \$1,656 in penalty wages to Claimant. ORS 652.150; OAR 839-001-0470(1).

5) Respondent is liable for \$1,656 in civil penalties to Claimant. ORS 653.055.

6) Under the facts and circumstances of this record, and according to the law applicable to this matter, the Commissioner of the Bureau of Labor and Industries has the authority to order Respondent to pay Claimant his earned, unpaid, due and payable wages, and the penalty wages and civil penalties, plus interest on these sums until paid. ORS 652.332.

OPINION

INTRODUCTION

In order to prevail in this matter, the Agency is required to prove, by a preponderance of the evidence, the following four elements: 1) Respondent employed Claimant; 2) The pay rate upon which Respondent and Claimant agreed, if it exceeded the minimum wage; 3) Claimant performed work for which he was not properly compensated; and 4) The amount and extent of work Claimant performed for Respondent. *In the Matter of Barbara Coleman*, 19 BOLI 230, 262-63 (2000).

A. Respondent employed Claimant.

Respondent asserted at hearing that Claimant was an independent contractor and not Respondent's employee. Respondent bears the burden of proving this affirmative defense. *In the Matter of Rubin Honeycutt*, 23 BOLI 224, 232 (2002). Respondent based his defense on the agreement that Claimant would be paid \$60 per

shift, his insistence that Claimant would purchase his own liability insurance, and the fact that Claimant signed a W-9 at Respondent's request.

This forum uses an "economic reality" test to determine whether a wage claimant is an employee or independent contractor under Oregon's wage collection laws. *In the Matter of Ann L. Swanger*, 19 BOLI 42, 53 (1999). The focal point of the test is "whether the alleged employee, as a matter of economic reality, is economically dependent upon the business to which [he] renders [his] services." *Id.* The forum considers five factors to gauge the degree of the worker's economic dependency, with no single factor being determinative: (1) the degree of control exercised by the alleged employer; (2) the extent of the relative investments of the worker and alleged employer; (3) the degree to which the worker's opportunity for profit and loss is determined by the alleged employer; (4) the skill and initiative required in performing the job; and (5) the permanency of the relationship. *Id.*

In this case, Respondent set Claimant's work schedule; Claimant had no investment in the business, used only Respondent's equipment in performing his duties, and had no opportunity for profit or loss; the skill and initiative required of him to perform his janitorial duties was minimal; there was no fixed date for Claimant's employment to cease; and Claimant worked for no one else besides Respondent during the wage claim period. All these factors indicate an employer-employee relationship. Consequently, the forum concludes that Respondent was Claimant's employer and that Claimant was not an independent contractor.

B. Claimant was entitled to Oregon's minimum wage.

Claimant and Respondent both testified that Respondent agreed to pay Claimant \$60 per shift. Respondent contends that Claimant was only entitled to \$60 per shift based on that agreement. Respondent is wrong. An agreement to pay at a fixed rate

includes the statutory requirement to pay the minimum wage, and an employee's compensation, however calculated, must result in the employee being paid at least the minimum wage for all hours worked. *In the Matter of Mary Stewart-Davis*, 13 BOLI 188, 198 (1994); ORS 653.025. Here, Claimant was entitled to be paid the minimum wage rate of \$6.90 per hour for all hours that were less than 40 in any given work week, and \$10.35 per hour (\$6.90 x 1.5) for all hours worked over 40 in any given work week.

C. Claimant performed work for which he was not properly compensated.

Claimant was paid a total of \$1,700. At \$6.90 per hour, this means Claimant was paid for approximately 246 straight time hours of work. The Agency established that Claimant worked a total of 263 hours. At \$6.90 per hour, Claimant earned a minimum of \$1,814.70. This calculation alone, which does not factor in the overtime hours Claimant worked, establishes that Claimant was not paid for all of the work he performed.

D. The amount and extent of Claimant's work.

ORS 653.045 requires an employer to keep and maintain proper records of wages, hours and other conditions and practices of employment. Where the forum concludes an employee performed work for which he or she was not properly compensated, it becomes the employer's burden to produce all appropriate records to prove the precise hours and wages involved. *In the Matter of Diran Barber*, 16 BOLI 190 (1997), quoting *Anderson v. Mt. Clemens Pottery Co.*, 328 US 680 (1946).

Where the employer produces no records, the Commissioner may rely on evidence produced by the Agency to show the amount and extent of the employee's work as a matter of just and reasonable inference and then may award damages to the employee, even though the result be only approximate. *In the Matter of Usra A. Vargas*, 22 BOLI 212, 221 (2001). This forum will accept testimony of a claimant as sufficient

evidence to prove work was performed and from which to draw an inference of the extent of that work -- where that testimony is credible. *In the Matter of Graciela Vargas*, 16 BOLI 246, 254 (1998).

In this case, Respondent had records and was ordered to produce them, but failed to do so before the hearing. Instead, at hearing Respondent produced summary records reflecting the hours and dates worked by Claimant, but not the originals from which the summaries were purportedly derived and there was no evidence that Respondent did not possess the original documents.^{vii} In contrast, the Agency provided the credible testimony of Ebuka, Claimant's co-worker, that he and Claimant had worked "10-12" hours per shift, from which the forum concluded that Claimant averaged 11 hours per shift. Respondent did not dispute the days Claimant claimed to have worked, except for his claim that Claimant and Ebuka drove all the way to Grants Pass one night and back without doing any janitorial work. Respondent also testified credibly that Claimant worked fewer than 11 hours several different nights in Eugene, but did not establish the dates or that Claimant's overall average was less than 11 hours per shift.

Under OEC Rule 311(c),^{viii} Respondent's failure to produce Claimant's original work orders and Respondent's original calendar creates a statutory presumption that the evidence contained in it would have been adverse to Respondent.^{ix} OEC Rule 308 provides that "a presumption imposes on the party against whom it is directed the burden of proving that the nonexistence of the presumed fact is more probable than its existence." Respondent did not meet this burden.

Based on Claimant and Ebuka's credible testimony and the presumption that Respondent's original records did not support Respondent's claims, the forum concludes that Claimant worked 33 shifts in total, for 363 total hours. Using the work week methodology set out in Finding of Fact 13 – The Merits, the forum has determined

that Claimant worked 252 hours of straight time, for which he was entitled to be paid \$1,731.90, and 112 hours of overtime, for which he was entitled to be paid \$1,159.20, for total earnings of \$2,891.10. Claimant was only paid \$1,700 and is owed \$1,191.10 in due and unpaid wages.

RESPONDENT'S EXHIBITS

At hearing, Respondent sought to introduce seven exhibits related to Claimant's wage claim. Four of them were provided with Respondent's original answer and request for hearing. Six of the seven were summaries prepared by Respondent showing hours worked and jobs performed by Claimant and amounts paid to Claimant, and the seventh was a copy of a W-9 purporting to show that Claimant was an independent contractor. The Agency objected to their admission based on Respondent's failure to provide them with a case summary or to provide them to the Agency in response to the ALJ's discovery order. The Agency further objected because Respondent did not provide the original documents on which the summaries were based and those original documents, which were subject to the discovery order, were not provided to the Agency before or during the hearing and Respondent gave no excuse for not providing them. Finally, the Agency argued it would be prejudiced by the receipt of the exhibits that had been attached to Respondent's answer inasmuch as the Agency had no way of knowing that Respondent intended to rely on them at the hearing without a case summary.

OAR 839-050-0210(5) provides that the ALJ may:

“refuse to admit evidence that has not been disclosed in response to a case summary order, unless the participant that failed to provide the evidence offers a satisfactory reason for having failed to do so or unless excluding the evidence would violate the duty to conduct a full and fair inquiry under ORS 183.415(10).

OAR 839-050-0200(11) provides that the ALJ may:

“refuse to admit evidence that has not been disclosed in response to a discovery order or subpoena, unless the participant that failed to provide discovery shows good cause for having failed to do so or unless excluding the evidence would violate the duty to conduct a full and fair inquiry under ORS 183.415(10).”

OAR 839-050-0020(10) defines “good cause” as follows:

“[U]nless otherwise specifically stated, * * * a participant failed to perform a required act due to an excusable mistake or a circumstance over which the participant had no control. ‘Good cause’ does not include a lack of knowledge of the law including these rules.”

Respondent stated that he did not provide the exhibits in a case summary or comply with the discovery order were because he believed the case would settle and because he had provided some of the exhibits with his answer. These excuses do not constitute either a satisfactory reason or good cause.^x The only question is whether not receiving the exhibits would violate the ALJ’s duty to conduct a “full and fair inquiry.”

Respondent gave no reason for not providing the **original** documents from which the information on exhibits R-1 and R-3 through R-7 were purportedly derived. Without the original documents to assess the accuracy of Respondent’s summaries, the Agency would be placed at a tremendous disadvantage that could not be cured by a continuance, but only by production of the original documents. Respondent had an opportunity to produce those original documents before and during the hearing and chose not to. Consequently, the forum concludes that Respondent had a “full and fair” hearing, inasmuch as the forum’s rejection of his exhibits was ultimately caused by his own failure to produce his original documents.

PENALTY WAGES

An award of penalty wages turns on the issue of willfulness. 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. *Sabin v. Willamette Western Corp.*, 276 Or 1083, 557 P2d 1344 (1976).

Respondent, as an employer, had a duty to know the amount of wages due to his employees. *McGinnis v. Keen*, 189 Or 445, 221 P2d 907 (1950); *In the Matter of Jack Coke*, 3 BOLI 238 (1983). Claimant left work from Respondent's house each day, worked from the schedule that Respondent had prepared, and concluded his work shift at Respondent's house, noting his work time on Respondent's daily work order that he left for Respondent. Consequently, the forum has no doubt that Respondent was aware of Claimant's hours of work. There was no evidence that Respondent acted other than voluntarily or as a free agent in not paying Claimant Oregon's minimum wage for the work he performed during the wage claim period. Instead, the evidence shows that Respondent underpaid Claimant based on his perception that Claimant was an independent contractor. This misguided perception is not a defense to an award of penalty wages, and the forum finds that Claimant is entitled to penalty wages.

Claimant voluntarily quit without advance notice, and his wages became due on March 11, 2003, five days after his last day at work and not counting Saturday or Sunday. More than 12 days have elapsed since written notice of Claimant's wage claim was sent to and received by Respondent, and more than 30 days have elapsed since Claimant's last workday. Penalty wages are therefore assessed and calculated pursuant to ORS 652.150 (8 hours x \$6.90 per hour x 30 days = \$1,656).

CIVIL PENALTIES UNDER ORS 653.055

Where a Respondent pays an employee "less than the wages to which the employee is entitled under ORS 653.010 to 653.261," the forum may award civil penalties to the employee. ORS 653.055; *Cornier v. Paul Tulacz, DVM PC*, 176 Or App 245 (2001); *In the Matter of TCS Global Corp.*, 24 BOLI 246, 260 (2003). Oregon's

minimum wage requirements are contained in ORS 653.025 and fall within the range of wage entitlement encompassed by ORS 653.055. The Agency established by a preponderance of the evidence that Respondent failed to pay Claimant at least the minimum wage of \$6.90 per hour for every hour Claimant worked. Therefore, Respondent is liable for \$1,656 in civil penalties as provided in ORS 652.150. This figure is computed by multiplying \$6.90 per hour x 8 hours x 30 days.

ORDER

NOW, THEREFORE, as authorized by ORS 652.332 and as payment of the unpaid wages Respondent owes as a result of his violation of ORS 652.140(2), the Commissioner of the Bureau of Labor and Industries hereby orders Respondent **Adesina Adeniji** to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232-2162, the following:

A certified check payable to the Bureau of Labor and Industries in trust for Claimant Dennis E. Moore in the amount of FOUR THOUSAND FIVE HUNDRED THREE DOLLARS AND TEN CENTS (\$4,503.10), less appropriate lawful deductions, representing \$1,191.10 in gross earned, unpaid, due and payable wages, \$1,656 in penalty wages, and \$1,656 in civil penalties, plus interest at the legal rate on the sum of \$1,191.10 from April 1, 2003, until paid, and interest at the legal rate on the sum of \$3,312 from May 1, 2003, until paid.

ⁱ The Agency alleged that Moore was entitled to \$1,944.93 and Vincent was entitled to \$143.20 in unpaid wages.

ⁱⁱ The Agency alleged that Moore was entitled to \$1,963.20 and Vincent was entitled to \$1,656 in penalty wages.

ⁱⁱⁱ The Agency alleged that Moore was entitled to \$1,963.20 and Vincent was entitled to \$1,656 in civil penalties.

^{iv} This figure is drawn from Ebuka's credible testimony that he and Claimant worked "10-12" hours per night and Claimant's near contemporaneous statement on his wage claim form that he "worked 10-13 hours per day (Average)".

^v See *In the Matter of Burrito Boy, Inc.*, 16 BOLI 1, 13 (1997) (where a respondent has not established a work week for purposes of computing overtime and has not established the beginning day of the employee's work week, the forum considers the work week to begin on the day the employee commenced work and to end seven consecutive days later).

^{vi} Respondent actually brought his original wall calendar to the hearing, but did not offer it into evidence, and there was no evidence to suggest that the daily work orders filled out by Claimant during his employment and given to Respondent had been destroyed or were not presently under Respondent's control.

^{vii} See fn. 6, *supra*.

^{viii} See *In the Matter of Dan Cyr Enterprises*, 11 BOLI 172, 179 (1993) (the forum may draw on the Oregon Evidence Code for guidance in a matter not addressed in OAR 839-050-0000 *et seq*).

^{ix} OEC Rule 311(c) creates a presumption that "[e]vidence willfully suppressed would be adverse to the party suppressing it."

^x See, e.g., *In the Matter of Contractor's Plumbing Service, Inc.*, 20 BOLI 257, 260 (2000) (respondent not allowed to introduce certain documents when it had not filed a case summary where the Agency had received copies of those documents prior to hearing but had chosen not to include them in its case summary)